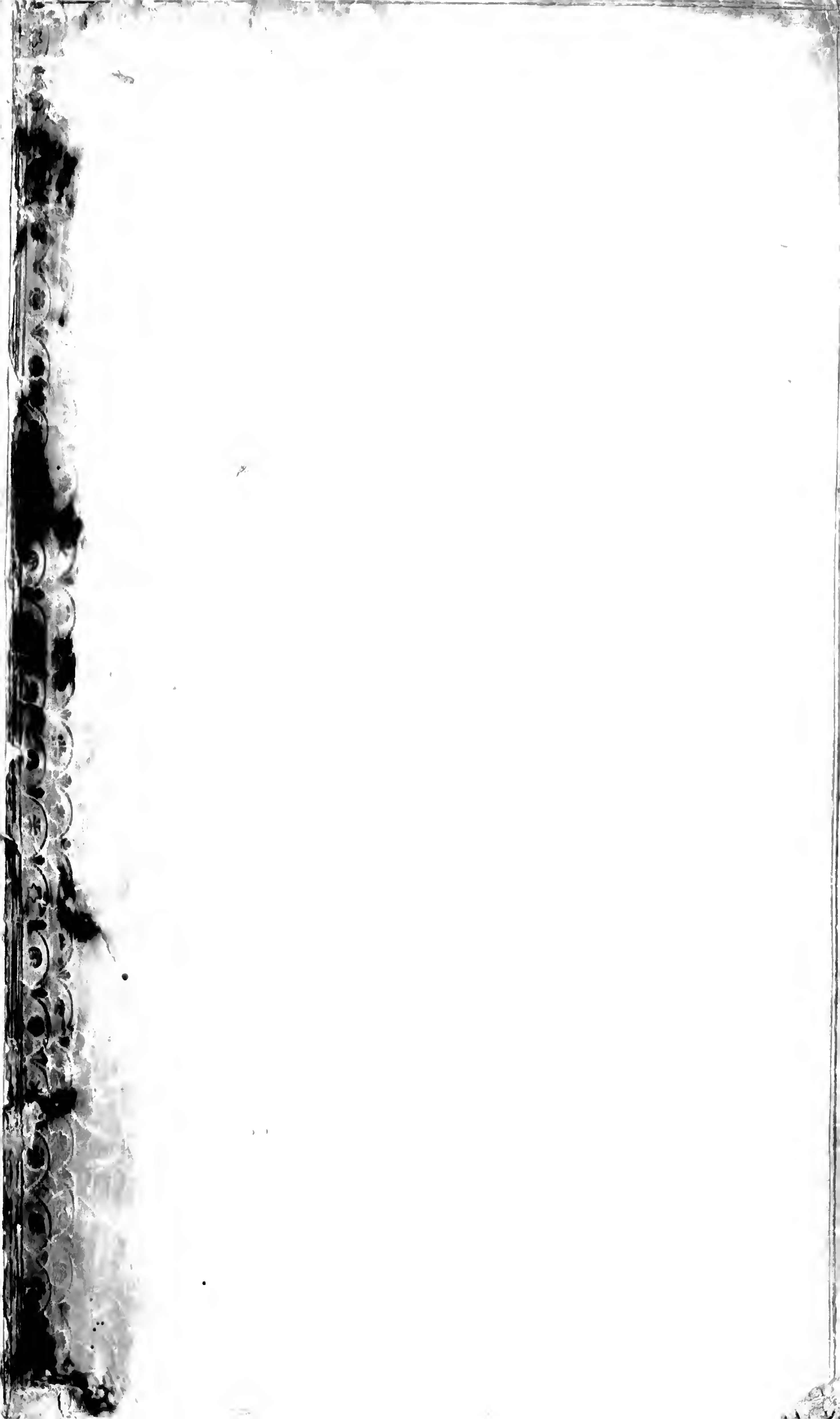

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A

General Abridgment

OF

LAW and EQUITY

Alphabetically digeſted under proper TITLES

WITH

NOTES and REFERENCES
to the WHOLE.

By CHARLES VINER, *Eſq;*

Favente Deo.

ALDERSHOT *in* Hampſhire *near* Farnham *in* Surry:
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(B. a) Modus Decimandi. In what Cases a Man may *prescribe in Modo Decimandi*; And How.

1. ADmitting that Tithes of Grass de Jure ought to be made into Hay by the Parishioner, yet it seems a Parish may prescribe, without any Consideration given to the Parson to pay the Tithes of this in Grass-Cocks, before any Tedding thereof. Contra, *Barham* v. *Goose*. Hill. 14 Ja. B. R per Curiam, præter Houghton, who seemed e contra them, because this Prescription is Non Decimando for this Part.

Modus Decimandi *is*, when Lands, Tenements, and Hereditaments have been given to the Parson and his Successors, or an annual certain Sum, or other Profit, always Time out of Mind, to the Parson and his Successors, in full Satisfaction and Discharge of all the Tithes in kind in such a Place. 13 Rep. 40. Trin. 7 Jac. in the Case of Modus Decimandi.——See (Y) pl. 1. 2. S. C.

2. So it seems a Parishioner may make such Prescription. Contra, H. 14 J. B. R. *Barham and Goose*, per totam Curiam, because it is in Non Decimando for this Part.

3. So a Parish may prescribe without any Consideration, to pay Tithes of Grass-Cocks after tedder and making thereof in Weekes and Wainrows, and putting into Grass-Cocks, then out of the Grass-Cocks to set out the Tithes, and not to make it into perfect Hay.

4. Contra, 15 Ja. B. R. between *Poppinger and Johnson*, a Prohibition denied. But nota, That only Houghton moved it as Doubt to him, to which no Answer was given, but the Prohibition denied notwithstanding.

See (Y) pl. 2. S. C.

5. If a Man prescribes, that if he hath under 10 Fleeces of Wool, that he shall pay one Penny to the Parson for each in lieu of Tithes, and that if he hath more, (*) that he shall deliver to the Parson the tenth Part of his Wool, upon his Conscience, without Fraud and Covin, sine Visu vel tactu of the Parson; this is not a good Modus, because it is unreasonable. M. 12 Ja. B. per Curiam, between *Wilson* and the Bishop of *Carlisle*. Vide the same Case, Hobert's Reports, 149.

Hob 107. pl. 130. S. C.

* Fol. 648.

6. If a Man prescribes to pay to the Parson for the Tithes of the tenth Sheep, as it falls out, and the tenth Swarth, this is not any Modus, because he does not prescribe to pay other Things than what was due, but a full Tenth. M. 13 Ja. B. between *Barker and Boswell*, per Curiam.

7. A Man may prescribe to pay the tenth Acre of Wood standing, and so to pay the tenth Acre of Grass standing for the Tithe of Hay. Hobert's Reports, Case 328.

Hob. 250. pl. 330 Hill. 12 Ja.——Hill. 16 Jac. in Case of Hide v. Ellis, S. P. obiter.

8. A Man cannot prescribe *in the Negative to be quit of Tithes, but in the Negative with an Affirmative*, viz. *That he and all &c. have used to be quit of Tithes*. Br. Prescription, pl. 17. cites 7 H. 6. 32. and 8 H. 6. 3.

Gibb. 120. 121. Monson v. Chapman, S. C. & S. P. accordingly.

9. Modus's *were* real Compositions by Parson, Patron, and Ordinary, the written Evidence of which is lost; but the Law presumes by the long interrupted Usuage that there was such; Agreed unanimously by Ld. Chancellor and Reynolds and Fortescue, Judges Assistants. Barnard. Rep. in B. R. 292, 293. Hill. 3 Geo. 2. in Canc. Munson's Case.

10. If Tenants Time out of Mind have used to pay a certain Price for a Tithe Lamb, so that the *Custom is fully settled*, though the *Parson incroach more*, or the Tenant pay the Lamb in Specie this does not break the Custom; But if one has paid 1 d. for a Lamb for 50 Years, and *after pays Tithe in Specie* before the Custom is settled, though he pay his 1 d. again for 20 Years, he can't prescribe in Modo Decimandi. Savil. 13. pl. 34. Hill. 23 Eliz. in Scacc. Fleming v. the Tenants of Dudly, and there said to be so resolved Mich. 25 Eliz. in Cam. Scacc. Beake v. Maine.

11. Parson libel'd against A. for Tithes, A. for a Prohibition shew'd, That within the said Parish of D. there is a *Hamlet* in which A. inhabited, that the said Inhabitants within the said Hamlet had had Time out of Mind a *Chapel of Ease* within the said Hamlet, because the said Hamlet was distant from the Church of the said Parish; and *with Part of their Tithes have found a Clerk* to do divine Service within the said Chapel; and also had paid a *certain Sum to the said Parson and his Predecessors for all manner of Tithes*, and it was held a good *Prescription*, and a Prohibition was granted. 4 Le. 24. pl. 77. Trin. 26 Eliz. B. R. Saer v. Bland.

12. Where a Man prescribes 1 *s. for the Tithes of all Willows cut down by him in the Parish of D.* it is not good. For thereby if he cuts all the Willows of other Men also, he should pay but 1 s. for all. But he should have prescribed for all Willows cut down by him *on his own Land*, and then it had been good. But as it is laid, it is unreasonable. Godb. 60. pl. 73. Mich. 28 & 29 Eliz. B. R. Anon.

13. A Modus was suggested in this Manner, viz. *That the Proprietors and Occupiers of such a Manor, or any Parcel thereof, should pay a Groat to the Parson for Herbage Tithes*; Adjudged an ill Modus, because if a Man had but two or three Feet of Ground in the Manor, he was to pay a Groat; But it should have been laid, *that the Proprietors and Occupiers of such a Manor for themselves and their Farmers had us'd to pay 4d.* 1 Vent. 3. Mich. 20 Car. 2. B. R. Anon.

14. A Prescription to pay 5 s. to the *Parish Clerk* in lieu of the Tithes of certain Land is not good, because he is dative and removable; Cro. E. 71. pl. 26. Mich. 29 & 30 Eliz. B. R. Savell v. Wood.

But if the Parson be tied to find such a Clerk, and such a Sum has been used to be paid to the Parish Clerk in Discharge of the Parson, it had been a good Prescription, and so by way of Composition. Le. 94. pl. 122. S. C.—— Mo. 908. pl. 1274. S. C. & S. P. accordingly.

15. Libel for Tithe of Corn, Hay &c. the Defendant suggested a Prescription *to pay a third Part of the 10th in one Part of the Land, and in another Part, a Moiety of the 10th for all manner of Tithes*; The Court inclined that it was a good Prescription, and a Prohibition was granted. Godb. 120. pl. 139. Hill. 29 Eliz. Rooke's Case.

16. The Parson of North-Lynn libelled for Tithes, the Defendant *suggested, that he is an Inhabitant of South-Lynn, and prescribed in the Inhabitants there, having Pastures in North-Lynn, to pay Tithes in kind to the Vicar of South-Lynn, where he is not resident; and that the Vicar hath paid to the Parson of North-Lynn* &c. *two Pence for every Acre.* The whole Court was against the Prohibition; For Modus Decimandi shall never come in Debate upon this Matter; But who shall have the Tithes,

Tithes, whether the Vicar of South-Lynne, or the Parfon of North-Lynne? Befides, the Prefcription is not reafonable. Le. 128. pl. 175. Trin. 30 Eliz. B. R. Gatefield v. Penn.

17. The Defendant alleged a Cuftom, *that the Parfon fhould have* for his Tithe Corn *the tenth Land fown with any manner of Corn, and that he fhould begin always at the firft Land next the Church &c.* The *Parfon fhew'd*, That the Defendant by *Fraud and Covin* fowed every tenth Land which belonged to the Parfon very ill, and with fmall Quantities of Corn, and did not dung or manure it as he did the other nine Parts, fo that it produced not half in proportion of what the other nine Lands did. And the Opinion of Wray J. was, That the Cuftom was againft common Reafon, and fo void. But if it be a good Cuftom, then the Parfon fhall have an Action on the Cafe. Le. 99, 100. Pafch. 30 Eliz. B. R. Stebbs v. Goodlack.

Mo. 913. S. C. fays, that the Suit by the Parfon in the Spiritual Court being for Tithes in Kind, viz. of every tenth Cock by reafon of the Covin, a Prohibition was granted notwithftanding the Covin, becaufe the Fraud is to be remedied in an Action on the Cafe at the Common Law.——— S. C. cited Arg. and there it is faid, that the Defendant at firft got a Prohibition on account of the Cuftom, but the Parfon afterwards had a Confultation, Wray Ch. J. faying, that this Cuftom was againft common Reafon. 2 Wms's Rep. 569. cites 1 Le. 99.———[But I do not obferve this Matter there.]

18. The Defendant furmifed *that he was an Inhabitant of S. and that* Time out of Mind *every Inhabitant there, who had Paftures in N. had paid Tithes for them to the Vicar of S. and that the Vicar of S. had paid to the Parfon of N. 2d. for every Acre*; and the Court held, that Prohibition lay, and that Plaintiff fhould declare, and the Defendant (in the Prohibition) might demur if he will; For it is as if he prefcribed to pay 2d. for every Acre. Cro. E. 136. Trin. 31 Eliz. B. R. Cotesford v. Peace.

S. C. cited Arg. 2 Wms's Rep. 571. in Cafe of Chapman v. Monfon.

19. In a Prohibition the Plaintiff *prefcribed to pay the 10th Sheaf of Grain growing on 60 Acres after it was reaped, in full Satisfaction of all Grain being upon the faid 60 Acres*, and which hath been accepted &c. The Court held this Prefcription not good, for it is no more than to pay fo much for the 10th Part when the Owner pleafeth; becaufe he may chufe whether he will make the Corn into Sheaves or not, or as much into Sheaves as he will, and fo for the 10th Part he may not have the 3d Part, which is not reafonable. And. 199. pl. 234. Trin. 31 Eliz. Adams's Cafe.

Roll Rep. 173. S. P.

20. Libel for Tithe of Calves &c. the Defendant fuggefted a *Cuftom* in the Parifh of B. *to pay for the Milk of every Cow 2d. in fatisfaction of Calves.* The *Proof was, That there was fuch a Cuftom* in the Parifh *for all the Land except five Farms*, and for this Caufe it was held that he had failed in his Prefcription; For it may be thefe Lands were Parcel of the five Farms; But had it been proved that the Lands were not Parcel, it had been otherwife, and therefore a Confultation was granted. Cro. E. 206. pl. 41. Mich. 32 & 33 Eliz. B. R. Bennet v. Shortwright.

21. Prefcription to be difcharged *of Locks of Wool* ought to be fhewn of Locks *cafually loft*. Mo. 911. pl. 1283. Mich. 37 and 38 Eliz. B. R. in a Nota there.

22. A Prohibition was pray'd on a Suit in the Spiritual Court for Tithes in Kind of a *Park now converted into Tillage*, upon a Surmife De modo Decimandi, to pay a Buck and a Doe for all Tithes, and allow'd per Cur. and agreed, 1ft. Though they are Feræ Naturæ, yet they may be given for Tithes. So to pay Pheafants &c. 2dly, Though they are not tithable of themfelves, yet they may be given for Modus Decimandi, as a great Tree may be given for Tithe of Trees tithable. 3dly,

Ibid. Coke Ch. J. cited one Shipden's Cafe, that fuch a Modus Decimandi generally for the Park is

not good, if it be difparked, but it fhall be particularly for all the Acres contained in the Park.

3dly, That that is a Difcharge to the very Soil, and the Park is only a Liberty, and the Owner may furnifh it with Game when he pleafes. Noy. 148. Sharp v. Sharp.

22. Whether a Modus Decimandi may *accrue after Endowment* of a Vicarage? Quære, But Prohibition deny'd on producing Endowment by Vicar by which it feems it cannot. See Godb. 180 pl. 254. Trin. 8 Jac. C. B. Anon.

23 In a Prohibition the Plaintiff declared, *That he for ten Years laft paft held and occupied* 100 *Acres of Land in the Parifh of S. lying within, and being Part of a Park there, called Ungar-Park, and that he, and all the Occupiers of the faid Park, Time out of Mind, have ufed to pay to the Parfon of S.* 4 *l. yearly, in full Satisfaction and Difcharge of all Tithes of the faid Grounds, which* 4 *l. the Parfon had fo accepted. After Verdict for the Plaintiff, it was moved in arreft of Judgment, that the Park was not alledged to be Antiquus Parcus,* and fo to bear Prefcription, and that the Prefcription was laid in the Occupiers, when it fhould have been in the Owners of the Park, nor by Way of Cuftom in the Place; but refolv'd, that this was no Matter of Intereft and Inheritance, but only in Part of Difcharge; for every Modus is a Difcharge of the natural Tithes, and fo works by Way of Difcharge. Hob. 118. pl. 148. Hill. 13 Jac. Shelton v. Mountague.

Roll Rep. 121. in pl 4. Arg S. P. where the Hay belonged to the Vicar, the Corn to the Parfon.——S. C. cited 2 Show. 462. Arg.——S. C. cited Equ. Ab. 368 —— When no one Year can pafs without fome certain Duty, this is a *permanent* Modus, though it be that the fame piece of Ground being fown fhall pay the great Tithes to the Parfon, and being converted into Meadow fhall pay the fmall Tithes to the Vicar. Arg. Gibb. 120. cites Godb. 194 [pl. 278. Trin. 10 Jac. C. B.] Brown's Cafe, and Cro. E 136.

24. If a Modus be *for Hay in Bl. Acre*, and the Party *fows it with Corn* feven Years together that does not deftroy the Modus, but whenfoever it fhall be made into Hay the Modus fhall *revive*; and when it is fown with Corn the Parfon fhall have Tithe in Kind. Godb. 194. Trin. 10 Jac. C. B. Brown's Cafe.

25. A Libel was for Subftraction of Tithes upon the Statute of 2 E. 6. the Defendant fuggefted, That as to that Farm, whence the Tithes in queftion arofe, there was a *Cuftom to take back thirty Sheaves* of the Tithe-Corn growing on fuch a Farm; Per Cur. It ought to be averr'd to be a great Farm, and if there were but thirty Tithe-Sheaves in all, the Owner fhan't have them; becaufe that would be an unreafonable Cuftom, and Day given to the other Side to fhew Caufe why the Prohibition fhould not be awarded. Godb. 234. pl. 324. Mich. 11 Jac. C. B. Jucks v. Cavendifh.

If the Prefcriber lets the Land to Farm, and the *Farmer pays Tithes in Kind*, this does not deftroy the Prefcription as to the Leffor. Roll Rep. 176. per Coke Ch. J. in S. C.

26 If there was a Prefcription, Time out of Mind, for a Modus Decimandi, if this Modus be *not paid for a certain Time*, yet this alters not the Prefcription for this Modus, but he may pay it when he will. Per Coke Ch. J. 2 Bulft 240. Trin. 12 Jac. Price v. Mafcall.

Roll Rep. 176. pl. 14. S. C. & S P held accordingly by Coke Ch J. the Prefcription being to pay fo much Money.——The Difference is, when the Prefcription is to pay *Money* for all the Tithes of fuch a Park, and it be difparked, there peradventure Tithes fhall not be paid;

27. Prefcription, Time out of Mind, for Modus Decimandi for Land when it was a *Park*, it fhall continue for Payment of this Modus only after that fuch a Park be difparked and converted to another more profitable Ufe; Per tot Cur. 2 Bulft. 240. Trin. 12 Jac. Price v. Mafcall.

paid; But where it is to pay the *Shoulder of a Buck* or a Doe at Christmas for all Tithes of the Park, there, if disparked, Tithes shall be paid as of other Land; per Popham Ch. J. Cro. E. 467. (bis) pl. 25 Pasch 38 Eliz. B. R. in Case of Bedingfield v. Freak. ——Mo. 909. pl. 1277. S. C. and same Diversity.——Ow 74. S P. by Popham.

28. If an *Orchard*, for which there is a Modus, be *plow'd* and afterwards it be *made an Orchard again*, the Modus shall be paid Arg. 2 Show. 462 in Case of Hill and Harris, cites it as agreed 1 Roll 121. Cooper v. Andrews.

Roll Rep. 121. Hill. 12 Jac. in Case of Hooper v Andrews.

29. Prescription that the *Parson had two Acres of Meadow given in Discharge of all Tithes of Hay Ground*, viz. of all the Meadow in the Parish, if any *arable Land* be *converted into Meadow*, it extends not to discharge that. Hutt. 58. cites 14 Jac. Conyer's Case.

30 A Custom in the Parish of B. *that all Lambs engendered, fallen, and bred upon any one Tenement or Living in the said Parish, tho' they belonged to several Persons, were reckoned together*, as if they were one Man's, that the tenth, or Tithe-Lamb of them so counted together, hath been paid for Tithe; The Court held, That all Customs against Common Right are triable at common Law; and that this Custom is unreasonable, because it may happen, that one Man may have but one Lamb, and that may be taken for Tithe, and they that have more shall pay nothing. Hob. 329 pl 405. Mich. 18 Jac. Barker v. Cocker.

31. The King's *Lessee* shall hold discharg'd, tho' his Feoffee shall not. Litt. 160. Mich. 3 Car C. B. Comins's Case.

32. Libel for Tithes of *Milk and Calves*, the Defendant suggested a *Modus, that every Inhabitant, &c. shall pay 4 d. for every Cow, and 2 d. for every Calf*; Issue was taken upon the Modus, and at the Trial the *Proof was, that the Tithes were never paid in Kind, but that every Inhabitant, &c. should pay 6 d. and some 7 d.* so that this was not the Proof of the Suggestion, and a Consultation was granted; but if a *Modus* had been suggested *to pay 20 s.* and the *Proof* had been *that 40 s. was usually paid*, that had been good, it being to intitle the Court to Jurisdiction; but in the principal Case no Modus is proved; so, it is merely uncertain. Hetl. 100 Trin. 4 Car. Goddard v. Tiler.

Litt. Rep. 151. Toddard v. Tiler, S C in totidem Verbis.

33. A Custom to pay the *20th Fish*, in Satisfaction of the Tithe *of all Fish taken in the Sea*, is good, for the Tithe thereof is payable only by Custom, it may by that Custom be less than a Tenth; adjudged. Lev. 179. Pasch. 18 Car. 2 Sheppard v. Primrose.

By the Common Law the Parson cannot have the Tithes of *Fishes taken in the Sea*, because it is not within any Parish, and then, when the Parson, by the Custom ought to have the Tithes of them, he ought to take them according to Custom, and that the tenth of the Moiety may be a good Discharge of the whole; and the Parties went to Issue upon the Custom in Cornwall. Noy 108. Hill. 1 Jac. Holland v. Heale.

36. But a Custom to pay the *Twelfth Sheaf, in Satisfaction of the Tithe of all Sheaf Corn*, is not good, because the Tenth of the Corn is due de Jure; per Cur. Ibid.

Sid. 278. pl. 2. Sheppard v. Penrows, S. C. & S. P. agreed, but adds a Quære if it had been that he should pay the 12th part *after stitching* &c. and it seems that it had been good.

37. A *Modus* was alleged in this Manner; *That the Proprietors and Occupiers of such a Manor, or Parcel thereof, shall pay a Groat to the Parson for Herbage-Tithes.* The Court held that this could not be, for if a Man had but two or three Feet of Ground in the Manor he should pay a Groat; but it ought to have been said; *That the Proprietors and Occupiers of such a Manor, for themselves and their Farmers, had paid 4 d.* Vent. 3. Mich. 20 Car. 2. B. R. Anon.

38. A Parfon libell'd againft J. S. for Tithes, who in a Declaration for a Prohibition fuggefted a *Compofition by Deed made in* 1125, which was excepted to, for being before R. II's Time, was before Time of Memory, and fo no Iffue could be taken, or could it be tried. 2. That if they did veft by the Grant, yet that they revefted in the Parfon *by the Council of Lateran in* 1215, or elfe by the Diffolution of Monafteries. 3. Becaufe 'twas not fhewn that the *Bifhop was Party*; 'Twas anfwer'd, that the Concurrence of the Bifhop was not neceffary; for as this Cafe was he had nothing to do with it, it being *a Priory*, which had an abfolute Eftate, which a *Patron* hath not. And, per Cur. The fole Objection againft this Prefcription is, becaufe it fhews the Reafon of the *Prefcription*, if they had *relied on the Deed* it might be otherwife. The Court of Lateran can affect nothing in this Matter &c. and Judgment affirmed. 2 Show. 439. pl. 403. Mich. 1 Jac. 2. B. R. James v. Trollop.

The Cafe was, that the Prior of &c was feifed of a *Portion of Tithes* in &c. *and of the Manor of &c. fimul & femel*, and that in the Reign of H. 1 he *granted the Manor* to W. F. in thefe Words, viz Dedit W. F. Norburiam *in feodo*, and afterwards *pro Decimis Dominii & duabus Carucatis Terræ, he fhould pay to the Prior* 5s. *per Ann.* and the Family of the F's had ever fince held the Lordfhip difcharged of Tithes, paying 5s. a Year to the Prior and his Succeffors until the Diffolution, and fince to the King. It was objected, that the Land whereof the Tithes were demanded was Parcel of the Demefnes of the Manor; But per Cur. the Lord at that time might have enfeoffed another to hold of himfelf, and fo it might have been *Part of the Demefne when the Prior granted it, and be afterwards granted and held of the Manor*, and as to an Objection that the Modus was not good becaufe *not paid to the Parfon*, the Court faid it might well enough be paid as a Modus *to one who has a Portion of Tithes*, and that then he has Quid pro Quo. Skin. 51. S. C.

39. Whenever a Modus *runs high* it is a ftrong Prefumption that it is no Modus; per Holt Ch. J. And the Court refufed a *Prohibition* becaufe it appeared (as the Modus was pretended to be) that it *was of nigh the full Value*. 11 Mod. 60. pl. 37. Trin. 4 Ann. B. R. Startup v. Doderidge.

40. A Modus was fet forth *to pay on or about fuch a Day* fo much &c. it is ill, for the Day muft be alleged certain. And the Bill further was, that the Parifhioners of &c. *conftantly paid, or ought to pay*, fo much which fhould have been conftantly paid, *and* ought to pay. 8 Mod. 375. Trin. 11 Geo. and cites it as lately refolved in the Cafe of Harrifon v. Clerk.

Gibb. 121. cites 2 Roll 265.

41. Though every Modus muft be fuppofed to have a reafonable Commencement, which the Court admitted; yet as to the Neceffity of *fhewing now that the Modus is reafonable*, that feemed not to be fo clear; for thefe Modus's having been *from Time immemorial*, none can know but that there were fuch Circumftances in thofe ancient Times as might have made fuch a Compofition reafonable tho' not difcoverable now; And that it was fufficient to fatisfy us now that Parfon, Patron and Ordinary might then bind the Revenues of the Parfon, but tho' fuch Inftrument be loft, yet the Modus is not. Per Ld. C. King affifted by Reynolds and Fortefcue J. 2 Wms's Rep. 572. Hill 1729, in Cafe of Chapman v. Monfon.

42. *But* if an *Inftrument* had been *made* by Patron, Parfon or Ordinary, *to a Layman to difcharge his Farm of all Tithes*, (tho' it would be good fo long as the Inftrument could be fhewn) and the fame fhould once be loft this being a Privilege in Non Decimando, the *Privilege would be loft by Lofs of the Deed*; fo far the Law went in favour of the Church; Per Ld. C. King, affifted by Reynolds and Fortefcue J. 9 Wms's Rep. 573. Hill. 1729. in Cafe of Chapman v. Monfon.

43. A Bill was brought to eftablifh a Modus, which was, That *in Confideration the Parifhioners, at their own Expence, made Tithe-Grafs into Hay, the Inhabitants were to pay no Tithes for dry and unprofitable Cattle.* It was proved, that the Parifhoners had not paid fuch Tithe Time out

of

of Mind, but not that fuch Non-payment was in Confideration as aforefaid. On the other Side it was proved, That Foreigners living out of the Parifh made the Tithe-Grafs into Hay, as well as the Inhabitants, and yet paid Tithe-Herbage, which Ld. C. King thought a material Objection againft the Cuftom, and made it feem to be the Ufage of the Parifh for the Parifh to make their Grafs into Hay of Courfe; And likewife that the Parifhioners did not divide the Grafs into ten Parts, when cut down, nor till made into Hay, fo that the Parfon could not have any Opportunity of making the Tithe-Grafs into Hay himfelf; and difmiffed the Bill with Cofts, but without Prejudice as to any Litigation at Law. 2 Wms's Rep. 521. Pafch. 1729. Fox v. Ayde.

44. A Modus, that the Parifhioners *making Tithe-Grafs into Hay fhould excufe not only the Herbage of the fame Ground, but alfo all Tithe-Herbage for all other Land depaftured by him within the Parifh*, tho' it might be a great Parcel of Pafture Land, and tho' the fame might be fed all the Year, is fuch a Modus as would be too much for a Court of Equity to eftablifh. 2 Wms's Rep. 523. Pafch. 1729. per Ld. C. King. Fox v. Ayde.

45. A Modus was laid to be *that every Perfon not inhabiting within the Parifh of B. occupying any Meadow or Pafture Land within the Parifh of B. had Time &c. paid 4d. an Acre* yearly, and fo proportionably for any greater or leffer Quantity. And this was held by Ld. C. King, affifted by Reynolds and Fortefcue J. to be a good Modus and certain enough. 2 Wms's Rep. 565. 572. Hill. 1729. Chapman v. Monfon.

46. Every Modus *muft be certain*, otherwife no *Length of Time* will make it good. Admitted by Ld. C. King, affifted by Reynolds and Fortefcue J. 2 Wms's Rep. 572. Hill. 1729. in Cafe of Chapman v. Monfon.

(C. a) Modus Decimandi.

[*Good. What is.*]

1. **It is a good Modus Decimandi, that,** in confideration the Parifhioners hath Time out of Mind &c. paid Tithe-Wool of all his Sheep which he hath fhorn, as well of thofe as he bought two Days before the Shearing, as of others that he had kept through the whole Year, he hath ufed Time &c. to be difcharged of Tithe-Wool of fuch Sheep that he fold two Days before the Shearing; **for by the Spiritual Law they fhould have Tithes of him, and de Refiduo pro Rata which he fold before Shearing, and therefore, in confideration that he here pays Tithes of thofe which he bought fo fmall a Time before the Shearing for the whole Year, which is not due by the Spiritual Law, it is therefore Good. M. 14 Ja. B. adjudged.**

2. **It is a good Modus** for the Tithes of Calves to pay a Calf for the Tithe if he hath feven in one Year, and if he have under feven, to pay an Halfpenny for every Calf **for the Tithe,** and if he fells any Calf, that he fhall pay the Tenth of that for which he fells it. **M. 14 Ja. B. R. between** *Lee and Collins* **refolved, and a Prohibition granted.**

S. C. cited per Cur. 2 Salk 656. pl 2. Mich. 10 W. 3. B. R. in Cafe of Hill v Vaux, that he is bound to pay if he has Hens or not, and he muft pay them at a certain Time.—Ld. Raym. Rep 360 S. C. cited by Holt Ch. J. accordingly; but if the Cuftom was that he fhould *pay* 30 *Eggs of his own Hens*, the Cuftom would be ill.

3. **It is a good Modus for Tithe** of Eggs, to pay in Lent 30 Eggs for all Tithe of Eggs **M. 14 Ja. B. R. between** *Lee and Collins*, **a Prohibition granted thereupon.**

4. **It is not a good Modus** to pay every tenth Pound of Wool for the Tithes of Wool, **if he doth not** fhew that he hath paid fomething, if his Wool does not amount to ten Pound, **for otherwife it is in Non Decimando if it be under ten Pound. M.** 7 **Ja. B. between** *Delman and Barton*, **per Curiam, for the tenth Part of this is due.**

5. Note; by the Serjeants that in the *Spiritual Court*, they *will not admit any Plea in Difcharge* againft Tithes, quod nota. Br. Difmes, pl. 11. cites 8 E. 4. 14.

6. In prefcribing *to be difcharged of Locks of Wool*, it ought to be fhewn of *Locks cafually loft*; Nota. Mo. 911. in pl. 1283. Mich. 37 & 38 Eliz. B. R.

7. Prohibition was fued upon a Cuftom *to pay an Halfpenny for the Wool of Sheep fold after fhearing*, and before Mich. and adjudg'd a good Cuftom. Mo. 911. pl. 1283. Mich. 37 & 38 Eliz. B. R. Anon.

Mo 910. pl. 1280 S. C. & S. P. cited to be adjudged.

8. A Cuftom was alleged *to pay Tithe-Wool at Lammas Day*, and fays, that he fet it out at that Day; It was objected that this is not good; for that this is not Modus Decimandi, but for the Time only which is to be tried in the Spiritual Court; But the Court held it good; For it is de Jure when it is clipp'd, but by Prefcription in may be fet out altogether at another Day, and that is good; Per Cur. Cro. E. 702. pl. 21. Mich. 41 & 42 Eliz. B. R. Green v. Hun.

9. Libel &c. by the Vicar of D. for Tithes, the Defendant fuggefted a Modus to pay fo much to the Parfon of D. in difcharge of his Tithes. The whole Court agreed, that a *Modus to pay fo much to the Parfon will not difcharge him from paying Tithes to the Vicar*; And therefore a Confultation was granted. 3 Bulft. 220, 221. Mich. 14 Jac. Wintell v. Child.

10. A Cuftom was fuggefted, That if one has *Lambs under the Number of feven*, he ought *to pay an Halfpenny for every Lamb* in Lieu of all Tithes of Lambs, *if he has but feven the Parfon* to have the feventh, and *fhould pay* 3 *d.* if he had eight he fhould pay 2 d. if he had ten the Parfon fhould have the tenth, without paying any Thing. Agreed that this being a Cuftom which they refufed to allow of in the Spiritual Court, that a Prohibition fhould be awarded. Cro. C. pl. 2. Pafch. 10 Car. B. R. Anon.

11. Cuftom to pay *Tithes in Kind for Sheep if they continue in the Parifh all the Year; but if* they are *fold before fhearing Time, then to pay but an Halfpenny for every one* fo fold; This was held an unreafonable Cuftom. Mar. 79. pl. 128. Pafch. 17 Car. C. B. Weeden v. Harding.

12. *A Vicar libelled for Tithes of Willow Faggots.* The *Defendant fuggefted* for a Prohibition *a Modus of paying* 2 *d. per Ann. to the Rector for all Tithes of Willows.* The Court held. that a Modus to the Rector is a good Difcharge againft the Vicar. Mod. 216. pl. 3. Trin. 28 Car. 2. C. B. Anon.

Keb 602. pl. 76. Baudink v. Bufhell, S. C. held

13. Prohibition was pray'd upon a Cuftom alleged, *That all Perfons who had Lands in fuch a Village, but lived out of the Village fhould pay* 4 *d. per Ann. only, in Satisfaction of Tithes.* But this was held an unreafonable Cuftom, that Foreigners fhould have greater Privilege than thofe

who

who dwelt in the Village, and are at greater Charge in refpect of their Refiancy, and fo the Prohibition was denied. Lev. 116. Mich. 15 Car. 2. B. R. Bawdry v. Bufhell.

accordingly; and Keeling faid, that there is no Precedent of any Modus fo variable and dancing.——Modus for *Foreigners to pay 4d. per Acre yearly for Herbage and Tithe Hay* held good, per King C. and two Judges. Gibb. 125 Hill. 3 Geo in Canc. Monfon v. Chapman ——But *thefe two Cafes were exploded, and the Court held it a good Modus*, and faid, that all Modus's were at firft upon an Agreement between the Parfon, Patron, and Ordinary, and by fome Deed or Inftrument in Writing, in the Nature of a Contract or Agreement, which though now loft, yet being run out into a Prefcription continues good; that here is no Uncertainty in the Modus, for the Parfon is always fure to have the 4d. per Acre, or elfe the Tithes in Kind, nor is there any Burthen on the reft of the Parifhioners by one or two going out of the Parifh, and a leaping or *dancing Modus is* where the Modus itfelf varies, and is fometimes more, or fometimes lefs, which is not the prefent Cafe, and decreed accordingly by the Lord Chancellor, affifted by Mr. J. Reynolds, and J. Fortefcue. Ld. Chancellor faid, the Cafe in Keble might perhaps be the Occafion of this Suit. Abr. Equ. Cafes 369. Trin. 1730. Chapman v. Bp of Lincoln. —— Ld. C. King difapproved of the Reafon in Lev. 116. that the *Inhabitants* ought to be *more favoured* in a Modus *than Foreigners*, becaufe liable to Repairs and Veftments of the Church; whereas by the Refolution in Jeffry's Cafe, 5 Rep. 66. b. a Foreigner occupying Lands within the Parifh, though living out of the Parifh, is liable to Repairs, and even Ornaments, and faid it was a fudden Opinion upon a Motion. 2 Wms's Rep. 565 to 567 Hill. 1729. S. C. by Name of Chapman v. Monfon, and e contra. —— Ibid. 574. Ld. C. King, affifted by Reynolds and Fortefcue J's, difliked that Cafe in Lev. 116. and it was then faid, that in the fame Parifh in which the Modus was infifted upon in Lev. 116 the very Modus, notwithftanding that Opinion, had been obferved, and Tithes paid in Kind, which fhewed that no regard was had to that Opinion, and the Parfon not advifed to rely upon it. —— Gibb. 121. in Cafe of Monfon v. Chapman, that Cafe in Lev. 116. was denied to be Law.

14. A Cuftom was alleged, That *all Perfons in the Parifh who had Sheep on their Grounds on Candlemas-Day, fhould upon full Payment of full Tithes for fuch Sheep* which were there on that Day, *be difcharged of Tithes of all Sheep* that afterwards fhould be *upon their Ground in that Year*; But this was held an unreafonable Cuftom. Mod. 229. pl. 18. Trin. 28 Car. 2. C. B. Moor v. Field.

15. A Prohibition was pray'd upon a Suggeftion of a Modus *to pay for all Tenants and Occupiers of the Land in Difcharge of Tithes*; but upon the firft Motion of the Prefcription in the Occupiers was doubted by the Court; tho' at Length, inafmuch as it goes only in Difcharge, and not in claiming of an Intereft; the Prohibition was granted upon Confideration of the Cafe of Cowper v. Andrews Hob. [39] & Ibid. 188. [118 148] Shelton v. Montague, and 1 Cro. Baker v. Breteman. 3 Lev. 386. Hill. 5 W. & M. in C. B. Stopp v. Peacock.

16. 11 & 12 *W.* 3. *cap.* 16. *S.* 1. *Enacts, That every Perfon who fhall fow Hemp or Flax fhall pay to the Parfon, Vicar or Impropriator of fuch Parifh or Place, yearly* 5 *s. for every Acre of Hemp and Flax, before the fame be carried off the Ground; for the Recovery whereof the Parfon &c. fhall have the ufual Remedy.*

S. 2. *This Act fhall not extend to charge any Lands difcharg'd by any Modus Decimandi, Ancient Compofition, or otherwife.*

Made perpetual by 1 *Geo.* 1. *cap.* 26.

17. A Modus to pay 2 *s. in the Pound out of the Rent referv'd from Time to Time* is no Modus. Ld. Raym. Rep. 696. 697. Mich. 13 W. 3. Byne v. Doderidge.

18. Bill was brought to eftablifh a *Modus* which was laid thus; *For Payment of fuch a Sum of Money*, [while the Lands are in the Hands of the Proprietors] *but if in the Hands of any other Perfon, to pay Tithes in Kind, or the Money, at the Election of the Parfon.* Ld. Chancellor faid, that he would never eftablifh a Modus againft a Parfon, without a Trial at Law, if he defires it; but this Modus is clearly ill, for a Modus cannot be defultory. Sel. Cafes in Canc. in Ld. King's Time. 52. 53. Mich. 11 Geo. Webber v. Taylor.

19. Note; The Court unanimoufly agreed, That *the fame Land may at one Time pay Tithe in Kind, and at another Time a Modus, where there are different Circumftances*; the only Thing effential to a Modus is, that the fame Land fhould not pay Tithe in Kind and a Modus both, where there are the fame Circumftances. Barnard. Rep. in B. R. 293. Hill. 3 Geo. 2. in Munfon's Cafe.

Gibb. 119. Monfon v. Chipman, S. C. held accordingly.

20. Bill fet forth that there was a Cuftom in the Parifh of B. *that all Perfons occupying Pafture and Meadow there, fhould be difcharged of Tithes in Kind by paying 4d. an Acre, unlefs they were Inhabitants of that Parifh or of the Parifh of* ——. The Plaintiffs were Occupiers of Pafture and Meadow Ground in this Parifh, but Inhabitants in the Parifh of W. And whether this Modus was good or not, was the Queftion. Reynolds and Fortefcue J. affifted the Chancellor in determining this Queftion. They all unanimoufly agreed, That Modus's were real Compofitions by Parfon, Patron and Ordinary, the written Evidence of which is loft; but the Law prefumes there was fuch by the long uninterrupted Ufage. Undoubtedly, they faid, there would have been no Difpute about this Modus if it had been without Reftrictions; and as *the Reftriction is for the Benefit of the Parfon*, they thought the Reftriction could make no Difference. They all allowed however that fomething muft be due from the Modus, and that too every Year; for as *no Prefcription can be in a Non Decimando generally and at all Times, fo neither can it be for fo long a Time as a Year together*, They feemed to allow too, that a *Modus would not be good where it depends upon the Will of the Occupiers, whether it fhould be more or lefs.* But here they faid, The Rule for the Payment of this Modus is as uncertain as the Rule for the Payment of any other Modus poffibly can be; the only Variation is as to the Perfons paying the Modus, and that they faid was never in Objection. Accordingly the Chancellor was going to decree for the Modus, but tho' the Proof was very clear to fupport it, he gave the Defendant's Counfel a Day to talk with their Client whether they would have the Modus tried or not, as it did concern the Inheritance. Barnard. Rep. B. R, 292, 293. Hill. 3 Geo. 2. in Chancery. Munfon's Cafe.

(D. a) Modus Decimandi.

What fhall be a *good* Modus Decimandi.

1. **IT is a good Modus Decimandi, if,** in confideration that he hath ufed **&c.** to make the Tithes of the firft Moath into Hay for the Parfon, at his Labour and Coft, he hath been difcharged of Tithes of the After-Moath. **Tr. 36 El. B. R.** *Johnfon and Keblethwayte*, 37 **El.** * *Johnfon and Awberry*; **in thefe two Cafes it was fo refolved, and a Prohibition** † **granted. P. 41. El. B. R. P. 11 Car. Banco Regis,** *Langford's* **Cafe refolved, and a Prohibition granted.**

* Cro. E. 660. pl. 7. S. C. adjudg'd a good Prefcription, that they had ufed to make the Hay of the firft Moaths into Cocks, and to fet forth the tenth Cock for the Vicar.——— Mo. 910 pl. 1280. Awberie's Cafe, S. C. but mentions the making the firft Moath into Hay, and adjudged good. ——— S. C. cited per Cur. by the Name of Awbrey v. John as adjudged. Cro. J. 42. pl. 7.

† Cro. C. 403, 404. pl. 2. Anon. S. P. and feems to be S. C. and a Prohibition granted

2. It

2. It is a good Modus Decimandi, that, in confideration of the cutting of the Grafs, and fpreading and putting it into Wenrews, leffect, tedding, and after making the Tithes of the Parfon of the firft Moath into Grafs-Cocks at his own (*) Cofts and Charges, he hath been difcharged of Tithes of the After-Grafs. Mich. 42 & 43 El. *Johnfon and Peppinger*; 1 Jac. *Eeles and Vachin*; 3 Jac. *Eeles and Winterlelt*; In all thefe Cafes Prohibitions were granted in B. R. And Mich. 14 Jac. Johnfon moved for a Confultation upon the faid Prohibition granted in the 43 El. againft Peppinger, but it was denied. Pafch. 41 El. B. R. between *Aubrey and Johnfon*; Pafch. 11 Car. B. R. *Langford's* Cafe, a Prohibition granted upon fuch Surmife for the After-Moath. Pafch. 14 Car. B. R. between *Manning and Clapham*, a Prohibitian granted for the tathing of Sheep upon the After-Pafture.

See pl. 1. and the Notes there.

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—— S. P. adjudged accordingly. Hob 250. pl. 330. Hill. 16 Jac. Hide v. Ellis —— And Ibid. fays the like Judgment was given upon the like Cuftom Pafch 2 Jac. B. R. Rot. 192. or 292. Hall v. Simmonds. —— Cro. J. 42. pl. 7. Mich. 2 Jac. B. R. Hall v. Fettyplace. S. P. adjudged a good Caufe of Difcharge of Tithes of the latter Mowth, and Prohibition ordered to ftand. —— Mo. 758. pl. 1048 S. C. but takes a Difference between making it into little Cocks and into great Cocks, that the laft is a good Prefcription but not the firft; and that a Prefcription to carry it into his Barn for the Parfon is good, and for this cites Johnfon's Cafe. —— A Prefcription was laid for the After-grafs in Confideration that every one fhall preferve Primam Tonfuram, by which the Parfon fhall have the better Tithe, and therefore to be difcharged of the After Crop for the Tithe of it, and this is called (rewine) is good; for by this the Parfon has the greater Benefit 2 Bulft. 238, 239 Trin. 12 Jac. 239. the 4th Point in Cafe of Price and Mafcall. —— Roll Rep. 38, 39. S. C. & S. P. adjornatur.

3. It is a good Modus Decimandi, that, in confideration of the making the Tithe-Grafs of the Parfon of certain Land into perfect Hay at his Cofts, he hath been difcharged of Tithe of the Pafture of the faid Land for the whole Year after. Pafch. 16 Jac. B. between *Nichols and Hooper*, refolved, and a Prohibition granted.

4. It is a Modus Decimandi, that, in confideration that they who fow the Land ought to reap it, and bind and fever the tenth Part from the nine, and fet it up in Hillocks or Heaps, that the Parfon fhall not have any Tithe of this Land the next Year following; the Land lying ley, and not tilled nor converted into Meadow, for of Common Right the Parifhioner is not bound to gather and fet up the Tithe in Hillocks &c. but it is a good Manner of Tithing to throw the Shocks out. Hill. 6 Jac. B. pl. 13. per Curiam.

5. It is a good Modus, that, in confideration that he hath Time &c. wound up the tenth Fleece of his Wool at his Shearing for the Parfon, at his Coft and Charges, and paid it to the Parfon, he hath been difcharged of Tithes of the Necks of his Sheep when he fhore them about their Necks for their prefervation two Weeks before Michaelmas, and two Weeks after Michaelmas. Mich. 14 Jac. B. R. between *Joys and Parker* Parfon of *Northmolton* in *Devon*, refolved, and a Prohibition granted, becaufe the Parfon fued for the Tithe of this Necking; for it appears, that the fhearing at this Time of the Year cannot be for the Benefit of the Wool.

Cro. J. 5[illegible] pl. 3. Jowce v. Parker, S. C. but S. P. does not appear —— 3 Bulft. 242 Fofle v. Parker, S. C. but S. P. does not appear —— 2 Brownl. 52. Arg. cites S. P adjudged, Pafch. 36 Eliz Jeffop's Cafe.

6. It is a good Modus, that, in Confideration the Parfon and his Predeceffors Time out of Memory &c. have been feifed in Fee of certain Meadow within the Vill of D. and taken the Profits thereof, in full fatisfaction and difcharge of all Tithes of Hay within the fame Town, Time out of Memory &c. for it fhall be intended that this Meadow was given at the Beginning, in full fatisfaction of all the Hay within the fame Town. Mich. 16 Jac. B. R. between *Moor and Bullock*, adjudged upon a Prohibition, this Matter being moved in Arreft of Judgment.

Cro. J. 511. pl. 10. S. C. adjudg'd accordingly — Libel &c. for the Tithe-Wood in B the Defendant fuggefted a Cuftom in the Parifh, *that all the Parfons of the faid Church, Time out of Mind habuerunt & capi fuerunt, fuch Land Parcel of the Manor of F. in recompence of all Tithe of Wood in the faid Parifh &c.* But did not

not aver that the Lands whereof the Tithes are demanded were Parcel of the Manor; but adjudged, that the Prescription was good, for it might be, that at the Beginning all the Land within the Parish was Parcel of the Manor, and the Land of the Allottee, and that such a Part was allotted to the Parson in lieu of Tithe-Wood. Cro E. 587. pl. 19. Mich. 39 & 40 Eliz B. R. Somerton v. Cotton. ——— S. C. cited Arg. Cro. E. 785.

In the principal Case of Moor v Bulluck it was moved in arrest of Judgment that the Surmise was not good; for he shewing that he was seised in Fee, that is as, parcel of his Glebe, it cannot be in recompence of the Tithes; or shewn that he and his Predecessors time whereof &c have had the Occupation of that Close, and the Profits thereof in lieu of Tithes; and not to say that he was seised, which shall be intended as Parcel of the Glebe; Sed non allocatur, for it is a better Form to say that he was seised in Fee; for it is so antient that it cannot be shewed when, or by whom it was given; But having had it always in lieu of Tithes, it is good enough, and shall be intended to be given before Time whereof &c. in recompence of the Tithes. Cro. J. 501. pl 10. Mich. 16 Jac. B. R. Moore v Bullock.

The Suggestion for a Prohibition was, *That the Parson had 20 Acres of Pasture, and a Close of 10 Acres of Wood, in satisfaction of all the Tithes demanded*; The Witnesses examined according to the Statute 2 Ed. 6. cap. 13. *proved that the Parson had the 20 Acres of Pasture, but not the 10 of Wood*, and yet the Prohibition was granted, because it appears that the Libel was unjust; for though the Parishioner had failed of his full Proof, yet there was enough to bar the Parson of his Tithes in kind, and he need not shew how, or by what Title the Parson had the Land; For *if it was not in Satisfaction of Tithes, the Parson ought to shew that himself*. Mo. 911. pl. 1284 Hill. 42 Eliz. B. R. Austin v Piggot.——— Cro. E. 736. pl. 4 S. C. the Substance is proved that he held Land in satisfaction ———Cro. J 501. in pl. 10. S. C. cited that the Prescription was held good.

7. **It is a good Modus Decimandi**, that he hath paid the Tenth of the Wool of all Sheep that he had before Lady-day, and sheered or sold, or put in any other Parish, or hath paid the Value of the Tenth thereof, to be in full satisfaction as well of all the Wool of such Sheep, as of all other Sheep brought within the Parish after Lady-day, **for it is not reasonable that the Tithes he hath paid should be a Discharge for all the other Parishioners; but this was intended to be a Discharge of all the Sheep of the Party himself brought within the Parish after Lady-day; but this was not so expressed, and this had been a good Custom. Mich. 9 Car. B. R. between** *Market and Knight*, **adjudged upon Demurrer, and so ruled in another Case the same Term upon a Trial at Bar.**

8. **It is not a good Modus** that he ought to be discharged of Tithes, in consideration that he hath used Time out of Memory **&c.** to employ the whole Profits of the Land in the Reparation of the Body of the Church, and to find all Necessaries for the Church, **for this is not a Recompence to the Parson. Pasch. 37 Eliz. B. between** *Longley and Meredine*, **adjudged.**

In a Prohibition Plaintiff suggested that Time out of Mind the Owner of the Land had found *Straw for the Body of the Church*, in discharge of all Tithes of Hay. Coke moved, that it is no Cause of Discharge, for the Parson was not chargeable with it, nor had any Benefit by it, but if he had alleged that he gave the Straw to the Parson, and he bestowed it in the Body of the Church, or that the Parson had a Seat in the Body of the Church it had been otherwise; and thereupon Consultation was granted. Cro E 276. pl. 7. Pasch. 34 Eliz. B. R. Scory v. Barber.

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9. But **it is a good Modus to be discharged**, because he hath used **&c.** to employ the Profits for the Reparation of the Chancel; **for the Parson hath a Benefit by this. Pasch. 37 Eliz. B. said to be adjudged in B. R.**

* Noy. 15. Parry v. Chauncey. S. C. ‡ Cro. C. 393. pl 4. Meade v. Thurman. S C the Court granted a Prohibition.——— Jo. 357. pl. 9. S. C. but that is of a Libel for green

10 **It is not a good Modus, that, in consideration** that the Parishioner having arable Land hath ploughed it, and hath had Head-Lands, green Slips, or Doles, parcel or appurtenant to their Husbandry-Houses or Lands, that in consideration the Parishioner would plough and sow his Land with some Kind of Grain, and mow it, and make it up into Shocks, Pooks, and sever it from the ninth Part, and prepare it for carriage for the Parson, the Parishioner hath used to be discharged of the Payment of any Tithe sowed, growing upon the Headlands **&c.** of such arable Land, and then sowed, applied, and converted for the Nutriment of his Cattle of Husbandry employed in the Tillage of the said arable Land, **that is not a good Modus, because of common Right the Parishioner ought to cut and prepare the Grain, and set out the Tithe. Mich. 3 Ja. B. R. between** * *Perry and Chauncey*, **adjudged upon Demurrer, and a Consultation**

tion granted. But Hill. 10 Car. B. R. between ‡ *Mead and Thurland*, a Prohibition granted per Curiam, where the Suit was for Tithes of Hay, growing upon such Head-lands, where by Custom not used to be paid.

Tares, cut for feeding labouring Horfes, and Prohibition was grounded not upon this general Suggeftion, but upon the Cuftom of the Parifh, that no Tithe was paid in this Cafe ——— 2 Le. 27. pl. 30. Mich. 30 Eliz. B. R. Perry v. Somes. S. P. and held by the whole Court, that it was a good Prefcription as to the green Tares.

11. It is not a good Modus, that in confideration that the Parifhioner having Barley, the greateft Part whereof he hath cut down and tied into Sheafs, and fet in Cocks, of which the Parfon had the tenth Cock, that he hath ufed to leave a fmall Parcel of the Barley to ftand, to the Intent to cut it down after for Bands for the Rakings voluntarily fcattered, and to be difcharged of the Tithes of this fmall Parcel of Barley when he cuts it. Hill. 8 Car. B. R. between *Saunders and Paramour*, per Curiam a Prohibition denied.

12. If a Parifhioner prefcribes, that whereas the greateft Part of the Land within the Parifh, and within the Parifhes next adjoining thereto, is arable Land, fo that for want of Grafs they ought to provide other Suftenance for their Plough-Cattle, and becaufe he hath ufed to cut and tie into Sheafs the Grain fowed there, and to put them into Shocks, of which the Parfon had the tenth Shock, by which the Parfon hath the Benefit of the Labour of the Plough-Cattle, and in confideration thereof the Parifhioner hath Time out of Memory, &c. ufed to be difcharged of the Tithes of green Tares before they come to Perfection, [and] in fmall Parcels in the Time of Harveft, or before, and given to his Plough-Cattle for their Subfiftance; this is not a good Modus, becaufe if he cuts them down, he fhall pay Tithes for them, as well as if they had come to their Perfection. Hill. 8 Car. B. R. between *Saunders and Paramour*, per Curiam, a Prohibition denied, fcilicet, Hill. 10 Car. B. R. between *Mead and Thurland*, a Prohibition granted per Curiam in fuch Cafe, this being alledged by way of Cuftom.

See pl. 10 S. C. and the Notes there.

13. It is not a good Modus, that, in confideration that he hath expended his Hay for his Husbandry-Cattle, to be difcharged of Tithes of Hay. M. 3 Ja. B. R. and there cited. Sir * *Warner's* Cafe, adjudged.

* Cro. J. 47. pl. 17. Mich. 2 Jac B. R. Webb v. Warner. S. C. adjudg'd.———Mo. 683 pl 941. Pafch. 44 Eliz. B. R Anon. S. P.———A Suggeftion was of a Cuftom, *that if any Parifhioner fed his Sheep with his Grafs till June or Auguft, that then he might mow the coarfe Grafs with which they fed the Sheep in the Winter*, whereby the Parfon had Uberiores Decimas of the Sheep &c. It was infifted that this was a plain non Decimando, and cited the principal Cafe here in Roll Abr. 650. pl. 13. and the Court held it a void Cuftom, and fo a Prohibition was denied. Ld. Raym. Rep. 677. Trin. 13 W. 3 Selby v. Clerk.

14. It is a good Modus for an Inn-keeper, that, in confideration that he and all &c. have paid Tithe-Hay and Grain growing upon the Land belonging to the faid Inn, and have paid Tithe for all their own Cattle feeding upon the Land, that they have been Time &c. difcharged of the Tithes of the Horfes of their Guefts agifted in the faid Land when they travel by the faid Inn; for fome have faid, that this was but a perfonal Tithe, and others have faid, that no Tithes fhould be paid for fuch Agiftment by the Common Law, without any Modus, between *Gabel and Richardfon* refolved, and a Prohibition granted.

15 It is a good Modus to be difcharged of the tenth Swarm of Bees for Tithe, in confideration of the Payment of the Wax and Honey to maintain them in Winter, and find Caps for them, inafmuch as they are Feræ Naturæ of themfelves, and require great Care and

Cro. C. 403. pl. 2. Anon. but feems to be S. C. adjudged.

and Labour to keep them when they fwarm. Dubitatur, Hill. 10 Car. B. R. *Langford's* Cafe. Pafch. 11 Car. in this Cafe moved again, and then a Prohibition granted. But fome of the Judges faid, the Modus was not good, fcilicet, but only the Duty which the Law gave; But they held, That no Tithes were due of the tenth Swarm, becaufe they are Feræ Naturæ.

Prefcription that all the Occupiers of L have ufed to pay to the Parfon, Proprietor of the Tithes *all their Hay in Shocks* which hath been *in lieu of all Broom, and other Benefits of the Tenement* was held an unreafonable Suggeftion; For a Modus of one Kind will not ferve for another. 2 Keb. 212. pl. 48. Pafch. 19 Car. 2. B. R. Brown v. Haywood.

16. It is not a good Modus to prefcribe to pay one Tithe for another.

Cro. E. 475. pl. 3. S. P. in S. C.—Mo. 909. pl. 1278. S. C. & S. P. —Gouldsb. 147. pl. 66 S. C. & S. P.——S. C. cited 2 Bulft. 238.—— 2 Salk. 657. pl. 3. Mich. 3 Ann. in the Exchequer in Cafe of the A Bp. of York v the Duke of Newcaftle; the Court admitted the Payment of Tithe of one Species or payment of a Modus for one Species of Tithe could not be a Difcharge as to another Species ——But if he had prefcribed that he had paid 1 d. for all Cows and Beafts agifted, that peradventure had been good; and fays this Diverfity was fo rul'd in Dr. Lewis's Cafe, and of that Opinion were all the Court here.——See Ld. Raym. Rep. 242. in Cafe of Norton v. Briggs.

17. As it is not a good Modus to prefcribe to pay for every Milch-Cow 2 d. and for every Calf 1 d. in fatisfaction for all Tithes of all manner of Cattle, for this fhall not difcharge dry Cattle, for this is but one Tithe for another. Mich. 3 Jac. B. R. is cited by Coke to be fo adjudged. between * *Sherrington and Fleetwood*, which Cafe was Trin. 38 Eliz. B. R.

Mo. 454. pl. 623. Monday v. Lovice. S. P. and feems to be S. C. and the Court held accordingly.

18. So if a Man prefcribes to pay one Heifer for all Tithes, this fhall not difcharge the Tithes of other Cattle, but he fhall pay them in Kind. Trin. 38 Eliz. B. R. per Curiam.

Mo 909. pl. 1279 S. C. & S. P. accordingly, becaufe the Cheefe is made by Labour and Charge. —— Cro. E. 609 pl. 15. S. C. held accordingly; but to pay the tenth Quart of Milk is not good; becaufe that is only for what is due. But Popham faid that to pay the 10th Quart of Milk at the Parfonage Houfe, or at any other Place is good enough.——S. C. & S P. cited Marg Raym. 2-S.——S C. cited, 2 Salk. 554. pl. 20. Trin. 4 Ann. B. R. in Cafe of Foy v. Lister, which was on a Modus fuggefted to pay *every 10th Day's Milk from April till November fkimm'd and made into Cheefe in lieu of all Tithes of Milk*, a Prohibition was granted to try the Modus and fettle the Matter.——6 Mod. 261 Leicefter v. Foy. S. C. The Court did not like the Modus as feeming very fevere on the Vicar, but to fettle the Point which they thought of great Confequence, they granted a Prohibition, directing them to declare forthwith.

19. It is a good Modus in confideration of the Payment of the tenth Cheefe made from the firft of May, until the laft of Auguft, that he hath been difcharged of the Tithe of Milk, for this is not a Tithe in kind of Parcel in difcharge of the Whole, for no Tithe in kind is due of Cheefe, but only of Milk, and fo a good Confideration. Pafch. 40 Eliz. between *Auften and Lucas*, adjudged.

Savil 100. S. C. by the Name of Savil v. Adams.——Mo 2-8. pl. 433. S. C.—— S. C. cited in the Cafe of Monday v. Lovice, Mo. 454.

20. One can't make a Prefcription to pay *Parts of the Tithes in Kind for all Tithes of the fame Nature*; as to pay an Apple for the Tithe of all his Apples, and fo of the like, Per fome of the Judges. And. 199. pl. 234. Trin. 31 Eliz. Adams's Cafe.

21. A Cuftom *to pay an Halfpenny for the Wool of Sheep fold after fhearing and before Michaelmas*, was adjudged a good Cuftom. And Ovis, or Sheep, is nomen aquivocum, and extends to Weathers as well as to Ewes. Mo. 911. pl. 1203. Mich. 37 & 38 Eliz. B. R. Anon.

22. A

22. A Prescription for a Modus Decimandi that *in Regard he paid for Milch Kine* 1 *d. he prescrib'd to be discharged of the Tithe of Milch Kine and also of all the Dry Cattle*; but this was held to be contrary in itself; for a Modus of one Kind to be discharged of another Kind, and the Court held that good. 2 Bulst. 231. Trin. 2 Jac. Arg. cites Mich. 37 Eliz. Lewis v. Gilbourn.

23. It is not a good Prescription *to pay Tithe-Corn in Satisfaction of all Tithes of the Land.* Mo. 454 pl. 623. Trin. 38 Eliz. cites it as adjudg'd in C. B. in Ridiard's Case.

24. The *Lord of the Manor* of B. in the Parish of B. *prescribed*, That he and his Ancestors, and all those whose Estate &c. had used from Time to Time whereof &c. *to pay the Parson of D.* the now Plaintiff, *and his Predecessors* 6 *l. per Ann. for all Manner of Tithes growing within the said Parish, and that by Reason thereof he and all whose Estates &c. Lords of the said Manor had used Time whereof &c. to have Decimam garbam or Decimum cumulum Garbarum seu Granorum of all of his Tenants within the said Manor.* Resolved, That it was a good Prescription, and that a Modus Decimandi by the Lord for himself and all the Tenants of his Manor, to bar the Parson from demanding Tithes in Specie is good, for it might have a lawful Beginning, viz. That before it was a Manor all the Lands were in the Lord's Hands, and that was paid for the Tithe thereof; and then when he conveys Parcel thereof to others it shall be discharg'd as it was in the Lord's Hands. And as to the Decimam Garbam &c. he has it as a Profit Apprender as Parcel or Appurtenant to his Manor not as Tithes. Cro. E. 599. pl. 5. Hill. 40 Eliz. B. R. Pigott v. Hearn.

Mo 483. pl 685. S C & S P. agreed by all the Justices.—S. C cited Mo. 589.—S. C. cited 2 Rep. 45. a. in a Nota by the Reporter.—2 Saund 142 cites S. C.

25. It is a good Prescription that he has used *to pay* 1 *d. called a Hearth-Penny, in Satisfaction of Tithes of all combustible Wood.* Mo. 910. pl. 1280. cites 41 & 42 Eliz. B. R. Green v. Hundle.

Cro. E 702. pl 21. Green v. Hun, S. C. adjudged to be a good Prescription.

26. Surmise that he used *to pay the tenth Sheaf of Corn, the tenth Cock of Hay, the tenth Fleece of Wool, the seventh Calf &c.* and that it was *in Satisfaction of all Tithes of all dry Cattle, and for all other Tithes of Corn, Hay and Cattle.* The Court held this Surmise not sufficient; for that which he used to pay is but Tithes in Kind, and therefore cannot be in Satisfaction for the Tithes of other Things than themselves. Cro. E. 716. pl. 26. Mich. 42 & 43 Eliz. C. B. Ingoldsby v. Johnson.

27. Parishoner suggested that he had all the *Tares* &c. that he sowed and *cut green to give to his Horses*, Tithe-free; and a Prohibition was granted, Nisi. Freem. Rep. 72. pl. 87. Hill. 1672. Stone v. Peacock.

28. Libel &c. *for Tithes of rough Hay growing on the Fenny Lands* of M. the Defendant *suggested that there were* 2200 *Acres of Fenny Land within the Parish, and* 600 *Acres of Meadow, and that the Parishoners paid Tithe of Hay and Corn growing upon the Meadow and Arable Lands, and so much for every Cow and Calf, and because they had not sufficient Grass to keep their Cattle in Winter, they used to gather this Hay, called Fenny Fodder, for the Sustenance of their Cattle for the better Increase of Husbandry, and for that Reason had been always freed from Tithes*; Adjudged that this Surmise is not sufficient; For one may not prescribe in Non Decimando, and they alleging that they bestow'd it upon their Cattle is not any Cause of Discharge. Cro. J. 47. pl. 17. Mich. 2 Jac. B. R. Webb v. Warner.

Mo. 683. pl. 941. Pasch. 44 Eliz. B. R Anon. S. P. adjudged accordingly, and seems to be S. C.

29. *Payment* of Tithes *to the Parson is sufficient Discharge against the Vicar*, because of Common Right all Tithes belong to the Parson and the Vicarage is deriv'd out of the Parsonage, so as no Tithes De Jure belonging to the Vicar but only upon Endowment or Prescription, which

which ought to be fhewn Ex Parte the Vicar and the Court cannot intend it; for the Vicarage is a Diminution and an Impairing to the Parfonage, whereof the Court will not take Notice without Monftrance of the Parties; Refolved. Yelv. 86. Pafch. 4 Jac. B. R. Grene v. Auftin.

Cro. J. 116. pl. 4. S C. but S. P. does not appear.

30. Where the Owner of the Land *pays Tithes of Hay* he is thereby *difcharged of Common Right, as to Tithe of Agiftment of the fame Land in the fame Year*; becaufe the fame Land fhall not anfwer the fame Year but only one Tithe, and the Agiftment is only Profit by the Mouth of the Beafts of the fame Land whereof the Parfon before had Tithes of Hay; Refolved. Yelv. 86, 87. Pafch. 4. Jac B. R. Grene v. Aulten.

31. Whether a Modus Decimandi may *accrue after Endowment of a Vicarage?* The Reporter thinks it may. Godb. 180. pl. 254. Trin. 8 Jac. C. B. Anon.

Win 1. Pafch 19 Jac Reynolds v. Poole, S. C. adjornatur. Ibid. 44. Mich 20 Jac. C. B. Pope v. Reynolds S. C. a Prohibition was granted, and adjudged that the Prohibition ftand.

32. If a Man prefcribes *to pay a Buck and a Doe yearly out of a Park in Difcharge of all Tithes of the Park*, and the Park is difparked the Modus is gone; Agreed per Cur. and that which is by Name of Park is for the Land, and is annexed to the Land by the Name of a Park. Hutt. 57, 58. Mich. 10 Jac. Pool v. Reynolds.

33. *But* if a Man prefcribes *to pay a Buck and a Doe out of the Park* it would alter the Cafe; but it is general and had been paid after the difparking viz. the 10 Eliz. Hutt. 57, 58. Mich. 10 Jac. Pool v. Reynolds.

See 2 Bulft. 259. S C. Arg.

34. A Libel was for Tithes *of Broom*, the Defendant prefcribed that for the rooting of the Broom and fowing the Land the following Year with Corn, which is of greater Benefit to the Parfon, and alfo becaufe the Broom is of little Value and good to cover Houfes, they have ufed to be difcharged of Tithes of Broom, which it was urged was in Effect Non Decimando and confequently not good; but it was anfwered, that the rooting it is a great Charge to the Party and the fowing the Land with Corn is more Benefit to the Parfou, and therefore the Prefcription not good; Coke Ch. J. faid he thought the *Land which has Broom* is not within the Statute of 7 E. 6. for it is not *barren Land*, and therefore if converted into arable is tithable; for the Statute fpeaks of barren Heath or waft Land. Roll Rep. 39. pl. 6. Trin. 12 Jac. B. R. in Cafe of Mafcall v. Price.

35. *Lord of a Manor prefcribed to have the Tithes within the Manor, for that he and all thofe whofe Eftates he has, have ufed to maintain a Chaplain* in the Church of Dinn. Exception was taken becaufe he *did not allege* that the Church of Dinn was within the fame Parifh with the Manor and fo no Confideration, nor does he allege *the Maintainance of the Chaplain for fo long Time as he claims the Tithes, viz. Time out of Mind*, nor did he prove *the Maintainance of the Chaplain within the laft fix Months* as he had fuggefted, but only the Refidue, whereas this is the principal Matter which makes his Prefcription good; and upon this laft Point a Confultation was granted per Curiam, And Coke Ch. J. faid it fhould be granted for all the other Exceptions alfo, but as to them the other Juftices faid nothing. Roll Rep. 2. pl. 3. Pafch. 12 Jac. B. R. Boocher v. Rogers.

36. A Libel was for Tithe-Hay; The Defendant fuggefted a *Cuftom to pay a Load of Hay for all Tithes of Hay growing and renewing on the Land where &c.* It was argued that this Prefcription was good and that it was not Tithes in Kind, becaufe it is *alleged that Defendant ufed to make the Grafs into Hay* by his Labour, and that it feems the Parfon de Jure ought to do this himfelf, for that the Tithes are to be fet out for the Parfon

Parfon when it is cut and is only Grafs, and confequently this is a good Modus Decimandi; But Curia e contra, and Prohibition was denied. Roll Rep. 172, 173. pl. 3. Pafch. 13 Jac. B. R. Cumberland's Cafe.

36. Libel &c. for Tithe-Wood &c. The Defendandant fuggefted for a Prohibition that the Libel was for Tithes of Beeches above 80 Years old, and that the Parfon had a *Confideration for Tithe-Wood, viz. Certain Wood in the Lord's Wood, Time out of Mind, and never had any Tithe-Wood*; per Cur. This fhall be intended a Compofition for Tithe-Wood; and a Prohibition was granted. Roll Rep. 355. pl. 6. Pafch. 14 Jac. B. R. Lapthorn's Cafe.

37. Cuftom to make the Tithe up *in Cocks*, upon Parifhioners Refufal the Parfon may fue in Court Chriftian for not making it into Cocks. Lat. 125. Pafch. 2 Car. Layton's Cafe.

But not in that Cafe, for not fetting out. Lat. 125. in S. C.

38. The Earl of Devonfhire had a *Manor in the Parifh of C.* in Buckinghamfhire, *which extends to Latmos where there is a Chapel of Eafe*, and the *Vicar of C. libels for Tithes* againft one of the Tenants of the Manor; And Henden moved for a Prohibition, for the Earl *prefcribed that he* and all his Tenants fhould *be acquitted of all the Tithes* of Land *within Latmos, paying 10 l. per Ann. to the Chaplain* of Latmos; and he faid that fuch a Prefcription is good as it was adjudged in Bowles's Cafe; and a Prohibition was granted. Hetl. 52. Mich. 3 Car. C. B. The Vicar of Chefham's Cafe.

Litt. Rep. 61. S. C. in totidem Verbis.

39. A Libel was for *odd Sheaves*, to which it was fuggefted, That the Parifhioners for the better dividing the Corn have *ufed to be at the Charge of making it up in Shocks*, and when made into Shocks *they fet out a Stack for Tithes*; and becaufe they have been at this Pains they have been difcharged for Tithes of odd Sheaves as will not make a Stack. This was held a good Cuftom and a Prohibition granted, becaufe they do more than of common Right they ought to do. Lat. 226. Mich. 3 Car. Anon.

40. Confideration of *making Hay* to be difcharged of Payment for *Greenflips, Headlands &c.* good, becaufe it is more than they are bound to do. Hetl. 147. Mich. 5 Car. C. B. Wood and Carverner v. Simmonds.

41. The Court refufed to grant a Prohibition on Suggeftion of a Modus *to pay 4 s. for every Day's Plowing of Wheat, and 2 s. for every Day's Plowing of Barley*, for the Uncertainty; *But* if the Modus had been *fo much for every Day's Work with Averment that it is certainly known, and how much it contains, it might be.* But by Hyde, Wheat could fcarcely be fo much worth Time out of Mind. Keb. 612. pl. 86. Mich 15 Car 2. B. R. Took v. Ledgierd.

42. A Prohibition was granted to a Suit for Tithes *of Cows, Calves, Herbage and Pafture*, upon *Suggeftion of a Cuftom that every Parifhioner* from Time whereof &c. *had ufed to pay 1 d. for every Cow having a Calf, and for every Cow not having a Calf 1 d. halfpenny as far as five Cows, for five Cows 1 s. 3 d. for fix Cows 2 s. 6 d. and for ten Cows 2 s. 8 d. in plena Satisfactione omnium Decimarum Vaccarum et Vitulorum, et Herbagii, et Pafturæ.* The Plaintiff declared in Attachment upon this Prohibition, and upon Traverfe of the Cuftom a Verdict was found for the Plaintiff in the Prohibition; Upon which Lutwych Serjeant mov'd in Arreft of Judgment in Eafter Term laft paft. 1. That this Cuftom was void, for it is laid to be a Difcharge of Tithe of all Cows which it is not; for nothing is laid for the Tithe of the feventh, eighth and ninth Cows, and Payment for the fixth cannot be Payment for the feventh &c. 2. This cannot be a Difcharge of the Tithes of Herbage and Agiftment; for Tithes of one Thing cannot be a Difcharge of Tithes of another, and

2 Lutw. 1043, 1052 Morton v. Briggs, S. C. accordingly, and a Confultation was awarded.

Tithes are payable of both; then fince the Cuftom is laid intire it is void in the whole; and cites 3 Cro. 446. 475. and of this Opinion was the whole Court, and therefore Judgment was arrefted and a Confultation granted, unlefs Caufe fhould be fhewn this Trinity Term. Ld. Raym. Rep. 242. Trin. 9 W. 3. Norton v. Briggs

Carth 461. S.C the Court was of Opinion, that the Cuftom was void —— 12 Mod. 206. S. C but S P does not fully appear. —— Ld. Raym. Rep. 358. S. C. and per tot Cur. the Cuftom is ill, and it is a plain Non Decimando; For fuppofe a Lamb bleats at the End of December, or at the Beginning of January, the Parfon fhall lofe his Tithes for four Months and more; and the Rule for Prohibition was difcharged.

43. Modus to pay a whole *Meal's Milk fuch a Day, and every ninth and tenth Night and Morning after, till a young Lamb yean'd be heard to bleat*, in Lieu of Tithe of Milk is ill; for by this Modus the Parfon may have nothing; as fuppofe a Lamb be heard to bleat before the 9th of May. 2 Salk 656. pl. 2. Mich. 10 W. 3. B. R. Hill v. Vaux.

44. A Modus was laid to be *ten Fleeces of Wool and two Lambs for all Tythe*, the Court was divided whether good or not. 2 Salk. 656. Mich. 3 Ann. in Scacc. Arch-Bp. of York v. the Duke of Newcaftle.

Cro E. 446. Grifman v. Lewis.—— Lane 17. Skelton v. Airie. S. P.

45. Payment of Tithe of *one Species* or Payment of a *Modus for one Species of Tithe* cannot be a Difcharge as to another Species. 2 Salk. 657. pl. 3. Mich. 3 Ann. in Scacc. Archbp. of York v. the Duke of Newcaftle.

Per Holt Ch. J. a Modus muft be of fomething certain that may be demanded in the Spiritual Court, and here fuppofe the *Land be let out at a Fine and 5 s. Rent*, what becomes of the Modus or of the Parfon, and a Cuftom cannot be laid *in a Rent which is alterable at Pleafure* of Parties, and befides, the Cuftom would amount to a plain Non Decimando; See the great Cafe in Roll's Abridg 378. to pay 2 s for all Tithes Hob. 192. and he faid if the Cafe of Perkins and Perkins came in Queftion again, he would defire to hear it argued, for he was not fatisfied with the Judgment of it. 12 Mod 563, 564. Mich. 13 W. 3. Vines v. Doderidge.

46. Modus to pay 2 s. *in the Pound of the improved Rent* is ill, for that is to rife and fall as the Land is let and the Parfon cannot know it, and a Modus fhould be as *certain* as the Duty that is deftroy'd by it; Holt dubitante. 2 Salk. 657. pl. 4. Pafch. 4 Ann. B. R. Startup v. Doderidge.

47. Objection was to a *Modus* that it was too great and *too near the Value of Tithes in Kind*; Prefcriptions had their Beginning before R. 1. when it is probable that 12 d. or 8 d. might have been the Value of the Inheritance, therefore decreed in the Exchequer to be a Compofition and not a Modus, but reverfed; for *Churches might have been endowed with more than the Value of the Tithes*. MS. Tab. March 5th, 1707. Pole v. Gardener.

49. Parfon leafed his Tithes by Parol for a Year to A. B. and C at 2 s. 6 d. per Acre, who *lett every Land-holder his Tithes at 3 s. per Acre*. The *Money* which the Leffee receives of the Land-Owners fhall be *accounted* a Modus. 8 Mod. 63. Mich. 8 Geo. The King v. Fairclough.

50. A Modus *that the Inhabitants of fuch a Tenement with the Lands ufually enjoyed therewith had been accuftomed to pay fuch a Modus for Tithe-Corn*, was held by the Mafter of the Rolls to be quite *uncertain*, for the Houfe may fall, or be uninhabited, and then no Modus will be payable, and nothing can be more uncertain than Lands ufually enjoyed with the Tenement, fince Lands lett with a Farm-houfe may probably be after fhifted. 2 Wms's Rep. 462. Trin 1728. Charlton v. Brightwell.

51. Modus to be difcharged *of Herbage-Tithes in Confideration of making Grafs into Hay* and fetting it up in Shocks for the Parfon is not good. Gibb. 52. Pafch 2 Geo. 2. in Canc. Fox v. Ayde.

(E. a) To *what* Thing the *Modus* fhall *extend.*

1. IF a Man prefcribes to pay to the Parfon a certain Thing as a Modus Decimandi for all the Demefnes of his Manor of D. and after erects a Windmill upon part of the faid Demefnes, he fhall not pay any Tithes for this Mill, but the Modus Grain for the Demefnes fhall go in Difcharge of this alfo which is built upon the Land difcharged. Trin. 39 Eliz. B. R. between *Ruffel and Moore*, per Curiam, and a Prohibition granted.

2. If a Man prefcribes in Modo Decimandi for Hay and Grafs in 40 Acres of Land, and the Tenant converts it into a Hop-Yard, or into Tillage, the Modus is gone, for when the Modus is fpecial for Hay and Grafs only, by Converfion of this to other ufes, the Modus is gone. H. 6 Ja. B. between *Sharp and Coult*, per Curiam.

Noy 148. in Cafe of Sharp v. Sharp, cites Hill. 6 Jac. C. B. the Vicar of Clare's Cafe in Suffolk, who fued for Tithe of Hops, and that there a Prohibition was granted, and feems to be S. C.

3. If a Man prefcribes to pay 6 s. 8 d. for all manner of Tithes of a Park, and after the Park is difparked, and converted into Tillage and Pafture Land, the Modus is gone by the Alteration aforefaid. *Spurdam's Cafe*, adjudged and cited by Coke Hill. 6 Jac. and there agreed per Curiam.

If there was a Prefcription Time out of Mind for a Modus Decimandi for Land, when it was a Park, this Prefcription fhall have Continuance clearly for the Payment of this Modus only, after that fuch a Park be difparked, and converted to another more profitable Ufe; Per Coke Ch. J. The whole Court agreed with him herein. 2 Bulft. 240. Trin. 12 Jac in Cafe of Price v. Mafcoll.

4. [But] if a Man prefcribes to pay 6 s. 8 d. for all manner of Tithes arifing from fo many Acres of Land which contain the Park, though the Park be difparked, and the Land converted into Tillage &c. yet the Modus fhall continue, becaufe the Prefcription is in the Soil, and not in the Park. *Spurdam's Cafe* adjudged; cited per Coke, Hill. 6 Ja. B. and there agreed per Curiam.

Noy 148. in Cafe of Sharpe v. Sharpe, Coke Ch. J. cited one Shipden's Cafe, that a Modus Decimandi to pay a Buck and a Doe generally for the Park is not good if it be difparked, but it fhall be particularly for all Acres contained in the Park

5. If a Man prefcribes to pay yearly 2 s. for every Acre of 140 Acres, which were once a Park, and alfo the Shoulder of every third Deer that fhould be killed within the Park, in Difcharge and Satisfaction of all Tithes, and after the Park is difparked, by which the Tithe (*) of the Deer is gone, which is part of the Confideration, yet it feems the 2 s. for every Acre fhall difcharge the Land. Dubitatur. Hill. 12 Jac. B. between *Hooper and Andrews*, quod vide my Reports, 12 Jac. and Hobart's Reports 54. Et vid. Mich. 5 Jac. B. between *Shaw and Sharp.*

Roll Rep. 120. pl 4. S. C. the Court divided —

* Fol. 652.

Mo 863. pl. 1186 Cooper v. Andrews, S C. the Court divided —— Godb. 137. pl. 329. S C. adjornatur. —— Hob. 39 pl. 47. S. C. with a long Argument by the Ch J —— Win. 46 Arg cites Mich. 10 Jac. Rot. 1225. S. P that the firft Opinion of the Court was, that the Defendant ought to plead in certain how that was difparked; and 2dly,

2dly, it was doubted whether the Modus, as to the 2 s was gone, in regard that the Shoulder of the Deer is gone by the difparking. —— S. C. cited Hutt. 58. and fays that it never was adjudged.

6. Inhabitants of A. a Hamlet within the Parifh of B. had a *Chapel of Eafe* within the faid Hamlet, becaufe the faid Hamlet was diftant from the Church of the faid Parifh, and prefcribe that *with part of their Tithes they have found a Clerk* to do Divine Service within the faid Chapel, *and alfo had paid a certain Sum of Money to the Parfon of B. and his Predeceffors for all Manner of Tithes*, and held a good Prefcription. 4 Le. 25. pl. 77. Trin. 26 Eliz. B. R. Saer v. Bland.

Nov 148. Sharpe v. Sharpe, S. P. and the Suggeftion allowed per Cur. and agreed firft, that altho' they are Feræ Naturæ, yet they may be given for Tithes; So to pay Pheafants &c. 2dly, Although they are not tithable of themfelves, yet they may be given for a Modus Decimandi; As a great Tree may be given for Tithe of Trees tithable. 3dly, That that is a Difcharge to the very Soil, and the Park is not but a Liberty, and the Owner may furnifh it with Game when he pleafes. —— The Court much doubted, whether one that had a Park, and ufed to pay one Shoulder of a Deer for all manner of Tithes, and the Park is difparked, fhould pay Tithes in kind or not. Brownl. 31. Pafch. 10 Jac. Anon.

7. R. was feifed of Hadley *Park*, and of all the Tithes thereof, and *payed* for the Tithes but *one Buck in the Summer, and a Doe in the Winter for 30 Years paft.* The Park was difparked, and turned into arable Land. Carus and Catlin faid, that he need not pay other Tithes but a Buck and Doe, for although they be not titheable, yet may they be paid by Compofition, and he may not take them, but they are to be delivered to him; and in like Manner Partridges and Pheafants in a Garden are not tithable, yet may they be paid in Lieu of Tithes, and fhall be brought dead to the Parfon, and altho' there be no Park yet may he give a Buck out of another Park, and perhaps it may be made a Park again. Ow. 34, 35. Trin. 31 Eliz. Ld. Rich's Cafe.

8. In the Cafe of a *Park* in Norfolk the Parfon prefcribed Pro Modo Decimandi to be paid 3 s 4 d. for all Tithes arifing out of the faid Park, and tho' the Park was afterwards converted into arable yet no other Tithes fhall be paid; Per Coke Arg. But Popham faid, it had been adjudg'd otherwife in **Wroth's Cafe** in the Exchequer; but that the Law is clearly as has been faid, and that *the Difference is when the Prefcription is to pay fo much for all Tithes, or when it is to pay a Shoulder of every Buck or Doe at Chriftmas*; for there if the Park be difparked, Tithes fhall be paid; for Tithes are not due for Venifon and therefore they are not Tithes in Specie. Ow. 74. Pafch. 38 Eliz. B. R. in the Dean and Chapter of Norwich's Cafe.

9. Where the Cuftom is to pay a *Sum* for *all Grounds* of fuch a Farm and *woody Ground is converted into Meadow*, the Cuftom fhall not extend to the Meadow; Per Montague Ch. J. 2 Roll Rep. 162. Pafch. 18 Jac. B. R. cites the Cafe of Coney v. Larke in C. B.

Hetl. 94. Pafch. 4 Car C. B. per Hutton J. if a Man has an ancient Garden for which he paid a Penny, and that is inlarged, Tithes in Specie ought to be paid of that Inlargement.

10. Where the Cuftom is for every Houfe to pay a *Garden-Penny* this will extend to Beans or Hops if they do not grow in Ground newly added to the Garden. Litt. Rep. 151. Trin. 4 Car. C. B. Alfrey v. Mills.

Per Cur. the Modus is not deftroyed by the Addition of the new Pair of Stones. Carth. 215. S. C. —— 4 Mod. 45. Grimly v. Fawlkingham, S. C. and a Prohibition was granted.

11. Modus for a *Corn Mill*, two *new Mill-ftones* are added; Per Holt Ch. J. it feems reafonable the Parfon fhould have the tenth Toll-Difh; adjornatur. Show. 281. Mich. 3 W. & M. Gumley v. Falkingham.

12. A

12. A Modus was, that the *whole Crop of two Acres was given in Discharge of all Tithes of Hay* within the Parish; it was lately determined in the Exchequer that it was extended only to the old Meadow Ground; Arg. Gibb. 53. Pasch. 2 Geo. 2. B. R.

13. A Modus *paid to the Parson may bar the Vicar of small Tithes claimed by him*; for originally, and of common Right all the Tithes, as well small as great, were the Parson's, and the Modus, if good, must have been Time out of Mind, and have commenced when the Parson was seised of all, and the after Endowment of a Vicarage shall not deprive the Parishioners of a Modus they were entitled to before. 2 Wms's Rep. 522. Pasch. 1729. by Ld. C. King. Fox v. Ayde.

(F. a) To what Thing it [the Modus] shall extend. *Mills.*

1. If a Man be discharged of two ancient Grist Water-Mill for one Modus, scilicet, for 6 s. 8 d yearly paid to the Parson, and after, by continuance of Time, by the Act of God, the Water-Course which used to run to the Mills is diverted, and runs in another Place a little Distance off from the ancient Mills, and thereupon the Owner of the Mills pulls down one of the ancient Mills, and rebuilds it upon the Stream in the new Course, he shall be discharged of Tithes of this new Mill for the said 6 s. 8 d. for this is altered by the Act of God. Mich. 11 Car. B. R. between *Johnson and Dandridge*, per Curiam resolved, and a Prohibition granted accordingly.

See (R) pl. 1 and the Notes there.

2. But in the said Case, if the ancient Water-Course be changed by the Act of the Party himself who is the Owner of the Mill, he shall pay Tithes thereof as for a new Mill, and the said ancient Modus shall not discharge it. Mich. 11 Car. B. R. in the said Case of *Johnson and Dandridge*, per Curiam resolved.

3. If for two ancient Messuages, and two ancient Water-Grain-Mills, Time out of Memory &c. there hath used to be paid to the Parson 20 s. per Annum in lieu of all Tithes issuing out of the said Messuages and Mills, and after the Owner of the Messuages and Mills erects two new Grain-Mills within the said Messuages, it seems the Modus will not discharge these new Mills from the Payment of Tithes, because the Tithes of a Mill is not meerly predial, but mix'd with the Personalty, and is more of the Personalty than of the Prediality. Mich. 13 Car. B. R. *Goodwin and Smith*, concerning *Torrington* Mills in the County of Devon, upon a Demurrer. Justice Berkly and Curia seemed to incline, that the Modus should not extend to these new Mills; but they did not resolve it, because the Issue was taken upon the Modus as to the two Messuages and ancient Mills; and at the Nisi Prius the Plaintiff in the Prohibition was nonsuit, by which he was nonsuit as to the Demurrer also, and for this Cause a Consultation was granted for the Whole.

4. If a Man be seised of eight Acres of Pasture, and of Meadow, for the Tithes of which there has been paid Time out of Memory &c. 5 s. 6 d. and after the Owner thereof erects thereupon a Corn-Mill, he shall pay no Tithe for the Corn-Mill, because the Land was discharged per Modum Decimandi. Co. Magna Charta 49 .

Show. 281. Gumley v. Falkingham, S. C. adjornatur. —— Carth 215. Gumble v. Falkingham, S C. and per Cur. the Modus is not destroy'd by the Addition of the new Pair of Stones. —— Brownl. 32. Anon. is, that if you have but one Pair of Stones, and pay a Rate-Tithe for the Mills, and then you add another Pair of Stones, new Tithes shall be paid in Kind.

5. In a Prohibition to a Libel for Tithes of a *Corn-Mill*, the Plaintiff suggested a Modus &c. the *Defendant confessed the Modus, but alledged that a new Pair of Mill-stones were added to the old Mill, and so prayed that the Prohibition might go only to the Tithes of the ancient Mill*; But it was said e contra, that the Modus extends as well to the new Mill-stones as to the old, for if these break, the Modus goes to the New, so that if they are laid down elsewhere under the same Roof the Prescription will extend to all, because the Mill is the Substance to which it chiefly relates; the Prescription is to the Mill in general, and it is but accidental whether there are one or two Pair of Mill-Stones therein, 'tis still but unum Molendinum, and must be so demanded in a Præcipe, and a Prohibition was granted. 4 Mod. 45. Trin. 3 W & M. in B. R. Grimley v. Falkingham.

(G. a) [Modus.]

To what Thing it shall *extend for a collateral Respect.* *Fraud.*

1. If a Man prescribes to pay an Halfpenny for every Lamb which he shall sell before the first Day of May without other Tithe of them, **and after by Fraud to deceive the Parson, he** sells the Lambs but a Day before May, **this is not a Discharge by the Custom of Tithing. Mich. 17 Jac. B. per Curiam.**

Mo. 913. pl. 1290. S. C. a Prohibition was granted notwithstanding the Covin, because the Fraud is to be remedied in an Action on the Case at the Common Law.

2. Libel &c. for Tithes, the Defendant suggested a Custom in the Parish of Letcombe, *that the Parson should have for his Tithes, the 10th Land sowed with any Manner of Grain, to be reckoned at the first Land next the Church*, the Parson replied, that the *Defendant by Fraud sowed every 10th Land which belong'd to the Parson as above very ill, and with small Quantity of Corn, and did not Dung and Manure it as he did the other nine Parts*, by Means whereof the other nine each of them yielded eight Cocks, but the tenth yielded but three Cocks. Wray Ch. J. held, that this Custom was against common Reason, and therefore void; but if it be a good Custom, then the Parson shall have an Action on the Case. Le. 99. pl. 127. Pasch. 30 Eliz. B. R. Stebbs v. Goodlack.

3. A Custom was for the Vicar to have Tithes *for all Peas and Beans set, drilled, or sowed in Rows in Gardens* or like Manner, afterwards a new *Improvement was found out to use a Plow instead of a Spade*, yet such Pease and Beans shall pay Tithes. MS Tab. January 23, 1717. Austin v. Nicholas.

(H. a) *Who* shall *prescribe* in Non Decimando.

* Fol. 653.

1. A Layman cannot prescribe in Non Decimando without special Matter, though he be capable of a Discharge of Tithes in favour of the Church, because it shall not lose its Right without an actual Recompence. Co. 2. the Bishop of Winchester 44. resolved.

Mo. 425. pl. 593. Hill. 38 Eliz. B. R. Wright's Case, S. C. held, that temporal Persons cannot prescribe in Non Decimando, but in Modo Decimandi they may.

2. A Spiritual Person may prescribe generally in Non Decimando, because he is more favour'd than a Layman, for this is always in a Spiritual Person, and so not taken from the Church, for such Spiritual Person was capable of a Grant of Tithes at the Common Law in Pernancy. Co. 2. the Bishop of Winchester 44. resolved.

Cro. E. 206. pl. 42. Mich. 32 & 33 Eliz. B. R. Nash v. Molins, held that a spiritual Person may prescribe in Non Decimando, and by the 31 H. 8. he shall hold it discharged as the Prior held it; and if he held it discharged Non refert by what Means. ——— Le. 240. pl. 325. S. C. held accordingly.

A Spiritual Person may *prescribe* in Non Decimando. Roll Rep. 264. pl 36. Mich. 13 Jac. B. R. the Bishop of Hereford's Case.

A *Dean and Chapter* may, though it was objected, that a Dean may be a Layman, as the Dean of Durham was by special Licence and Dispensation of the King; yet it was answered, that this is a rare and special Case, and therefore not to be brought for an Example. Win 65. Pasch. 21 Jac. C. B. Briggs's Case.

3. As a Bishop may prescribe in Non Decimando, as to be discharged of Tithes for himself, his Farmers, and Tenants at will, for certain Land in the Parish of another. Co. 2. the * Bishop of Winchester 44. adjudged; And Mich. 15 Ja. B. R. same Case came in Question, and adjudged, and a Prohibition granted accordingly. Mich. 42 43 Eliz. B. R. between || *Crowther and Frier*, adjudged; M. 13 Ja. B. R. in the Bishop of Hereford's Case, resolved, and a Prohibition granted accordingly.

* Cro E. 475. pl. 1. and 511. pl. 36. Wright v. Wright, S. C. adjudged. ——— Mo. 425. pl. 593. S. C. adjudged ——— S. C. cited Mo. 531.

|| Mo. 618. pl. 844. Crowther v. Fryar, S C.

4. [And] when certain Land is so discharged by Prescription in Non Decimando in the Hands of a Spiritual Person, if he leases it for Years to a Layman, he may now prescribe in Non Decimando also, because the Land is discharged in Facto. Co. 2. the Bishop of Winchester 45. adjudged; And Mich. 15 Ja. B. R. in the same Case it was adjudged also, and a Prohibition granted.

Mo. 425. pl. 593. Hill. 38 Eliz. B. R. Wright's Case, S. P. adjudged, and seems to be S. C. ——— Cro. E. 475. pl. 1. 511. pl. 36. S. C. adjudged. ——— S. C. cited Mo. 531.

5. A Parson of a Parish having Land in another Parish, parcel of his Glebe, may prescribe in Non Decimando for him, his Farmers, and Tenants. Mich. 13 Car. B. R. between *Dr. Ward and Taylor*, per Curiam.

6. The Church-Wardens of a Parish, admitting they may have Land by Prescription, yet cannot prescribe generally in Non Decimando, for this Land which they have for the Reparation of the Church for the Parishioners, for they are not Spiritual Persons; P. 37 El. B. between *Longeley and Meredine*, adjudged.

7. Copy-

Cro E 784 pl. 23 Crouch v. Fryer, S. C. adjudged, that the Preſcription is good —— Mo 618 pl. 844. S. C. adjudged accordingly by 3 Judges, Popham contra.

7. Copyholders of Inheritance that hold of a Biſhop as of his Manor, may preſcribe, That the Biſhop and his Predeceſſors ſeiſed of the ſaid Manor for themſelves, their Tenants for Life, Years, and Tenants by Copy of Court-Roll of the ſaid Manor Time out of Memory &c. have been diſcharged of the Payment of Tithes for their Lands parcel of the ſaid Manor; for this is a good Preſcription, and the Copyholders ſhall be diſcharged of Tithes thereby, for their Tenements are part of the Demeſnes of the Manor, and this might commence upon a real Compoſition for the whole Manor. M. 42, 43 El. B. R. between *Crowcher and Frier*, adjudged.

—— Yelv. 2. S. C. adjudged by 3 Juſtices. And adds a Nota of the Reaſon; becauſe Preſcription in the Lord ought of Neceſſity in common Intendment to precede the Preſcription in the Eſtate of the Copyholder, and the Diſcharge of Tithes in the Lands, which in this Caſe may well be, (becauſe he is a Spiritual Perſon) ſhall trench ſo to the Benefit of the Tenant who is the Copyholder; for by this Means it is to be preſumed that the Lord has greater Fines and Rents; And adds another Nota, that Popham was againſt this Judgment becauſe the Plaintiff, who is a Copyholder, will have in Suo Genere an Eſtate of Inheritance diſtinct from the Eſtate of the Lord, who is the Biſhop. —— Noy 132. S P. and cites S. C.

A *Copyholder* may preſcribe to be diſcharged of Tithes, by *pleading that he was always Tenant by Copy to a Spiritual Corporation.* Lane 17. Arg. cites it as ſo reſolved 40 Eliz.

Mar 26. pl. 59. Paſch. 15 Car. Anon. S. P.

8. A Pariſh cannot preſcribe in Non Decimando. Hill. 14 Ja. B. R. *Barham and Gooſe*, per Curiam.

2 Salk. 655. pl 1. Hill. 8 W. 3. B. R. the S. P. as to a Thing that is in its Nature de Jure tithable; for as no ſingle Perſon, or his Eſtate, can, no more by the ſame Reaſon can the Hundred, [or County] which conſiſts but of many ſingle Perſon's Eſtates. In the Caſe of Hicks v. Woodiſon.

9. A County may preſcribe in Non Decimando; Contra, P. 12 Ja. B. R. per Coke.

Though it be generally put in Dr. and Stud. 166. that a County may preſcribe to be diſcharged of any Tithe, yet I find no Inſtance of it in any other Caſe than Tithe Wood, (except one in Roll 654. which I am not ſatisfied with). Now Tithe-Wood does not ſeem to be due of common Right, becauſe it does not renovare Annuatim, but the Church had got Poſſeſſion of it, and the Statute de Silva Cædua, 45 E 3. cap. 3. is but an Affirmance of the Common Law, and where they have obtained it, it is to be paid as a Cuſtomary Tithe, and yet in the Caſe of Wood the Parſon need not lay a Cuſtom in his Libel; but if the Country be diſcharged by Cuſtom, it muſt come on the other Side. (Contra 13 Co. 13). The Caſe of Tithe Wood is ſomewhat like the Caſe of Tithe of Mills; The Church claimed Tithes for Mills, and by the Statute of Articuli Cleri, cap. 5. de molendino de novo erecto, a Prohibition lies not, but yet of an old Mill a Man may now preſcribe generally in Non Decimando. Per Holt Ch. J. Comb. 404. Hill. 9 W. 3. B. R. in Caſe of Hicks v. Woodiſon.

Libel for Tithes of Wood; the Defendant ſuggeſted for a Prohibition, a Preſcription to

10. So a Wild may preſcribe in Non Decimando, As the Wild of Suſſex; Mich. 13 Ja. B. R. a Trial was at the Bar upon a Prohibition upon ſuch a Preſcription to be diſcharged of Tithes of Wood, between *Porter and Tike*, and the Preſcription found, and Judgment given accordingly. Hill. 14. (*) Ja. B. R. per Curiam, ſuch a Preſcription is good in *Barham and Gooſe's* Caſe. Mich. 17 Ja. B. in Dr. *Andrews and* , adjudged upon a Trial at Bar, by which the Preſcription is found.

* Fol 654.

be diſcharged of the Tithes *of Wood within the Wild of Kent.* The Plaintiff traverſed the Preſcription, and Iſſue found for the Plaintiff in the Prohibition and allowed, and the Plaintiff was diſcharged; And there is a Nota, that the Wild of Kent has twenty Pariſhes in it; And Henden Arg ſaid, that Tithe of Wood was not originally given to the Clergy before John Stratford, Arch-Biſhop of Canterbury, Anno 17 Ed. 3. made a Conſtitution, that Tithes of Silva Cædua ſhould be paid within his Province, and that in the next Parliament, 18 E 3. and ſo in every Parliament to the 16 R. 2. the Commons complained of this as a Grievance and Oppreſſion, and ſhewed two Parliament Rolls, where it was concluded, that Tithes in them ſhall be paid as the Uſage was before, and not otherwiſe; and that upon the ſame Iſſue the *Wild of Suſſex* was diſcharged the Year before in B. R. and ſo the *Wild of Surry* was in two Trials in C. B. and in B. R. Palm. 37, 38. Mich. 17 Jac B. R. Clanrickard (Earl of) v Denton (Lady) —— 2 Roll Rep. 122. S. C.

There

There is not any Case of a *Custom in Non Decimando* excepting for Wood in the Wilds of Kent and Suffex, which is no Authority for allowing such a Custom as to any other thing which is tithable of common Right, for per Cur. *Wood* is not tithable of common Right being part of the Freehold, but it is tithable by Custom only; Quod Nota. Carth. 392. Hill. 8 W. 3. B. R. Hicks v. Woodson.

But Quære, for if Wood is tithable only by Custom, then all the *Libels for Tithe Wood ought to be founded upon the Custom* alleged; and if so, then *there could be no Suggestion of a Modus for Tithe-Wood*; for it would be absurd to suggest *one Custom against another* for one and the same Thing; for if the Duty arises by Custom only, it cannot be discharged by another contrary Custom, and yet many Modus's have been allowed against Libels for Tithe-Wood. Carth. 393. Hill. 8 W. 3. (seems to be a Note of the Reporter.)

11. So the Wild of Kent may prescribe in Non Decimando of Wood. Tr. 15 Ja. B. between *Bell and Tarde*, a Prohibition granted. Mich. 17 Ja. B. R. between adjudged upon a Trial at Bar, in which the Prescription was found. Mich. 21 Ja. B. R. between *Loan and Dixson*, a Trial was at the Bar upon a Prohibition, in which the Issue was, Whether Hilden-Borough-Ward was within the Wild of Kent or not? admitting and agreeing that it was discharged of Tithes of Wood if it was within the Wild, and found by Verdict that it was within the Wild. Tr. 17 Ja. B. between *Fawkener and Andrews*, per Curiam.

12. A Man may prescribe, that by the Custom of the Country where he is sued for the Tithes of Milk of Ewes, no Tithes Time out of Memory have been paid for Milk of Ewes. Mich. 14 Car. B. R. between *Sewel and Bickner*, per Curiam, a Prohibition granted upon such a Surmise to the Consistory of Winton.

13. A Man may prescribe that there is a Custom within the Hundred of Ofulston in the County of Middlesex, and in the County of Surrey, that if any common Baker of Bread inhabiting within any of those Hundreds erects any Water-Mill, Wind-Mill, or Hand-Mill, within any of those two Hundreds, to grind his Grain, to be employed in making of Bread for himself, in his Trade of a common Baker, for the making of Bread for the Maintainance of his Family, and to sell to his Customers inhabiting there, or near the said Hundreds, for their Sustentation, by the Support of whom the Parsons within the said Hundred have more ample Tithes, videlicet, of those who have Lands or Tenements, and others, as of Handycraft Tradesmen, Offerings, and such like, no Tithes hath used to be paid from the Time &c. from the grinding of this Grain so employed as is aforesaid in his Trade; for two Hundreds may prescribe in Non Decimando. P. 15 Car. B. R. between *Kidden and Edwards*, a Prohibition granted upon this Suggestion, where the Baker is inhabits in one of the said Hundreds, and erected a Mill in the other Hundred.

The Case of Kidden v. Edwards, Roll 654. cannot be right, it is against the Statute of Articuli Cleri; Per Holt Ch. J. Comb. 404. Hill. 9 W. 3.

14. If an *Abbot or Prior* had been *seised of Lands discharged of Tithes*, he who is now Farmer of such Lands shall be admitted to prescribe in Non Decimando by the Statute 2 E. 6. which wills that none shall pay Tithes otherwise than they did for 40 Years before, but in no other Case shall a Man prescribe in Non Decimando, but only in Modo Decimandi. Mo. 219. pl. 356. Mich. 27 & 28 Eliz. in Branche's Case.

15. A *whole Country* may prescribe to be discharged from Payment of Tithes *but this* at the first *of Necessity ought to have a lawful Commencement by Way of Composition or &c.* Per Doderide J. cites Linwood and Dr. and Student, to which Coke Ch. J. agreed. 2 Bulst. 285. Mich. 12 Jac.

A Country may prescribe to be quit of Tithes of Wood, or any other Tithe, so that there is sufficient Maintenance and Sustentation for the Parson besides; but a Town cannot so prescribe. 2 Inst. 645. cites Dr. and Stud. 147. b. and Br. Disines, pl. 14. ——— 13 Rep. 13. Mich. 6 Jac. Arg. cites Dr. and Stud. lib. 2. cap. 55 S P. ——— Roll Rep 22. pl. 31. Pasch. 12 Jac.

Jac. B. R. in Cafe of Porter v. Tike, it was faid by Coke Ch. J. that Wray Ch. J. held, that a Country may prefcribe in Non Decimando, if the Incumbent has fufficient for his Livelihood, but Coke faid that it feemed to him e contra.

S. C. cited Ld. Raym. Rep. 137.

16. A *Hundred* may prefcribe in Non Decimando and it is good; for it is the Cuftom of the Country, which is the beft Law that everwas; but a *particular Town* cannot prefcribe in Non Decimando; and thereupon a Prohibition was granted. Mar. 25, 26. pl. 59. Pafch. 15 Car. Anon.

4 Mod. 336. S. C. and the Cuftom held not good, and Confultation granted. —— Skin. 561. pl. 7. S. C. adjornatur. —— Comb. 404. fays a Confultation was granted, and the Court directed that it fhould be fpecially entered, becaufe it appears that the Cuftom is void and againft Law. —— Carth. 392. S. C. the Cuftom was held void, and a Confultation granted. —— 2 Salk. 655. pl 1. S. C. held accordingly, and a Confultation granted. —— 12 Mod. 111. S. C. held accordingly and Confultation granted; For no Country or Hundred can prefcribe in Non Decimando for any Thing that is tithable of common Right. —— Ld. Raym Rep. 137. S. C. ruled accordingly, and the Judgment was arrefted, and the Court directed the Entry to be made as is mentioned above out of Comb.

17. In Prohibition upon a Suggeftion that the *Hundred* of Hunsbyton in the County of Somerfet is an ancient Hundred, that there has been a Cuftom, Time out of Mind, *that the Inhabitants of that Hundred have been difcharged of the Tithes of barren Cattle*, Iffue was taken upon the Cuftom, *and Verdict for the Plaintiff, but Judgment was ftaid.* 1. Tithe is due for Agiftment of barren Cattle of common Right, and at the common Law it is 2 s. per Pound, but the Cuftom governs it as to the Sum. Comb. 403. Mich. 9 W. 3. B. R. Hicks v. Woodifon.

18. Cuftom to pay no Tithe of *Hay imployed in fothering* Cattle is ill, for *Hay is a predial Tithe*, and though you feed your Cattle with it, yet you ought to pay Tithe; Per Holt Ch. J. 12 Mod. 496. Pafch. 13 W. 3. Selby v. Bank.

19. B. moved for a Prohibition to the Spiritual Court, the Libel being for Tithe Hay and Lambs, Cuftom to pay the 10th *Lamb yeaned* there, in Confideration whereof to be *Tythe-free of Lambs* which were *not yeaned there* is ill; Per Holt Ch. J. of *common Right* Tithe Lamb is payable where they fall, but by *Canon Law* there is a Regard to be had to the Place where they were engendered and bred; And after Confideration the Court declared at another Day that no Prohibition fhould go in either Part, for as to the Lambs it is a *dangerous Cuftom*, becaufe eafily converted into Fraud by taking the Sheep away in yeaning Time. 12 Mod. 496, 497, 498. Pafch. 13 W. 3. Selby v. Bank.

20. Of *Wood fpent in an ancient Meffuage* for Husbandry one may prefcribe in Non Decimando, for that formerly Tithe was not paid for Wood; Per Holt Ch. J. 12 Mod. 497. Pafch. 13 W. 3. in Cafe of Selby v. Banks.

(H. a. 2) Modus Decimandi; What is; And Remedy for it; And Pleadings.

1. PRohibition for fuing for Tithes of 15 Acres of Land, 10 Acres of Meadow and feven Acres of Pafture, and furmifed, that he and all thofe &c. Time out of Mind &c. *had ufed to pay 4 d. yearly in Satisfaction of all Tithes of Hay cut there*; The *Jury find* the Prefcription, but *that Part of the Land was never mowed*, but fhew not certainly *what Part*; It was adjudged for the Plaintiff; for both Parties agreed that all the Land had been mowed, and the finding contrary is void; and

and the Verdict is certain enough. Cro. E. 333. pl. 13. Trin. 35 Eliz. B. R. Folcot v. Ridge.

2. Every Modus Decimandi is a Difcharge of the natural Tithe, and fo works by Way of Difcharge. Hob. 118. pl. 148. Hill. 13 Jac. in Cafe of Shelton v. Montague cites D. Parfon of Pyekirk's Cafe.

Modus's are real Compofitions run out into Prefcription; Per King C. Gibb. 120. ——— A Modus is nothing but *a real Compofition* for, or in lieu of Tithes, *or an annual Profit certain and permanent*; Per Ward Ch. B. and Smith B. 1 Salk. 656. Mich. 3 Ann. in Scacc. in Cafe of the Arch-Bp. of York v. D. of Newcaftle.

3. One Modus fued for in the Spiritual Court, and *another Modus fuggefted* is no Caufe of Prohibition unlefs for other Caufe; Per Doderidge J. but per 2 Juftices contra. 3 Bulft. 241, 242. Mich. 14 Jac. Harding v. Gofling.

4. Bill in Chancery to maintain the Prefcription of a Modus Decimandi, to which the Defendant demurred, and fays, It is proper for the common Law or Ecclefiaftical Court; and the Court allowed the Demurrer and *difmiffed the Bill.* Ch. Rep. 27. 4 Car. 1. Brown v. Thetford.

5. In Actions for Tithes and a Prohibition brought upon this *Prefcription*, That Time out of Mind &c. the Sum of *2 s. 9 d. had been paid for* 11 *Doles of Meadow* at 3 d. the Dole, and the Cafe was that this was a fmall Piece of Meadow taken off and inclofed from a great Meadow of which it was Parcel, and the Witneffes did prove that 3 d. the Dole had ufed to be paid for the whole Meadow, and that the 11 Doles in queftion was Parcel of it, and the Judge did direct the Law to be againft the Plaintiff, becaufe he had laid his Prefcription intire 2s. 6 d. [2 s 9 d.] for the Whole, and not 3 d. the Dole, which does amount juft to fo much, and upon this Direction the Plaintiff was Nonfuit. Clayt. 56, 57. pl. 97. Affizes in Lent, by Vernon J. Ann. 1637. Seton's Cafe. And fays, Vide if it is not all one in Mountjoy's Cafe. 5 Rep.

6. In a Prohibition and the *Prefcription* fuggefted was *to pay a Rate-Tithe of* 13 *s.* 4 *d. for all Land &c. and for Profits of a Mill*, and in Evidence the *Witneffes proved feveral fmall Sums paid, as* 5 *s.* 2 *s. &c. which in the Whole came to the juft Sum laid in the Prefcription*, and it was holden no good Proof by the Owner of the Inheritance; otherwife it had been if thefe feveral Sums had been paid by the feveral Tenants of feveral Parcels of the Land in queftion; and in this Cafe it was held if fuch a *Prefcription* is *laid for an* 100 *Acres*, and the *Plaintiff fails in the Number*, it is doubtful whether it be not a Failure in Proof; The beft Way is to lay it that it has been paid for fuch Clofes &c. by Name; and in this Cafe it was held clearly that no Proof being to extend this Sum paid for the Mill, the Plaintiff did fail in his Prefcription in all. Clayt. 81, 82. pl. 135. Affifa 15 Car. before Henden Baron of the Exchequer. Sir Arthur Robinfon's Cafe.

7. There was a *Compofition* between the Prebendary of A. and the Abbot and Convent of B. *that the Prebendary of A. and his Succeffors*, for all Time to come, *fhould have their Election yearly, either to receive Tithes in Kind of Corn or Grain arifing within certain Lands of the Abbey, or elfe to receive five Marks*, to be paid by the faid Abbot and Convent *in Lieu thereof, fo as fuch Election was notified to the Abbot or any of the Monks*, or Porter of the Abbey &c. *The Lands came to the King by the* 31 *H.* 8. *and from him to the Defendant*, and the *Prebend came to the King by the* 1 *E.* 6, *of Chanteries &c. and from him to the Plaintiff.* Admitting the Compofition good, it was adjudged that the Power of Election was gone, becaufe it cannot now be made according to the Compofition; but in this Cafe it was faid by Hale Ch. B. that in one Southwell's Cafe in 44 Eliz. where an Abbot had a Quantity of Wood to be taken

yearly

yearly in fuch a Wood, or a Sum of Money at his Election; it was held the Election was transferred to the King by the Statute of Diffolution of Monafteries. Hardr. 381. Mich. 16 Car. 2. Sir William Ingolby v. Wivel & al.'

But an *uncertain Modus* is no Caufe of Prohibition Hetl. 100. Trin. 4 Car. Goddard v. Tyler. —— Litt. Rep. 151. Toddard v. Tiler, S. C. —— 11 Mod. 60. S. P. argued, Startup v Doderidge.

8. If the Jury on an Iffue joined in a Prohibition upon a Modus Decimandi find a *different Modus*, yet the Defendant fhall not have a *Confultation*; for it appears he ought not to fue for Tithes in Specie there being a Modus found. Vent. 32. Pafch. 21 Car. 2. B. R. Anon.

9. Chancery deny'd to *decree Rate Tithe*, though it might be after two Verdicts, and though it was urged that it was frequently done in the Exchequer. Ch. Cafes 187. Mich. 22 Car. 2. Bufh v. Richley.

10. There is *no Remedy* for a Modus Decimandi *but in the Spiritual Court*. 12 Mod. 416. Per Cur. Mich. 12 W. 3. in Cafe of Johnfon v. Ryfon.

Ibid. cites the Cafe of Reynolds v. Rogers, where the Plaintiff fuggefted a Modus, but did not lay it payable on any certain Day, neither did the Defendant in his Anfwer confefs any Day of Payment; fo that no certain Day of Payment appearing, either in the Bill or Anfwer, the Defendant, who was Plaintiff in a Crofs-Bill, having laid it to be payable on a certain Day, it was held good.

11. Where a Modus was fet forth *payable on or about fuch a Day*, this was not good; for the Day muft be certain. 8 Mod. 375. Trin. 11 Geo. 1. Blackett v. Finny; and cites it as lately refolved in the Cafe of Harrifon v. Clerke.

(H. a. 3) In what Cafes a Parol Agreement is good, or where there muft be a Leafe.

IN Trefpafs the Plaintiff counted that a Parfon Anno 18 H. 6. *Sold* to him all his Tithes of his Parifh of A. payable which did or might arife in the faid Parifh *during feven Years* next &c. and juftified for Tithes Anno 18 and 19. Per Newton this cannot be good; for in Anno 18 the Tithes which came Anno 19 were not in Effe, and therefore it is not a good Contract of a *Thing not in Effe*; But per Palton contra, and therefore the Plaintiff recovered notwithftanding thefe Objections. Quod Nota pro Lege. Br. Contract, pl. 13. cites 21 H. 6. 43.

2. A Parfon may leafe his Tithes for Years *without Deed*; Per Chocke J. Quod non Negatur. Quære Tamen. Br. Difmes, pl. 8. cites 9 E. 4. 47.

Tithes will not pafs by Grant without Deed. Le. 23. pl. 29. Trin. 26 Eliz. B. R. Withy v. Saunders.

3. A *Parfon in Confideration of* 12 *d. granted to one of his Parifhioners that he fhould hold his Lands difcharged of Tithes*; It was holden by the whole Court that the fame was no good Difcharge, being without Deed as a Leafe of his Tithes; But it was holden, if the Parfon afterwards fues the Parifhioner for Tithes againft the fame Grant and Promife, the Parifhioner may have an Action upon the Cafe againft the Parfon upon his Promife, although he cannot plead the Grant as a Leafe. 2 Le. 73. pl. 98. Trin. 28 Eliz. B. R. Wellock's Cafe.

4. Confideration to *pay to A. the Parfon* 10 *l. per Annum* during fuch a Term *for his Tithes*, A. promifed that the Plaintiff fhould hold his Lands without Tithes and without any Suit for the fame; Per Gawdy; It is a good Difcharge for the Time, and a good Compofition to have a Prohibition

Prohibition upon, and is not like unto a Covenant. Le. 151. pl. 208. Trin. 31 Eliz. B. R. Chapman v. Hurst.

5. Libel for Tithes, the Defendant suggested for a Prohibition, that P. was seised of the Lands out of which the Tithes were issuing, and in *Consideration of 5 l. paid by him to the Parson, it was covenanted and agreed between them, That P. and his Assigns should hold the said Lands discharg'd of Tithes during the Parson's Life*; A Prohibition was granted, but afterwards it was held that they may still proceed in the Spiritual Court, because here is no express Grant of the Tithes, but only a Covenant or Agreement that P. should be discharg'd of the Payment, for which he hath a proper Remedy by an Action for not performing the Agreement, and therefore no Prohibition shall go; for this Agreement cannot be without Deed, and the Assignee has no Colour to take Advantage thereof. Cro. E. 188. pl. 13. & 249. pl. 10. Mich. 33 & 34 Eliz. B. R. Nelson and Bugg v. Woodward.

2 Le. 29. pl. 32. Woodward v. Bugg, S. C. and a Consultation was granted. Wray said, that if it had been for Years it had been good, but here it is not any Contract, but only a Discharge for Life, which cannot be during his Life without Deed; and afterwards the Record was read, which was Concordatum agreatum fuit between the two Parties pro omnibus Decimis, during the Time that one should be Parson, and the other Occupier of the said Lands, that in Consideration of 5 l. the said Prettiman and his Assigns should hold the said Lands discharged of Tithes, the same is not a Contract but a Promise, for he does not grant any Tithes &c. 3 Le. 257. pl 341. S. C. in totidem Verbis. ——— Ow. 103. Woodward v. Nelson S. C says, that about this Time Wray Ch. J. died, and Popham succeeded, and was sworn the same Day, and the Court held that the Agreement by Parol was not good, and a Consultation was awarded; But says, that upon Search made no Judgment is entered upon the Roll.

6. If a Man *sell* his Tithes for Years *by Word* it is good; but if the Parson *agrees* that one shall have his Tithes for seven Years by Word it is not good, because it amounts to a Lease; and Fleming Ch. J. held strongly that Tithes *cannot be leased for Years without Deed*. Brownl. 98 Mich. 9 Jac. Anon.

Noy 28. S. P. ——— Tithes may be granted for *one Year* without Deed, and for no longer; Per Coke Ch J. Roll Rep. 174 Sorrell v. Grove. ——— Because the Parson for that Year had, as it were, an Interest; Per Fenner J. Ow. 103. in Case of Woodward v. Nelson. ——— By way of Agreement Tithes may pass for Years without Deed, but *not by way of Lease* without a Deed; But a Lease for one Year may be of Tithes without Deed. Godb. 354 pl. 449. ——— S. P. by Wray and Fenner. Cro. E. 249. pl. 10. in Case of Nelson v. Woodward.

7. An *Agreement to be discharged from Tithes* may be *for a Year by Parol*, and shall *be good*; *but* to have such an Agreement *during the Parson's Life or for Years cannot be without Deed*; And although it were objected that this Agreement being in Way of Contract by Retainer is not any Lease of them, but only a Contract which may be for many Years by Way of Discharge to the Party himself who ought to pay them by retaining them without Payment, as well many Years as one Year; yet the Court held that it could not be, because the Law will permit it for a Year; it being Quasi by Way of Sale; but for many Years (which sound in Nature of a Lease) it cannot be. And Tanfield said, That such a Surmise was in a Case betwixt **Nelson and Pretiman** to be discharged for Years, and ruled to be void; a Multo Fortiori to be discharged during the Parson's Life; and such a Case was ruled betwixt **Rolls and Rolls**; Wherefore without further Argument it was adjudg'd for the Defendant, and Consultation was awarded. Cro. J. 137. pl. 13. Mich. 4 Jac. B.R. Hawkes v. Brayfield.

8. If a Parson contracts with me *by Word for keeping back my own Tithes* for three or four Years, this is a good Bargain by Way of Re-[illegible]iner, and if he sue me in the Ecclesiastical Court, I shall have a Pro-[illegible]tion on this Composition; But if he grants to me the Tithes of an-[illegible], though it be but *for an Year*, it is not good unless it be by Deed. [illegible] vnl. 11. in a Note there. Mich. 8 Jac. B. R.

2 Brownl. 17. contra if it be for more than one Year and cites **Willow's** Case, as so [illegible]; but the last Point of the Grant of the Tithes of another was agreed by all to be void; so

of the Tithes of the Parifh without Deed. Godb. 373. Bellamy v. Balthorp —— But agreement for *his own Tithes for Life* is not good, and in the Cafe of Years it is the better Way to *plead it as an Agreement*, and not as a Leafe. Noy. 121. Small's Cafe —— Agreement to retain them *for Life of the Parfon* adjudged good. Lev. 24. Bernard v Evans.——Pleading it by way of *Demife* for a Year is void by Parol; But *difcharge* of Tithes by Parol is good, or *Leafe of the Rectory*, confifting of the Glebe and Tithes by Parol for Years is good. Lat. 176. Bellamy v. Balthorp.——Not good without Deed. 2 Le. 29. Woodward v. Buggs.—— 3 Le 257. S. C.——Per Hutton J. Het. 107.—— Cro. J. 137. Hawks v. Brayfield. —— Grant of Tithes *by Deed* for Life is not good if it be *to commence at a future Day, and to enure by way of Intereft* and not by way of *Difcharge*, and though it be to the Owner of the Land, yet to make it good there muft be Words of Difcharge in it Yelv. 131. Edmonds v. Booth.—— During the Life of the Parfon the Contract is on foot, but though the Contract was with the Parifhioner, his Executors and Affignes, yet the *Affignee* cannot fue the Parfon upon this Contract, but he may have a Prohibition to ftay the Parfons Suit in the Spiritual Court for the Tithes in Kind, and may put the Parfon to his right Remedy, and that is to fue here. This Agreement is no Leafe, becaufe not by Deed, and the Parifhioner being dead, the Parfon fhall have his Remedy againft the Executor, and not againft the Executors, Leffee at Will. Per Doderidge J. and a Prohibition was granted. Godb. 333. Snell v. Barret. S. C.

Cro. J. 137. pl. 13. Hawkes v. Brayfield, S. C. and a Confultation awarded; For though fuch Agreement may be good by Parol for a Year, yet it cannot be during the Parfon's Life, or for Years, without Deed, and cites S. P. ruled between Rolls and Rolls.—— Yelv. 94. Hawkes v. Brothwith, S. C. takes a Diverfity where it is a Contract to have Tithes by way of Retainer without Deed, and where by way of Perception.

9. Libel &c. the Defendant fuggefted, That there was an *Agreement* between the Lord Chandos who was feifed of the Manor of B. in the County of Wilts, and the Plaintiff who was Parfon of B. *that* the faid *Lord Chandos and his Tenants of the faid Manor, fhould pay unto the faid Parfon fo long as he fhould continue Parfon there, fo much Money in Satisfaction of all Tithes, and that in Confideration thereof they fhould hold the faid Manor difcharged &c.* and upon Demurrer it was adjudg'd for this Defendant, and a Confultation awarded. Hob. 176. pl. 199. Hill. 13 Jac. B. R. Hawles v. Bayfield.

10. A *Parifhioner* covenants with the Parfon by Deed *to pay the Parfon annually* on Lammas-Day 11 s. and the *Parfon in Confideration thereof* and *upon Receipt of the faid 11 s. covenants* by the fame Deed *to difcharge and acquit him of the Payment of the Tithes of B. Clofe* as long as he fhall be Parfon; The Parifhioner being Tenant for Life made a Leafe for a Year and after at Will to another; The Parfon fued for Tithes in Kind in the Spiritual Court, about three Years afterwards a Prohibition was moved for but deny'd; One Reafon was, That this was only a Covenant and no Leafe. 1. Becaufe it *dependt on a Condition Precedent*. 2. Becaufe of the Words, (*upon Receipt of 11 s.*) and a Leafe ought to have a certain Commencement and nor depend on a Condition; (cites Pl. C. 271.) 3. Becaufe the Words are not that he fhall retain the Tithes, but that he will difcharge and acquit him of the Payment of Tithes, which Words found only in Covenant. 2 Roll Rep. 121. Mich. 17 Jac. B. R. Alders v. Wray.

So of a Covenant. Poph. 140. Fulcher v. Griffin. — So where the Parfon in Confideration of 6 l. per Ann. covenanted and granted *by Deed to difcharge the Parifhoner of Tithes* on Condition to be void on Non-payment. The Parfon fued in the Spiritual Court; But the Court would not grant a *Prohibition*, becaufe the Original, viz. the Tithes, belong to the Spiritual Jurifdiction; But it was faid he may have Covenant upon the Deed at Law. Godb. 272. Barnwell v. Pelfie.——2 Roll Rep. 42. S. C.

11. In Confideration of Compofition promifed by the Parifhioner for his Tithes; Parfon promifes that *he will not fue for Tithes*; after Parfon fues; the Tithes do not pafs in Intereft, for which the Parifhioner was put to his Covenant being by Deed. Palm. 377. cites Alders v. Rayner. 16 Jac.

12. Tithes *cannot pafs without Deed.* Cro. J. 613. pl. 3. Pafch. 19 Jac. B. R. Swodling v. Piers.

13. The

13. The Parson made a *Parol Agreement* with A. a Parishioner, *That in Consideration of* 10 *s. to be paid to him every Year by A. his Executors or Assigns, he and they should be quit of Payment of Tithes for such Lands during the Life of the Parson*; the 10 s. was constantly paid to the Parson, which he accepted; afterwards A. the Parishoner made B. an Infant his Executor and died; the Mother of the Infant took out Administration Durante Minore Ætate, and made a Lease at Will of these Lands, and the Parson libelled against the Lessee for Tithes; Per Doderidge during the Life of the Parson, the Contract is a Foot; but the Assignee cannot sue the Parson on this Contract, though he may have a Prohibition to stay the Suit in the Spiritual Court, and put the Parson to sue here; and a Prohibition was granted. Godb. 333 pl. 426. Trin. 21 Jac. B. R. Snell v. Bennet.

2 Roll Rep. 327. Bennet v Snell, S. C. and by Doderidge the Parson has no Remedy against the Lessee for the Rent, but he must have it against A. or his Executors, but the Lessee may have Action against the Parson if he sues him in the Spiritual Court; and a Prohibition was granted. —— Palm. 377. S. C. and Prohibition was granted.

14. Where the Defendant in *Trover* justified by *Lease of the Tithes &c. by the Impropriator for a Year*; Per Cur. It is meerly void *without Deed*, otherwise if it be by Lease of the Tithes of a Year *by the Parson himself*. Noy 89. Mich. 2 Car. B. R. Bellamy v. Balthrop.

Lat. 176. S C. held accordingly as to the Impropriator; but that the Parson may discharge the Parishioner of Tithes by Parol, or lease the Rectory, consisting of Glebe and Tithes, by Parol for Years.

15. If A. *contracts with the Parson for the Discharge of Tithes for Years* of his Lands, and demises his Lands to another, yet he shall not pay Tithes, but the Discharge runs with the Land; but if he takes a *Lease for his Tithes by Deed* and makes a Demise of his Land he has Tithes of the Lessee; and the Direction was, That the Lessee of the Farm ought to shew expresly to the Ecclesiastical Court, that the Farmer (viz. A. the Lessor of the Land) had not a Lease of Deed. Het. 31. Mich. 3 Car. C. B. Booth v. Franklin.

Hetl. 122. Mich. 4 Car. C. B Stone v. Walfingham, S. P.

16. There was an ancient Composition between the Prior and Convent of Bath and the Vicar of North-Stoke, *that the Vicar and his Successors should have five Marks yearly in Lieu of all Tithes of Sheep kept upon the Manor of North-Stoke, and that all the Tenants of the said Manor should be discharg'd accordingly, but such Sheep were only to be Hog-Sheep and not exceeding* 500. The Manor came to the King by Dissolution, who granted it to Seymour. The Vicar notwithstanding this Composition, and though only 500 Hog-Sheep were kept there, and though the five Marks were constantly paid, libelled for Tithes in Kind; but the Defendant had a Prohibition upon suggesting this Matter, and upon hearing the Cause on an English Bill in the Exchequer the Composition was confirmed. Palm. 525. Pasch. 4 Car. in Scacc. Lon v. Seymour.

17. A Suggestion for a Prohibition was that the *Parson made several Agreements with his Parishioner for the Payment of* 6 *s.* 8 *d. for his Tithes for four Years*, and thereupon a Prohibition was granted; And Harvey said, That if an Agreement be proved for those four Years it is sufficient. Het. 128. Mich. 4 Car. C. B. Stone v. Wallingham.

18. The *Vicar and Parishioner Inter se convenerunt* to pay so much for Tithes, this was *confirmed by the Bishop*; This is no real Composition but *only a personal Contract*, and shall not bind the Successor; and a Prohibition was granted. Mar. 87. pl. 140. Pasch. 17 Car. Hitchcock v. Hitchcock.

19. Agreement made ten Years before at 2 s. in the Pound for every Pound Rent of Land within the Parish *as long as they should live together and he continue Parson*, Payment to be made May 1st and November 1st.

Per

Per Cur. This Agreement will not bind the Parfon being *by Parol*, but it will excufe the Parifhioners of the Penalties of 2 E. 6. and from Cofts till Notice given of his Diffent, and *Notice* given after Payment due is *too late*, and fo if given *after Lands are manured and fowed.* Hardr. 203. Mich. 13 Car. 2. in Scacc. Breamer v. Thornton.

20. In Debt on 2 E. 6. cap. 13. on Nil Debet, it is good Evidence to excufe the Defendant from the Penalties of the Statute to fhew a *Parol Agreement.* Keb. 21. pl. 60. Pafch. 13 Car. 2. B. R. Barnard v. Ewen.

21. In a fpecial Verdict in Trover for a Lamb and a Sheaf of Wheat, the Cafe was, That the *Abbey* of Fountaine being *of the Ciftertian Order, and exempted from Payment of Tithes of thofe Lands, Quas propriis manibus excolerent, was feifed of the Grange of Hemmingford &c. within the Prebendary of Stodely &c.* and *between the Year* 1216 *and* 1261, *the Abbot and Convent and the Prebend made a Compofition, confirmed by the Patron and Ordinary, that the faid Abbot and Convent fhould be difcharged of all Tithes of their Lands, Quas propriis manibus excolerent in Hemmingford,* but they fhould pay Tithes there and elfewhere for their Lands out of Hemmingford; *and that they fhould pay yearly to the faid Prebendary and his Succeffors five Marks by equal Payments every* every half Year. That *Anno* 1359 *there was another Compofition made between the then Abbot and Prebendary reciting the former Compofition, but the Jury did not find that it was confirmed as the firft was* by the Patron and Ordinary, *and by their later Compofition the Prebendary and his Succeffors were to have the Tithes of Corn and Grain, as well of Lands in the Hands of the Abbot and Convent as in the Hands of Tenants arifing yearly in the faid Place, or elfe five Marks at the Election of the faid Prebendary &c. of which Notice was to be given to the Abbot &c.* or to the Porter of the Abbey, on St. Thomas's Day, *and that when no Election was made then the Prebendary &c. fhould have the five Marks, faving the Right of Tithes of Lambs and Wool which was to be paid as formerly*; afterwards *the Poffeffions of this Abbey came to the Crown by the Statute of* 31 *H.* 8. *and* that at the Time of the Trover, *the Defendant was Proprietor of the Lands in Hemmingford, and that the Plaintiff was feifed in Fee of the faid Prebend, and* that a *Lamb and Sheaf of Wheat were renovant on the faid Lands*; and the Queftion was, Whether the Defendant fhould pay Tithes or not? and this depended upon another Queftion, viz. Whether the fecond Compofition was good? It was infifted for the Plaintiff that it was good, though not confirmed by the Patron and Ordinary because it was for the Benefit of the Prebend and his Succeffors, and an Enlargement of the firft Compofition; for by that he was tied up to the firft five Marks, but by this he has his Choice either to take the five Marks or his Tithes in Kind; therefore it needs no Confirmation, for the Rule is that the Parfon without his Patron and Ordinary, Poteft meliorare Statum Ecclefiæ fuæ; it is true the Abbey is now diffolved, and the Poffeffions given to the Crown by the Statute 31 H. 8. and fo is the Prebendary by the Statute 1 E. 6. but yet the Tithes in Kind may be recover'd; *for the Diffolution of the Abbey* will not hinder it, becaufe it *was by Surrender of the Abbot and Convent*; for the *Statute* 31 *H*, 8. *vefts nothing in the Crown but what the Abbots themfelves furrendered fince* 27 *H.* 8. and it is a Rule in Law that Res inter alios acta alteri nocere non debet; it is likewife true that the *Prebendary can make no Election, becaufe his Poffeffions are given to the Crown*; but where no Election can be made, there the Party who was to have the Benefit of it fhall have the Thing itfelf without any Election; but adjudged, That *the fecond Compofition was void, becaufe* it was *not confirmed by the Patron and Ordinary, and becaufe there could be no Elect according to the Compofition, for that the Prebend was diffolved*; then

fore *the firft Compofition fhall ftand Quoad Terras in propriis manibus* as thefe Lands were; *and for the others, that Tithes in Kind may be taken*; fo the Defendant had Judgment. 3 Nelf. Abr. 298, 299. pl. 8. cites Hardres 381. [pl. 10. Mich. 16 Car. 2. in the Exchequer.] Ingoldsby v. Wivell.

22. A Suggeftion for a Prohibition was of an *Agreement for a Year*, and though this Agreement *was pleaded in the Ecclefiaftical Court by Way of Contract*, and not in Bar as an Agreement for Life or for feveral Years; yet the Court held it all one, and that both are triable in the Spiritual Court if the Suit be for Tithes in Kind; but otherwife *if it were for the Money then a Prohibition would lie*; and fo Cro. J. 17. muft be intended. 2 Keb. 6. pl. 14. Pafch. 18 Car. 2. B. R. Buckley v. Chefter (Bp.)

23. In *Ejectment of* Tithes *upon Demife of J. S. not fhewing by Deed*, for which Caufe after Error brought here on Judgment in C. B. after Verdict, Rotheron prayed for the Plaintiff in the firft *Judgment* that it may be reverfed, which Twifden doubted; but per Cur. *reverfed*. 2 Keb. 376. pl. 33. Trin. 20 Car. 2. B. R. Angell v. Rolfe.

24. *Indebitatus Affumpfit for Tithes fold.* Baldwin moved in Arreft of Judgment, that this founds in the Realty, and fo an Action of the Cafe will not lie; But per Cur. it is well enough for this fhall *not be intended a Leafe* of Tithes, *but a Sale* of Tithes. Freem. Rep. 234. pl. 242. Mich. 1677. Anon.

25. A *Leafe* of Tithes *cannot be for more than one Year without Deed*, and it is not good by Way of Leafe for one Year, but fo it enures by Way of Sale; Per North Ch. J. Freem. Rep. 234. pl. 242. Mich. 1677. Anon.

26. Cafe on a *Special Promife for Tithes for fix Years*; on a Motion in Arreft of Judgment it was *held good*, though fuch Agreement be not a good Leafe, nor does any Intereft pafs by the fame in the Tithes, yet it is good to ground an Affumfit and the Action lies; Judgment for the Plaintiff. 2 Show. 307. pl. 314. Trin. 35 Car. 2. B. R. Eaton v. Sherwin.

Though no Intereft paffes by fuch an Agreement, yet he having according to the Agreement fuffered him to take the Tithes, an Action lies for the Money upon the other's Agreement. Skin. 113. pl. 4. S. C.

27. The Law for feveral Years paft hath been clearly taken that no *Prohibition* will lie on any Compofition whether *for Life or Years* for any Tithes, and therefore the *proper Remedy is to appeal to the Arches* if the Confiftory Court fhould refufe a Plea of Compofition. Carth 70. Mich. 1 W. & M. in B. R. Bradfhaw v. Swanton.

28. Parol Agreement for the Tithes of *Lands to be inclofed was*, That the Proprietors would be at the Charge of enclofing, and that the Rector and his Succeffors fhould have *every tenth Acre* in Satisfaction of all Tithes, which fhould be likewife inclos'd for him. This Agreement was made with the Predeceffors of the prefent Rector; the prefent Rector traverfed the Agreement, and the Plaintiff took Iffue on the Traverfe; the Jury found the Agreement, and gave a Verdict againft the Rector, and after feveral Motions the Judgment was affirm'd. 2 Lutw. 1057. Hill. 13 W. 3. C. B. Machin v. Moulton.

29. Where an Agreement is made for Tithes they fhall *pafs by Way of Bargain*; for otherwife they cannot pafs at all becaufe they ly in Grant, and therefore cannot otherwife pafs than by Deed; for a *verbal* Agreement for them is good only for a Year. 8 Mod. 62. Mich. 8 Geo. The King v. Fairclough.

Hetl. 122. Mich. 4 Car. C. B. Stone v. Walfingham, S. P.

30. Parfon

And shall pay the *Poor-Rate*. Ibid.

30. Parson leases his Tithes for 2 s. 6 d. per Acre to A. B. and C. they let every Landholder his own Tithes at 3 s. per Acre; The Money which the *Lessees* receive of the *Landholders* for those Tithes shall be accounted a *Modus*, and wherever there is a Modus he that receives it shall be *taken to be Occupier* of the Tithes. 8 Mod. 63. Mich. 8 Geo. The King v. Fairclough.

(I. a) *Who* shall *have Advantage* of a Prescription in Non Decimando.

* Cro. C 422. pl. 14. S C. adjudg'd by 3 Justices for the Defendant, and that Consultation be awarded —— Jo. 368. pl 10. S. C. and held by 39. Contra Crook, that no Prohibition lies, and a Consultation was awarded. — S. C cited per Cur Jo 387. pl. 3. Pasch. 12 Car. B R. —— 2 Keb. 29. pl. 59. Pasch. 18 Car. 2. B. R. the S. C. cited per Cur. and said that it had been agreed for Law in all the Courts of Westminster. —— Ibid. 175. pl. 61. cites S C. accordingly.

1. IF a Man prescribes, that such an Abbot and his Predecessors Time out of Memory &c. held certain Land discharged of Payment of Tithe, and that this came after by Dissolution by the Statute of 27 H. 8. to the Crown, and so derives a Title to it from the Crown, the Patentee shall not have Advantage of this Prescription by the Common Law, without the help of any Statute, because it shall be intended that this Discharge was by reason of some Personal Privilege given the Abbot and his Predecessors, and so is gone by Dissolution of the Body Politick, and not in respect of any real Composition. P. 7 Car. in Scaccario, between *Clarke and Ward*, adjudged in the Case of the Vicar of Dantre. Mich. 10 Car. B. R. between * *Tiddowne and Holms* per Curiam, upon Demurrer, and gave a peremptory Rule for Judgment accordingly, if Cause was not shewn the next Term to the contrary; But after Judgment was stay'd till M. 11 Car. at which Time it was solemnly argued by the Court, and then adjudged by Brampston, Jones, and Barkely e contra, the Opinion of Croke, that the Prescription in Non Decimando was gone by the Common Law. H. 11 Car. between *Cock and Thorpe*, and so adjudged upon a Demurrer without Argument e contra the Opinion of Croke. Intratur, P. 11 Car. Rot. 28.

Fol. 655.

Jo. 387. pl. 3. S. C. and a Consultation was granted. —— The King's Lessee shall hold discharged, but his Feoffee shall not; Per Henden, Davenport and Atthow Serjeants. Hetl. 60. Mich. 3 Car. C B. in Comins's Case. ——

2. In a Prohibition, if the Plaintiff prescribes, that King Edw. 6. was seised de nuper de-afforestata foresta de Savernack in Comitatu Wilts of which 20 Acres of Wood, call'd Wickham-Hussocks, within the Parish of Pewsey, a Tempore &c. was Parcel, and that King Edw. 6. and all his Progenitors and Predecessors, Kings of England, Forestam prædictam, cum pertinentiis, unde &c. habuerunt & gavisi fuerunt exoneratam & acquietatam immunem & privilegiatam de & a Solutione omnium & singularum Decimarum quarumcumque Rectori Ecclesiæ parochialis de Pewsey prædict'; seu Firmario suo, pro Tempore existenti solubilium infra Forestam prædictam, seu aliquam inde parcellam crescentium, renovantium, provenientium, & contingentium, Rectori Ecclesiæ de Pewsey prædicta, seu ejus Firmario, pro Tempore existenti solubilium and that King Edw. 6. by Deed enroll'd, convey'd the said Forest to the Duke of Sòmerset in Fee, and so it was convey'd from him by mean Conveyance to the Plaintiff, the new Earl of Hertford, in Fee, and that the Defendant being Parson of the said Parish, had sued for Tithes of the said 20 Acres of Wood, to which Defendant pleaded for a Consultation, that the said 20 Acres were not Parcel of the said Forest, upon which an Issue being joined, a Verdict was given for the

the Plaintiff; And after it was moved in arreft of Judgment, that this Prefcription in Non Decimando, which was laid in the King and his Progenitors Kings of England, was Perfonal, and did not extend to the Alienee of the King; and after feveral Arguments at the Bar, it was adjudged per totam Curiam, that the Plaintiff could not take Advantage of this Prefcription, without any Argument by them, and a Confultation granted accordingly, for that the Ground of this Prefcription was either becaufe it was a Foreft, and could not render Tithes fo long as it was ufed with wild Cattle, fcilicet, Deer, or becaufe the King was not within the Council of Lateran, which ordains the parochial Right, or becaufe the King is Perfona mixta, and fo might prefcribe in Non Decimando as a Spiritual Perfon, in all which Cafes it could not extend to the Alienee of the King, the faid Foreft being difafforefted; and fo now it may render Tithe in Kind; and it fhall not be intended that any real Compofition or Confideration was given for this Difcharge without fhewing thereof fpecially, no more than in Cafe of a Spiritual Perfon or Abbot that makes fuch Prefcription. P. 11 Car. B. R. between the Earl of *Hertford and Leech*, adjudged. Intratur, Hill. 8 Car. Rot. 565. Vide my Argument in this Cafe in my Book.

Cro. C. 94 pl. 20 Morant v. Comming S. C. it was doubted whether the Patentee may have fuch Privilege, or that it be only a Privilege annex'd to the Crown during the time that the Land is in the Crown; but a Prohibition was granted De bene effe, unlefs Caufe were fhewn to the contrary fuch a Day.——Lands in a Foreft not paying Tithes being in the Hands of the King, is but an Immunity for that Time only. Sty. 137. Mich. 24 Car. in Cafe of Banifter v. Wright.

It was held upon Evidence by Hale Ch. B. and the whole Court, that the King is not by Virtue of his Prerogative difcharged of Tithes for the antient Demefnes of the Crown; but that he is capable of a Difcharge De non Decimando by Prefcription, (becaufe he is Perfona mixta) as well as a Bifhop. See 2 Rep. Bifhop of Winchefter's Cafe. But if the King alien any of the Lands that he is fo difcharged of Tithes for, his Patentee fhall pay Tithes, and not only fo, but the Prefcription is deftroyed for ever, though the fame Lands fhould afterwards come into the King's Hands again, by Efcheat or otherwife. Hardr. 315. pl. 7. Mich. 14 Car. 2. in Scacc. Compoft v. ......

3. The *Abbot of A. was feifed in Fee, and* that *he and his Predeceffors Time out of Mind*, had *held the fame difcharged of Tithes, and he granted the Land to All Souls College in Oxford* &c. Keeling Ch. J. delivered the Opinion of the Court, in which they all clearly agreed, that this could not be intended of a Difcharge by real Compofition, not being pleaded or found fo by the Jury, but a mere Prefcription, and Perfonal to the Abbot, and ran not with the Land. 1 Lev. 185. Trin. 18 Car. 2. Bolls v. Atkinfon.

Sid. 320. pl. 13. Bowles v. Atkins. S. C. adjudged accordingly.

(K. a) *Who* fhall *pay* Tithes.

1. If a Parfon fows his Glebe, and after leafes over the Land, and after the Leffee fevers the Emblements, he fhall pay Tithes for them to the Parfon. P. 40 El. B. R. in *Humfrey's* Cafe, per Fenner.

2 [So] If a Parfon fows his Glebe, and after fells over the Emblements, referving the Land, and the Vendee fevers the Emblements, the Parfon fhall have Tithes of them, notwithftanding his own Grant. P. 40 El. B. R. *Humfrey's* Cafe. Dubitatur. H. 11 Ja. B. R. between * *Moyle and Ewer*, Curia, and affirmed in a Writ of Error.

* Cro. J. 362. pl. 23. S. C. adjudged. And the Court faid, that if any one will buy Corn ftanding of the Proprietor of a Rectory, if he has not fpecial Words to difcharge it he ought to pay Tithes, and the carrying it away without fetting out the Tithes is an Offence within the Statute, and fhall pay treble Damages.——2 Bulft. 183. S. C. adjudged for the Plaintiff; States it that the Plaintiff

Plaintiff was poffefs'd of the Land fown with Corn, (but had not then the Parfonage) but that before Severance he became Parfon.

Hob. 188. pl. 232. Trin. 15 Jac. Harris v Cotton S P. of an Action brought by the Parfon appropriate; but the Court would give no Opinion, becaufe it hanged before them in Suit——Brownl. 69 S. C & S. P. in an Action of Debt brought upon the Statute 2 E. 6. and the Court feem'd to incline that it would lie.

3. If a Parfon fows his Glebe, and dies before Severance, and after a Succeffor is inducted, and after the Executor or his Vendee fevers the Emblements, the Succeffor fhall have Tithes of them, for though the Executor reprefents the Perfon of the Teftator, yet he cannot reprefent him as Parfon, inafmuch as another is inducted. Contra P. 40 El. B. R. Humfrey's Cafe.

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S P and fo if he refigns before Severance; Per Coke Ch. J. 2 Bulft. 184. Hill. 11 Jac.

4. If a Parfon fows his Glebe, and after is depofed before Severance, and another is inducted, it feems he fhall have Tithes of his Predeceffor. (Quære, * Whether there be not a Diverfity where he dies before the Annunciation, or where after?) H. 11 Ja. B. R. per Curiam.

* This feems to belong to the former Plea.

If a Parfon leafes his Glebe for Years the Leffee fhall not pay Tithes; Per Brown and Welton; Quod fuit conceffum Mo. 47. pl. 140. Pafch. 5 Eliz.—Contra by Coke Ch. J. 2 Bulft. 184. Hill. 11 Jac. ——If the Parfon of a Church which is not impropriate leafes his Glebe the Leffee fhall pay Tithes; but otherwife if it had been an impropriate Church, becaufe of the Statute of 32 H. 8. of Diffolutions; cited by Hutton Serjeant Noy. 132. as ruled in the Exchequer in Cafe of Brewer v. Veyfoy.——If the Parfon demifes the Glebe, his Leffee fhall pay him Tithes. Per Eyre Ch. J. Gibb. 79. Trin. 2 & 3 Geo 2 C. B.

5. If a *Parfon demifes his Glebe to a Layman* there he fhall pay Tithes; Contra of the Parfon himfelf who referves them in his proper Hands; And that Land before difcharg'd of Tithes fhall be yet difcharg'd of Tithes, yet if *he who has purchafed Manor and Rectory* which is *difcharg'd of Tithes leafes Part of his Demefnes*, the Leffor fhall have Tithes thereof becaufe he has the Parfonage. Br. Difmes, pl. 17. cites 32 H. 8.

Cro E. 161. pl. 52. Parkins v. Hinde S. C. and though the Rent was mentioned to be for all Exactions and Demands, yet a Confultation was granted by all the Juftices, For Wray faid, that the Words here are no Difcharge; For thefe Tithes arife, and accrue after, and are not Things iffuing out of the Land, but collateral and due Juré Divino; and therefore cannot be difcharged but by fpecial Words; But if the Words had been as well for Tithes growing and arifing upon the Land, as for other Demands, then peradventure it had been a good Difcharge. But as the Cafe is, it cannot be intended by any Words, that he referved the Rent for Tithes, and fo Gawdy J. did conceive, efpecially as the Cafe here is, the Leafe being of 24 Acres of Land, and only 13 s. 4d. referved. ——D. 43. Marg. pl. 2. cites S. C that it was refolv'd the Tithes fhould not pafs by fuch general Words.——S. C cited 11 Rep. 13. b. by the Reporter in a Nota as refolv'd per tot. Cur. that the Tithes fhall not pafs by fuch general Words.

6. A Parfon makes a *Leafe for Years of parcel of his Glebe* Land *of the Value of* 13 *l. per Ann. rendering* 13 *s. Rent*; Adjudged that the Leffee fhall pay the Tenths to the Leffor, notwithftanding his own Leafe, and the Refervation of the Rent; But there *otherwife* it had been, *if it had been a Rack-Rent* to the value of the Land. Sed quære of that Diverfity. Noy. 35. Mich. 31 & 32 Eliz. Perkins v. Wilde.

7. As long as the *Vicar occupies his Glebe Lands* in his own Hands, he *fhall pay no Tithes*; *but* if he demifes it to another, the *Leffee fhall pay* Tithes to the Parfon that is impropriate. Brownl. 69. 14 Jac. Harris v. Cotton.

8. If *Parfon* be *Tenant of the Land*, and at this Time Land is difcharged of Tithe of Wood in his Hand, yet if he leafes or fells the Wood the *Leffee or Vendee fhall pay Tithes unlefs he fells the Tithes alfo*; Per

Per Doderidge and Haughton. Palm 38. Mich. 17 Jac. B. R. in Cafe of the Earl of Clanrickard v. Denton.

9. If a *Layman Impropriator leafes the Glebe* the Leffee fhall pay Tithes. And if he *purchafe other Lands* in the Parifh which are difcharged of Tithes in his Hands, and he demifes them the Leffee fhall pay him Tithes. Het. 31. Mich. 3 Car. C. B. Booth v. Franklin, faid that it was adjudged accordingly in the Cafe of Perkins v. Hinde.

10. Tithes were claimed by the Defendant as his *abfolute Inheritance under a Grant from the King*, and the fame were decreed fo. Fin. Rep. 309. Trin. 29 Car. 2. Roak and Collier v. Lee.

(K. a. 2) Payable to whom.

Executors or Succeffors &c.

1. IN Trefpafs it was admitted that where *Parifhioners fow* the Land *the 10th Day of May*, and after the *Parfon makes his Executors and dies*, and after *another Parfon is inftituted* and inducted, and after the Parifhioners cut the Corn and fever the Tithes from the nine Parts, the Executors of the firft Parfon fhall have the Tithes, and not the new Parfon. Br. Difmes, pl. 7. cites 21 H. 6. 30.

2. If a Man *keeps Sheep in one Parifh until fheering Time, and then fells them into another Parifh*; in this Cafe the Vendee fhall pay the Tithe-Wool to the Parifh where they were depaftured in the greater Part of the Time of the growing of the Wool; Per Williams. Lane 16. Hill. 4 Jac. in the Exchequer. Anon.

(L. a) *By whom* they fhall be *paid*.

1. If a Man fells to me Wood, and I burn it in my Houfe, the Vendor fhall be charged for the Tithes, and not the Vendee, for no Tithes are due for Wood burnt in my Houfe; and this was refolved, P. 14 Ja. B. between Parfon *Ellis of Devon and Drake*, and a Prohibition granted accordingly; although it was faid, by the Civil Law the Parfon hath Election to fue either of them; But this croffes the Common Law.

2. If A. agifts the Cattle of a Stranger in his Land, the Parfon may fue the Owner of the Land for the Tithes of the Pafture; for otherwife it would be very inconvenient for the Parfon to fue every Owner of Cattle, and it would be very hard to know, and infinite. Mich. 7 Car. B. R. between *Facey and Lange*, per Curiam.

Cro C. 237. pl. 20. S. C. but S. P. does not appear. —— J. 254 pl. 5. S. C. it feem'd to the Court in reafon that a Suit was well brought againft the Owner, but be that as it will it belongs to the Court Chriftian to determine which of them ought to be fued, and therefore for this Reafon as to this Point a Confultation was granted. —— S. C. cited Hardr. 35 pl. 2. by the Name of Fare v. Cauge, as held, that Tythes fhall be paid for Agiftment of Cattle by the Occupier of the Lands.

3. Where *Grafs is cut and made into Reeks or Cocks, and afterwards fold*, the Parfon cannot fue the Vendee for the Tithes thereof, but muft fue him who fever'd it. 2 Roll Rep. 78. Hill. 16 Jac. B. R. Cannon's Cafe.

4. If a *Stranger takes Emblements before feverance from the Tythes* the Parfon *fhall fue* in the Spiritual Court for Tythes againft *the Trefpaffor*, and not againft the Tertenant; Per Ley Ch. J. 2 Roll Rep. 440. Trin. 21 Jac. B. R. in Cafe of Gwyn v. Merryweather.

5. In a Bill in Equity for the Tithes *of a Nurfery* fold; The Court was of Opinion, that if the *Owner fells them and pulls them up himfelf*, he fhall pay the Tithes; but if he fell them particularly to another [after Severance] the Vendee fhall pay the Tithes; As in Cafe of Tithes of Corn; if Corn be fold ftanding, the Vendee fhall pay the Tithes; But if he fell it after feverance the Vendor muft. Hardr. 380, 381. pl. 9. Mich. 16 Car. 2. in Scacc. Grant v. Hedding and Ball.

6. Upon hearing the Caufe above divers Doubts and Queftions were made; As 1ft. Whether Tithes fhould be paid if they *yielded no other Fruit?* 2dly, Whether Tithes fhould be paid *for thofe Trees that yield Fruit, which pay Tithes?* 3dly, If *fome yield Fruit and others not*, Whether or no thofe that yield Fruit, privilege and exempt the other which yield none, when they are all fold together? 4thly, Whether Tithes fhall be paid for them when *fold and tranfplanted in another Parifh?* Et adjornatur. But afterwards Tithes were decreed in all fuch Cafes. Hardr. 380, 381. Mich. 16 Car. 2. in Scacc. Grant v. Hedding and Ball.

7. The Plaintiff being Rector of the Parifh of Hemyoke in Devonfhire, brought a Bill for agiftment Tithes againft the Agifter, the Cafe appear'd to be thus, *Defendant's Father lived in the Parifh and rented a Farm there, Defendant lived with him, and he being a Butcher and renting a Farm in an adjacent Parifh, frequently brought Cattle and put them in his Father's Ground for two or three Nights, and fometimes kill'd fome of them off, but generally fent them to his own Farm.* The Queftion was, Whether the Owner of the Land or the Owner of the Cattle fhould pay agiftment Tithes? Ch. Baron and other Barons agreed, that the Demand ought to have been againft the Occupier of the Land for the agiftment Tithe if any had been due, but they thought in this Cafe nothing appear'd due. And Baron Page faid, that as to what had been faid that the Demand might be either againft Occupier or Agifter, that could not be; for the fame Duty could not arife in two different Perfons at the fame Time. MS. Rep. in Scacc. Fifher v. Lemen.

(M. a) Tithes Perfonal.

What fhall be faid *Perfonal* Tithes.

1. A Perfonal Tithe is the tenth Part of the clear Gain quæ debentur ex opere Perfonali, **his Charges and** Expences, **according to his Eftate, Condition, or Degree, to be firft** deducted. **Co. Magna Charta** 621. 657. 649.

2. **Tithes of** Fifh taken at Ifland, **or of** Herrings **or** Pilchards, **upon the Sea are Perfonal Tithes. Mich.** 14 **Ja. B. R.** * *Goflin and Horden*, **per Dodderidge. H.** 14 **Car. B. R. faid by Juftice Jones, that in an Appeal out of Ireland to the Delegates here, in my Lord** *Defmond's* **Cafe, it was agreed by all the Civilians, That Tithes Perfonal taken in the Sea out of any Parifh are due deductis Expenfis, and not Tithes in Kind. Co. Magna Charta** 621.

* See (C) pl. 4. and 6. S. C. and the Notes there.

3. **Tithes**

3. **Tithes of** Fulling-**Mills** and Paper-Mills **are Personal Tithes. Co. Magna Charta** 621.

Tithe of Mills are Perfonal Tithes, per Coke Ch. J. Roll Rep. 405. pl. 15. Jake's Cafe.——See (Q) pl. 19 and the Notes there.

4. **The Tithes of a** Corn-Mill **are not Perfonal, but predial or mix'd, and of this according to the Cuftom of the Realm, the Millar ought to** pay the tenth Toll-Difh **for Tithes. Contra. Co. Magna Charta** 621.

Carth. 215. Hill. 3 W. & M. in B. R. Gumble v. Falkinham.

S. P. the Court doubted what Tithes ought to be paid out of a tithable Mill: Whether only Perfonal Tithes, viz. The 10th of the clear Gain, or elfe Predial Tithes, viz. The tenth of all the Income in General, and therefore a Prohibition was granted generally on Purpofe that the Point might come before them upon a Declaration and Demurrer to it, fo that the Matter might receive a folemn Determination by the Court.——Show. 281. Gumley v. Falkenham. S. C. and by Holt Ch. J. The 10th Toll-Difh is the Tithe; it is not the Owner of the Mill, nor the Owner of the Grain that has the Profit, but the Miller; and this is a Predial Tithe, becaufe payable Rectori Loci, viz. Where the Mill is, and not merely where the Parfon lives. It feems reafonable, that the Parfon fhould have the 10th Toll-Difh. Adjornatur.——4 Mod. 45. Grimly v. Fawlkingham. S. C. but S. P. does not appear.————The Defendant had libelled in the Spiritual Court for the Tithe of a Corn-Mill as Predial Tithe. The Plaintiff fet forth in his Anfwer, that he conceived the Tithe of a Corn-Mill to be a Perfonal Tithe; and therefore prayed to be allowed all his neceffary Charges in attending the Mill before the Tithe fhall be paid. The Judge over-ruled this Plea, and decreed that the Plaintiff fhould pay thefe Tithes without any fuch Deduction Upon which Mr. Dennifon moved for a Prohibition, and cited the Cafe of **Chamberlain v. Clifton**, determined in the Houfe of Lords the 20th of June 1706, wherein it was refolved, That the Tithe of a Corn-Mill was Perfonal Tithe; accordingly a Rule was made to fhew Caufe. 2 Barnard. Rep. in B. R. 336. Mich. 7 Geo 2. Donalt v. Lowther.

5. Mr. Newte being Rector of the Portions of Pitt and Tidcomb, of the Rectory and Parifh Church of Tiverton in Com' Devon, and an *Horfe-Mill for the grinding of Malt*, being erected within the faid Portions by the Corporation of the faid Borough, who in 1699 had leafed the fame to the Appellants for three Years at 30 l. per Annum. Newte preferr'd his Bill in the Exchequer Mich. 3 Ann. and on 20th February 1705, the Caufe was heard and debated, and the Court took Time to deliver their Opinions until the next Term after, and on 22d April 1706, the Court of Exchequer were unanimoufly of Opinion, That Tithes were due for this new erected Mill, and that fuch Tithe was the tenth Toll-Difh, and decreed the Appellants to account with the Refpondent accordingly, viz. from the 8th of May 1699 to the 8th of May 1701, and alfo to pay Cofts; from which Decree the Defendants in the Exchequer appealed to the Houfe of Lords. 1. Becaufe the Tithe of an Horfe Malt-Mill was a perfonal Tithe, for there was no natural Increafe from it, but only a Profit arifing from the Invention of a Machine and the Labour of a Man and Horfe, and if it were perfonal the fame could only be for the Tenth of the Neat Profit deducting all Charges. 2. If a perfonal Tithe was due for fuch Mill it was only due where perfonal Tithes have been by Cuftom paid for 40 Years before the Statute of E. 6. 3 The Appellants only took 2 d. per Bufhel for Grinding, and the Refpondent did not prove any Cuftom, nor the Value of the tenth Toll-Difh, nor any other Toll to be taken by the Appellants. 4. That the tenth Toll-Difh would be more fometimes than the whole Proprietors Gains, confidering the Expence of erecting and maintaining this Mill. 5. That the Corn will pay Tithe twice, for that moft of the Corn that was fo ground was grown within the fame Parifh, and fo the Tenth paid to the Refpondent in the Field; and if any was ground that grew elfewhere the fame did in like Manner pay the Tenth to the Incumbent where it grew. 6. This Decree will introduce a new Sort of Tithe, and will affect a great many People in London where there are many fuch Mills, and fome Thoufands of them are in other Parts of the Kingdom,

It was decreed in the Houfe of Peers, on Appeal from the Court of Exchequer, that the Tithes of a Mill *are Perfonal* Tithes, againft feveral feeming Authorities or Doubts in the Books; and that in Confequence of their being Perfonal Tithes, not the tenth Toll or tenth Difh of the Corn ground belongs to the Perfon, but the *tenth Part of the clear Profits*, after the Charges of erecting the Mill, and the other Charges of Servants, Horfes, and other Ex-

Kingdom, and if this Decree be affirmed they must all pay Tithes. On the Respondent's Part it was insisted, 1. That Tithes were due both by the Canon and Statute Law for new erected Mills; that Tithes were by the Canons due for all Mills, and by *Artic. Cler. cap.* 5. for new erected Mills, which expresly *provides that no Prohibition shall lie in such a Case.* 2. That there had been from Time to Time several Resolutions and Decrees for Tithes of Mills. 3. That the rest of the Mills within the Respondent's Portions had all along paid and did still pay Tithe or a Composition for the same, and every Modus for a Mill proves Tithes to be due if they were not discharged by such Modus. 4. That it was a predial Tithe and the tenth Toll-Dish payable for the same, and so was both the Canon and Custom and Usage of this Kingdom. 5 That this was not a double Tithe for it was paid by different Persons and for different Purposes, viz. In the first Case by the Owner of the Corn; and in the second Case by the Owner of the Mill. This Cause was heard at the Bar of the House of Lords Monday 20 January 1706-7, and upon some Debate in the House the Consideration of Tithes predial mixt or personal were due for such a Mill, and if any due in what Manner payable was referred to the Judges, who after several Adjournments attended in the House on the 17th Day of February following, and all the Judges of the King's-Bench and Common-Pleas (except Justice Powell) were of Opinion unanimously, That the Tithe due for a new erected Malt-Mill was a personal Tithe only, and Ch. J. Holt, and Ch. J. Trevor held, That there was no Tithe due at all for such Mill, because a personal Tithe was due only where it had been paid within 40 Years before, according to the Statute of 2 & 3 E. 6. cap. 13. S. 7. Upon which the Lords reversed the Decree of the Exchequer, but ordered that Mr. Newte should be paid the tenth Part of the Profits &c. deducting all Charges and Expences, as Reparations &c. and that the Appellants should account with him in the Court of Exchequer for these Profits &c. Monday 17th Day of February 1706. It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, that the Decree of the Court of Exchequer complained of in the Petition of Roger Chamberlain and Francis Plympton shall be and is hereby reversed; and that the Plaintiff in the Court below John Newte (the now Respondent) do recover his Tithes of the said Mill in the *Nature of a personal Tithe only; that is to say, The tenth Part of the clear Profits arising from Corn ground in the said Mill, over and above all incident Charges*; and to that End an Account is to be taken of the Profits of the said Mill, and Charges for the Time past within the Time of the Demand of the Plaintiff John Newte's Bill in the Exchequer and since, and the said Tithes do so continue to be paid for the future. And it is hereby ordered that the said Court of Exchequer do cause the said Account to be taken, and what should be found due thereon paid accordingly. MS. Rep. Mich. Vac. 5 Ann. Chamberlain & al' v. Newte.

pences deducted. Abr. Equ. Cases 366. Newt v. Chamberlain. —— S. C. cited 2 Wms's Rep. 463. as determin'd in the House of Lords upon an Appeal from a Decree of the Court of Exchequer, where the Bill was brought for the Tithes of a Malt-Mill in Tiverton in Devonshire, and where the Lords determined, with the Assistance of 8 Judges, (whereof Holt Ch. J. was one) that Mills were tithable, but that the same was a Personal Tithe, and so ought to be paid out of the clear Gain after all manner of Charges and Expences deducted. And upon the Authority of this Case the Master of the Rolls decreed, Trin. 1728. in Case of Carleton v. Brightwell, the Mill in Question there to pay Tithes, but that they should be only paid as a Personal Tithe. 2 Wms's Rep. 463.

Tithe for *Malt-Mills* is only Personal, for it is not natural Increase, being only Profit arising from the Invention of a Machine, and the Labour of Man and Horse, and Personal can only be for the Tithes of the neat Profit, deducting all Charges. MS. Tab. January 20. 1706. Chamberlayn v. Plympton.

(N a.) [Personal Tithes.]

In what Cases they are due. Of what Things they shall be paid.

1. NO Personal Tithes shall be paid out of the clear Gains of the Party. Mich. 14 Ja. B. R. per Curiam.

2. As if the Owner of a Ship lends it to Mariners to go to Island for Fish, upon a certain Quantity of Fish to be paid to him upon their Return, no Tithes upon their Return shall be paid by the Mariners to the Parson out of those Fish which the Owner shall have for the Hire of his Ship, because this is a Personal Tithe, and for that that it but of the clear Gain; and so in Devon upon the Hire of a Ship or Boat to take Pilchards or Herrings. Mich. 14 Ja. B. R. per Doderidge, in *Goslin and Horden's Case.* Roll Rep. 419. pl. 5. S. C. but S. P. does not appear.

3. If a Man purchases an House for 300 l. and sells it again in a short Time for 500 l. yet no Tithe shall be paid of the Gain (*) thereof, for this is against the Common Law. M. 11 Ja. B. R. between *Davies and Tolbin* resolved, and a Prohibition granted. * Fol. 657.

5. 2 & 3 *E. 6. cap.* 13. *S.* 7. *Every Person exercising Merchandizes, bargaining and selling, Cloathing, Handicraft, or any other Art or Faculty, being such Persons and in such Places as within these* 40 *Years have used to pay personal Tithes, or of Right ought to pay other than such as the common Day-Labourers, shall yearly at or before Easter pay for his personal Tithes the tenth Part of his clear Gains, his Charges and Expences according to his Estate or Degree to be deducted.*

6. *S.* 8. *In all such Places where Handicraftsmen have used to pay their Tithes within these* 40 *Years the same Custom shall continue.*

7. 2 *E.* 6. *cap.* 13. *S.* 9. *If any Person refuse to pay his personal Tithes it shall be lawful to the Ordinary of the Diocese where the Party is dwelling, to call the Party before him and examine him by all lawful Means, other than by the Parties own Oath, concerning the Payment of the said personal Tithes.*

8. A Parson libelled in the Spiritual Court *against an Innkeeper for Tithes of the Profits of his Kitchen, Stables and Wine-Cellar,* and alleg'd in his Libel that he made great Gain in selling his Beer which he bought for 500 l. and sold it for 1000 l. that Negotiando & Traficando he gain'd in the Sole 3000 l. and better; the Court granted a Prohibition. 2 Bulst. 141. Mich. 11 Jac. Dolley v. Davis.

(O. a) Tithes *Extra-parochial.* *Who* may have them.

1. ANY Stranger may have a Portion of Tithes in the Parish of another Parson. 14 H. 4. 17. 44 Ass. 25.

2. 3 E. 1. Rotulo Clausorum Membrana 3. the Abbot de Burgo Petri had by the Charters of divers Kings Decimam Venationis capt' in Forestis Regis infra Comitatum Northt' 8 E. 1. Rot. Clausarum, M. 2. accordingly in Foresta Regis citra Trentham.

* Quære, if this be not misprinted for N. S. and intended to signify New Sarum, which is but a small Distance from Clarendon.

3. 13 E. 1. Rotulo Patentium, M. 6. the Dean and Chapter * M. S. had the Tithe in Foresta de Claringdon ex concessione Regis.

* Br Scire Facias, pl. 154. cites 22 Aff 75. —— Br. Dismes, pl. 10. cites S. C. —— Br. Patents, pl. 53 cites S. C. —— Br. Prerogative, pl. 47. cites S. C. —— Br. Prerogative pl. 143. cites S.C. —— Br. Jurisdiction, pl. 64. cites S. C.

4. The King shall have the Tithe in Places which are out of any Parish, as in Forests, and the like, and may grant them by his Letters Patents, and the Patentee shall have them. * 22 Aff. 75. D. Proxys, 4 Co. 2. the Bishop of Winchester 44. for he is Persona mixta.

2 Inst. 647. same Record cited —— See (P. a) pl. 2.

5. Libro Parliamentorum, Fol. 19. inter Placita in Parliaemnto de 18 E. 1. the Prior of Carliol and the Bishop of Carliol's Case, it is there said, that the Tithes of Land within a Forest, which is out of any Parish, belongs to the King, because he is Foresta prædict' Villas ædificare, Ecclesias construere, Terras assertare, & Ecclesias illas, cum Decimis Terrarum illarum, pro voluntate sua cuicunque voluerit conferre potest, eo quod Foresta illa non est infra Limites alicujus Parochiæ.

6. There is a Fenn called *Wildmore in Com' Lincoln*, which is not known to be in any Parish within. Whereupon it was ordered in the Exchequer that in this Case the Tithes shall be *paid to the Parson, Vicar, or Pensionary &c. where the Owner of the Cattle inhabits*; *But if the* Tithes have been *paid to the Parson of any Parish Time out of Mind &c. though* it is *not known in what Parish the Moor* or Common *is, they shall be continued to be paid in the same Parish* where they have been used to be paid. But where no Use of Payment had been as before, nor the Parish certainly known, they shall be paid to the Parson or Vicar where the Owner dwells by a Proviso in the Statute 2 E. 6. cap. 13. Sav. 60, 61. pl. 136. 7 May, 26 Eliz. in Scacc. Wildmore Fenn's Case.

By the Civil Law the Bishop of the Diocese shall have the Tithes of Lands not within any Parish there, but in England the King shall have them by the Custom of the Realm; Arg. quod fuit concessum per Coke and Hobart, that the King shall have them. Roll Rep. 454. Hill. 14 Jac. in Cam. Scacc.

7. The *Canon Law* is, That the Bishop is to have all Tithes growing on Lands not assigned to any Parish within his Diocese; yet this Canon being against the Law of the Land never had Allowance within this Realm, for in such Part of the Forests as are out of any Parishes the King shall have them. 2 Inst. 647.

8. If *Lands are disafforested* and be within a Parish they ought to pay Tithes; for their not paying Tithes being in the Hands of the King is but an Immunity for that Time only. Sty. 137. Mich. 24Car. Banister v. Wright.

9. The *Parson of* the Rectory of *A. by Right of Prescription hath Interest in and to the predial Tithes in the Parish of B. where there are divers barrsn Heaths and wast Grounds converted into Tillage* which never before yielded any Profit to the Church; The Parish *Church of B. shall have these Tithes* because they are *Decimæ Novalium*, viz. arising of such Grounds as never were manured nor yielded any Profit at all to the Church before; because by the Foundation of every Church the Tithes in general of that and every Parish are due to their own proper and peculiar Church. Now forasmuch as the Church of A. &c. could never before be in the Possession of the Tithes of these wast Grounds, because

becaufe they never were in Being, and becaufe the Law is Tantum Præfcriptum eft quantum eft Poffeffum & non plus; and alfo becaufe *Prefcription is not extended ad futura*, viz. it reaches not to Profits of tithable Grounds to come, it ftandeth with great Equity that the Church of B. fhould reap and receive thefe Tithes. The Tithing Table 7, 8. cites feveral Books of the Civil Law.

(P. a) [Tithes Extra-parochial.]

To whom they belong *de Jure*.

1. THE Tithes of fuch Places as are out of any Parifh belong de Jure to the King, as Forefts, and fuch like. 22 Aff. 75. per Thorpe.

Br. Scire Facias, pl. 154. cites S. C. —See (O. a) pl 4. and the Notes there.

2. 18 E. 1. Libro Parliamentorum 19. b. upon a Suit for Tithe between the Parfon and the Grantee of the King, &c. Willielmus, qui fequitur pro Domino Rege, dicit, quod Decimæ prædictæ ad Dominum Regem pertinent, & ad nullum alium, quia dicit, quod prædictæ placeæ funt infra Bundas Forefte ipfius Domini Regis de Inglewood, & quod ipfe Dominus Rex in Forefta fua prædicta, villas ædificare, Ecclefias conftruere, Terras affertare, & Ecclefias illas, cum Decimis Terrarum illarum, pro voluntate fua cuicunque voluerit conferre poteft, eo quod Forefta illa non eft infra Limites alicujus Parochiæ & petit quod Decimæ illæ Domino Regi remaneant, prout debent ratione prædicta &c.

See (O. a) pl. 5.

3. *2 E. 6. cap. 13. S. 3. Every Perfon which fhall have any Beafts or Cattle titheable depafturing on any waft or common Ground, whereof the Parifh is not certainly known, fhall pay their Tithes for the Increafe of the faid Cattle to the Parfon, Owner, or their Farmers, of the Parifh or Place where the Owner of the faid Cattle inhabiteth.*

4. *S. 4. No Perfon fhall be fued or compelled to pay Tithes for any Lands which by the Laws of this Realm, or by any Privilege or Prefumption are not chargeable with fuch Tithes, or that be difcharg'd by any Compofition Real.*

5. Libel by a Vicar for Tithes of young Cattle, and furmifed, That the Defendant was feifed of Lands in Middlefex, of which Parifh he was Vicar, and that the Defendant had *Common in a great Wafte called Sedgmore Common* as belonging to the Lands in Middlefex, and put his Cattle into the faid Common; the Defendant fuggefted for a Prohibition that the Land where his Cattle went was not within the Parifh in Middlefex, but no Prohibition was granted becaufe of the Claufe in the Stat. 2 E. 6. cap. 13. that Tithes of the Cattle feeding in a Waft or Common where the Parifh is not certainly known, fhall be paid to the Parfon of the Parifh where the Owner of the Cattle lives. Mod. 216. pl. 3. Trin. 28 Car. 2. C. B. Anon.

6. Bill brought by the Rector of S. for Tithes *of Beafts fed upon a Common*; Defendant by Anfwer infifts, That *the Common extends into feveral Parifhes*, and that the Cuftom was that every Farmer fhould pay Tithes to the Rector where he lived, and that he lived in another Parifh, and he paid the Tithes to that Rector; but there being Proof that *the Cattle was driven upon that Part of the Common that lies in S.* there was a Decree for the Rector of S. but reverfed becaufe the Cuftom was good, there being no Inclofures. MS. Tab. Jan. 1710. Mickleburgh v. Crifp.

(Q. a)

(Q. a) Payable. At what Place.

Tithe-Milk fhall be delivered at the Parfonage-Houfe; Per Raymond B. becaufe where there is no Cuftom the Common Law prevails; But Ld. Ch B. and the other two Barons agreed that it fhould be delivered in the *Church-Porch*, becaufe the neighbouring Parifhes did fo; and fo it was decreed. Raym. 278. Pafch. 31 Car. 2. in Scacc. Dod v. Ingleton. ——Freem. Rep 329. pl. 409. S. C. ruled accordingly. — S. C. cited 12 Mod. 206. by Holt Ch. J. who faid that this was a meer equitable Decree guided by the Cuftom of the neighbouring Parifhes; and that a Parifhioner is not obliged of common Right to deliver his Tithe-Milk eiter at the Vicarage-Houfe or Church-Porch, but only to fet them out. — Ld. Raym Rep. 359 cites S. C. and Rokeby J. held according to Raym. but Holt Ch J. contra, and cited 3 Cro. 609. Auftin v Lucas, where Popham held, that a Prefcription to pay it at the Parfon's Houfe is a good Modus, and that the Refolution in Raym. is an equitable one.

1. PRefcription to pay the *Tithe-Milk* at the *Parfonage Houfe* or at any other Place is good enough; Per Popham. Cro. E. 609. pl. 15. Pafch. 40 Eliz. B. R. in Cafe of Auften v. Lucas.

2. A Cuftom was laid to pay *Tithe-Milk* of Cows to the Vicars &c. *at the Place where the Cows were milk'd.* It was argued that this Cuftom was void for Uncertainty there being no Place certain mentioned, fo that it is in the Power of the Owner upon the tithing Nighs and Mornings to milk them in feveral Places and there leave the Milk, which being to be paid on certain Evenings and Mornings, it would be impoffible for the Vicar to have fo many Servants to attend at every Milking Place to take the Milk, and fo may be deprived of it; befides in Law Tithe Milk in Kind ought to be carried by the Proprietor either to the Parfonage-Houfe or to the Church-Porch. The Court held the Cuftom void. Carth. 461. Mich. 10 W. 3. B. R. Hill v. Vaux.

(R. a) Payable. At what Time.

1. THE Tithes *belong to the Parfon as foon as fever'd* by the Parifhioners; Per Manwood J. 3 Le. 24. pl. 50. Mich. 15 Eliz. C. B. in Cafe of Tottenham v. Bedingfield.

2. Tithes ought to be paid *as foon as the tenth Part can be well fevered from the nine*, if there be no Cuftom to the contrary; and fo it is for Corn and Hay as foon as it is made into Shocks or Cocks. Freem. Rep. 335. pl. 416. Mich. 1698. in Scacc. Anon.

3. All Tithes ought to be paid *fo foon as they may be fit for the Parfon to receive them*; fo Calves at fuch an Age, and other Things as the Matter will bear. Raym. 277. Pafch. 13 Car. 2. in Scacc. Dod v. Ingleton.

(S. a)

(S. a) Payable. In what Cafes, though there is no Product.

1. WHEN Tithes are payable *by Cuftom* they fhall be paid though the Lands are not rented or *lay frefh*. Hardr. 184. pl. 9. Pafch. 13 Car. 2. in Scacc. in Cafe of Holbeech v. Whadcock.

(T. a) Who capable.

1. THE *King* was capable of Tithes at common Law; for he *was Perfona mixta*; Refolved. 2. Rep. 44. a. in the Bifhop of Winchefter's Cafe. and cites 22 Aff. 75.

2. And *fo was his Patentee* by the Prerogative of the King; Refolved. 2 Rep. 44. a. cites S. C.

3. But the *King's Leffee* fhall pay Tithes, though the King never paid any; for the King is privileged by Reafon of his Prerogative. Cro. E. 511. in Cafe of Wright v. Wright. Arg. cites it as adjudged, 31 Eliz. in the Exchequer.

Cro. E. 599. pl. 5 Hill. 40 Eliz. B. R. the S. P. agreed per Cur. and cites S. C.——Mo. 486. pl. 685. Mich. 39 & 40 Eliz. S. P. affirm'd in a Nota at the End of the Cafe. ——— Jo 387 pl. 3. Pafch. 12 Car. S. P. in Cafe of the Earl of Hertford v. Leech; Refolv'd, and that the Council of Lateran does not bind him unlefs where he voluntarily fubmits to it, that this was a Perfonal Privilege which non egreditur Perfonam, and their Grantee fhall not have Benefit of it.

4. 28 *H.* 8. *cap.* 11. *S.* 4. *If any Ordinary take the Fruits, Tithes, Profits, or Cafualties belonging to any Parfonage or other Spiritual Benefice &c. during the Vacation of fuch Benefice &c. and the fame upon reafonable Requeft, does not reftore to the next Incumbent, or interrupt the Incumbent to have the fame; every Perfon fo doing fhall forfeit the treble Value of fo much as he fhall have received; the Moiety of which Forfeiture fhall be to the King, and the other Moiety to the Incumbent, to be recovered in any of the King's Courts.*

5. In a Prohibition againft a Parfon who fued for Tithes, it was furmifed, That the *Clerk of the Parifh* and his Predeceffors, Affiftants to the Minifter, have ufed to have 5 s. for the Tithe of the Place where &c. It was the Opinion of the Court that if this fpecial Matter be fhewed in the Surmife, it might perhaps be good by Reafon of long Continuance; and that by this the Parfon is difcharg'd from finding the Clerk; which perhaps he fhall be charg'd with, and fo is as a Payment of Tithes to the Parfon himfelf; but they held by common Intendment Tithes are not payable to a Parifh Clerk, and he is no Party in whom a Prefcription can be alleged, becaufe he is dative and removeable; wherefore a Confultation was awarded. Cro. E. 71. pl. 26. Mich. 29 & 30 Eliz. Savell v. Wood.

Mo 908. pl. 1274. S C held accordingly.

6. None *by the common Law* had Capacity to take Tithes but *only Spiritual Perfons, or Perfona mixta* and regularly no mere Layman was at common Law capable of them unlefs in fpecial Cafes; for no Layman unlefs in fpecial Cafes could at common Law fue for them in Court Chriftian, viz. for Subftraction of them; Refolved. 2 Rep. 44. a. Pafch. 30 Eliz. the Bifhop of Winchefter's Cafe.

Cro. E. 512. pl. 36 Wright v. Wright, S C & S P. but that by way of Retainer he may well have them, and cites 8 E. 4. 14. Regifter Fol 38 and F. N. B. 41. (G) and that there it is held that an Affignee may hold difcharged of Tithes.

For they are Spiritual, and of a diftinct Nature, and fo cannot belong to a Manor, and the Court held, that a Man cannot *prefcribe* for Tithes as Parcel of a Manor, but if he had prefcribed to have *Decimam partem Granorum* it had been good, but not to have *Portionem Decimarum*, and a Confultation was granted. Cro. E. 293. pl. 7. Hill. 35 Eliz. B. R. Sherwood v. Winchcomb.—— Same Cafes cited Saund 142.

7. Tithes cannot be faid to be Parcel of or *appendant to a Manor*, and the *Difference* is *between a Tenth and Tithe*, the firft is Temporal and the other Spiritual. Cro. E. 599. pl. 5. Hill. 40 Eliz. B. R. Pigot v. Hearn.

8. Parifhioners prefcribed that there had been a *Curate* or an Incumbent *by Appointment of the Rector* who adminiftered the Sacraments &c. and that the Cuftom of the Parifh Time out of Mind was, that the Curate fhould have all Tithes renewing within that Parifh except Decimas Granorum which were paid to the Parfon, and that every Parifhioner who had fo paid the Tenths to the Curate was difcharged againft the Parfon; but the Prefcription was held ill; for the Rector may remove the Curate at his Pleafure. Noy. 15. Mich. 2 Jac. B. R. Bott v. Brabalon.

9. One who was accepted for a *Chaplain to a Chapel of Eafe which was not Prefentative or Donative*, libelled for Tithes of the Inhabitants within the Precinct of the Chapel; and a Prohibition was granted. Litt. Rep. 72. Mich. 3 Car. C. B. Anon.

10. An *Incumbent prefented by Simony* cannot fue for Tithes againft his Parifhioners. Mar. 84. pl. 109. Arg. cites Mich. 10 Jac. Stamford v. Dr. Hutchinfon.

11. *Appropriator gave a Rectory by Will* to the Maintainance of a Minifter there for ever, referving no Nomination of a Minifter there, and *faying Nothing about a Nomination.* The Devife was void at common Law, being made to no certain Perfon. The Eftate thereof came to J. S. who nominated A. to be Minifter and ferve the Cure; afterwards B. fuppofing a Lapfe to the Crown was prefented inftituted and inducted as if the Church had been void. J. S. the Rector fuppofing that the Nomination of the Minifter belong'd to him, nominated A. It was urged for B. that here is a pious Ufe wholly fubject to this Court, and that coming in by the Ordinary, though he was *not Parfon or Vicar*, [but Curate only] *was allowed by the Bifhop* and decreed accordingly that he fhould have the Tithes. 2 Ch. Cafes 31. Trin. 32 Car. 2. Perne v. Oldfield.

Skin 51. S. C. adjornatur. —— Ibid. 239. S. C. but S. P. does not appear. —— 2 Show. 439. pl 403. S. C and Judgment in C. B. affirmed. —— Pollexf. 523. S. C. argued by the Reporter.

12. The *Prior of N.* being *feifed of the Manor of N. and of the Tithes* thereof, *fimul & femel as of a Portion of Tithes*, *25 H. 1. granted the Manor and Tithes to A. and his Heirs rendering Rent, and he enter'd and held it difcharg'd* of Tithes, *and after granted two Hides* of Land, *Part of the Manor to S. with the Tithes thereof, and A. and his Heirs paid the Rent to the faid Prior till the Diffolution, and after to the King and his Affigns*; It was adjudged, That the two Hides fhould be difcharged of Tithes, for the Prior might prefcribe for Tithes en Prender, and being well in him he might grant them to A. paying 5 s. Rent; and fo a Judgment in C. B. affirm'd in B. R. 2 Mod. 320. Trin. 34 Car. 2. in B. R. James v. Trollop.

13. A Layman is not *capable* of Tithes *en Prender*, but a Layman is capable of paying and taking a *Modus* in Lieu of Tithes; Agreed by Council Arg. 2 Show. 440. Mich. 1 Jac. 2. in Cafe of James v. Trollop.

(U. a) Barren Lands. And what fhall be faid fuch.

1. 2 & 3 E. 6. cap. 13. S. 5. *ALL fuch barren Heath or wafte Ground, other than fuch as be difcharged of Tithes by Act of Parliament, which before this Time have paid no Tithes by reafon of Barrenneſs, and fhall be improved and converted into arable Ground or Meadow, fhall * after feven Years after fuch Improvement pay Tithe-Corn and Hay growing upon the fame.*

* Here are no exprefs Words of Difcharge of the Tithes during the feven Years, but by reafonable Conftruction it impliedly amounts to a Difcharge during the feven Years, and the feven Years are to be accounted next after the Improvement. 2 Inft 656.

Only fuch is intended barren Land, which before the ploughing produced no Profit to the Owner. Freem. Rep. 335. pl. 416. Mich. 1698. in Scacc. Anon.——Bendl. 80. pl. 122. 2 Eliz. S. P. fays, that it is fo underftood by the Opinion and Judgment of the Common Law.——S. C. cited D. 170. b. Marg. pl. 5.

Wafte Ground is underftood fuch Ground as no Man claims for his own, or no Man can tell to whom it certainly appertains, and lies uninclofed and unbounded with Hedge or Ditch; But Ground that lies inclofed, and hedged and ditched in fo as the Land is known, is not wafte Ground. Bendl. 80. pl. 122. 2 Eliz. Anon.——S. C. cited D. 170. b. Marg pl. 5.

Heath Ground is intended fuch Ground as is difperfed and lies in Common. Bendl. 80. pl. 122. 2 Eliz. Anon.——S. C. cited. D. 170. b. Marg. pl. 5.

2. *S. 6. If any fuch Barren Wafte or Heath-Ground, hath before this Time been charged with Tithes, and that the fame be hereafter improved and converted into arable Ground or Meadow; the Owners fhall, during feven Years after the Improvement, pay fuch Kind of Tithe as was paid for the fame before the Improvement.*

3. A *Suit* was in the Ecclefiaftical Court *for Tithes of Wheat and Rye on 60 Acres of Land*; The Defendant mov'd for a Prohibition, fuggefting that the Lands were barren Heath and wafte Grounds. It was *founded by Verdict that it was barren, but that of 30 Acres of it Tithe of Wool and Lambs had been paid.* And becaufe by another Provifo in the Statute, viz. That fuch Tithes as were paid before fhould be paid within feven Years after the Improvement &c. and not any Tithes of another Nature, and becaufe the Libel was not for other Tithes than for Wheat and Rye, *the Party could not have a Confultation, but* they told him that *he might commence a new Suit in the Ecclefiaftical Court for Tithes of Wool and Lamb in the 30 Acres not improv'd.* D. 170. b. pl. 5. 171. a. pl. 6. Mich. 1 & 2 Eliz. Pells v. Sanderfon.

S. C. cited by Hobart Ch. J. Hob. 301. and fays, that at firft the whole Court thought a Confultation ought to be awarded for the Tithe Corn; but that upon better Advifement they refolv'd the Contrary; For he had no Right to purfue his Suit for the Corn.

4. If Land be full of *Thorns and Bufhes* from Time whereof &c and it is grubbed up and made Meadow or arable Land, Tithes fhall be prefently paid thereof, notwithftanding the 2 & 3 E. 6. 13. For thofe Lands were not *naturally Barren*, but became fo by Negligence or ill Husbandry, and the Statute intends only barren Land made good by Induftry. Cro. E. 475. pl. 3. Trin. 38 Eliz. B. R. in Cafe of Sherington v. Fleetwood.

2 Inft. 656. S. C. & S. P. refolved.——Mo. 909. pl. 1278. S. C. refolv'd.——Gouldsb. 147. pl. 66. S. C. but S. P. does not appear.——Mo 599. pl. 824. S. C. but S. P. does not appear.——S. C. cited by the Name of Farington's Cafe, by Coke Ch. J. Roll Rep. 354 in pl. 4. Pafch. 14. Jac.——3 Bulft. 165. S. C. cited by Coke Ch. J. as refov'd.—— Bendl. 80. pl. 122. 2 Eliz. Anon. S. P.—— Freem. Rep. 335. pl. 416. Mich. 1698. in Scacc. Anon. S. P.

5. Fenny

If Land be overflowed with Water and afterwards gained by Induftry, Tithes fhall prefently be paid though the overflowing had been Time whereof &c. Cro. E. 475. pl. 3. Trin. 38 Eliz. B. R. in Cafe of Sherington v. Fleetwood.

5. *Fenny Land drain'd* is not exempted by the Act. Mo. 430. pl. 603.

6. Land which has *Broom* is not within the Statute of 2 E. 6. For it is not barren Land, and therefore if converted into Arable fhall pay Tithe; Per Coke Ch. J. Roll Rep. 39. Trin. 12 Jac. B. R.

Roll Rep. 354. pl. 4. Buck v Witt S. C. held accordingly, notwithftanding it was infifted that the Party had been at great Cofts in making Mounds to keep out the Sea, and that the Statute was made for the Encouragement of Husbandry.

7. If a Man at a great Expence *gains Land from the Sea, which was Marfh and fandy Land, and covered with falt Water, and* afterwards *converts it into arable* Land he fhall pay Tithes prefently, becaufe this Land is not barren of its own Nature, but only by Accident, by Reafon of the Sand and Salt-Water overflowing it; Agreed per Cur. clearly. 3 Bulft. 156, Pafch. 14 Jac. Witt v. Buck.

Hetl. 147. S. C. & S. P.

8. If Sheep were kept on barren Land or if yielded any Profit which yielded Tithes, this *Tithe* ought to be paid within the feven Years; Per Richardfon Ch. J. Litt. Rep. 311. Mich. 5 Car. C. B. Flower v. Vaughan.

9. In Action on the Statute 2 E. 6. the Cafe was an Inclofure was Part of the Wafte and it was turned into a Pafture, and held that tho' it was of fmall Value, viz. 2 s. per Ann. and never fown or turned into Meadow yet it fhall pay Tithes, and the very *Inclofure is an Improvement*, and it is no wafte Ground within the Statute to be freed from *Tithes* for a Time &c. Clayt. 127. pl. 226. March 1647. Anon.

10. Barren Lands to be exempted from Tithes within the Meaning of 2 E. 6. muft be fuch Land as is *Barren Suapte Natura*; And on Suggeftion for a Prohibition to a Suit for Tithes of fuch Lands it *muft be alleged* to be Barren Suapte Natura; Per Powell J. 2 Ld. Raym. 991. Trin. 2 Ann. Anon.

If Land yields any Profit before, as Wood &c. it is not within the Statute; for it ought to be Suapte Natura Sterilis. 6 Mod. 96. 2 Ann. B. R. Homer v. Bonner.

11. Prohibition for fuing for Tithes *of barren Lands newly cultivated* was denied. 1ft, Becaufe the *Plaintiff did not fuggeft that they were Suapte natura Steriles.* 2dly, Becaufe there *was no Affidavit that this was pleaded in the Spiritual Court.* 6 Mod. 86. Mich. 2 Ann. B. R. Anon.

(X. a) Difcharge. By Common Law.

So if he make Feoffment his Feoffee fhall pay. Savil. 3. pl. 8. Mich. 22 & 23 Eliz. Vicar of Sturton v. Griefly. ——— D. 43. a. b. pl. 21. Mich. 30 H. 8. fays the Juftices and Serjeants were of different Opinions as to the Leafe of Parcel of the Glebe, referving a Rent, and fays ideo Quære.

1. IF the Parfon of a Church not impropriate leafes his *Glebe* the *Leffee fhall pay* Tithes; But otherwife it it had been an *impropriate Church*, becaufe of the Statute of 32 H. 8. of Diffolutions. Noy. 132. cites D. 43. a.

The *Orders of the Ciftertians Templars and Hofpitallers,*

2. The Prior of St. John's of Jerufalem had Privilege from Rome viz. *Cifterians, Templars, Hofpitallers,* that they fhould *not pay Tithes of any Lands, Quæ propriis manibus* aut fumptibus *excolunt, but their Fermors* and all other Occupiers *paid Tithes* according to the Statute 2 H. 4 cap.

4. cap. 4. *The Prior and Confreres made a Leafe for Years before the Diffolution, and the Leffee paid Tithes to the Church of Rochefter Proprietary, and the King after the Diffolution granted the Reverfion* of the Manor *to B. and his Heirs, in tam amplo Modo as the Prior &c. had it.* The Term expired, the Patentee and his Heirs fhall hold difcharged fi propriis manibus excolunt. But if he makes a Leafe the Termor fhall pay by the Statute 31 H. 8. cap. 13. Per Ld. Keeper, Catlyn, Saunders, Southcot and Dyer. Dy. 277. 8. pl. 60. Trin. 10 Eliz. Anon.

were difcharged of Tithes *fub Modo*, viz. *Quamdiu propriis manibus excoluntur* &c. 2 Rep. 44. b. at the bottom cites D. 277. 10 Eliz.—This Privilege to thefe three Orders of Religion was *granted to them by the Council of Lateran*, Anno Domini 1215, and Anno 17. Johannis Regis, and was allowed by the general Confent of the Realm; but *this Privilege extends only to the Lands which they had before that general Council.* 2 Inft. 652.

3. *Lands in the Hands of an Abbot and of the Farmers of an Abbot were beyond Time of Memory &c. charged with Tithe only of Lambs and Wool*, and now the Parfon fues to have Tithe of Hay and Grain; Prohibition lies by the Statute 31 H. 8. by the Word (difcharged) in the Statute. D. 349. b. pl. 16. Pafch. 18 Eliz. Parfon of Peykirke's Cafe.

4. *Unity* of Poffeffion is no Caufe of Difchatge of the Difcharge of Tithes, but is only a Sufpenfion during the Time of the Unity, but if *after Severance no Tithes are paid* for 20 or 30 Years they fhall be charged with the Payment continually, and the Payment proves that the Unity was the only Caufe of the Stay of Payment; but if after the Severance Tithes *have not been paid* it is a vehement *Prefumption of Difcharge* by fome Compofition, or that the Abbey was of the Order of Cifterians, or others who were difcharged by the general Councel; Per Manwood, Ch. B. Savil. 62. pl. 134. Pafch. 28 Eliz. in Cafe of Whifcard v. Futter.

5. Libel againft the *Bifhop of L.* for Tithes out of the Manor of D. the Bifhop *fuggefted, That he and all his Predeceffors were feifed of the faid Manor, and fo long as it was in their Poffeffions it had been difcharged of Tithes*; and that in the Reign of E. 6. the *faid Manor was conveyed to the Duke of Somerfet in Fee; and afterwards re-granted to the Bifhop and his Succeffors*; held the Prefcription good in a Spiritual Perfon but not of a common Perfon; and they were all clear that the *Prefcription is not gone by this Interruption*; for Tithes are not iffuing out of the Lands, neither can a Unity of Poffeffion extinguifh them, neither are they extinguifhed by a Releafe of all Right to the Land. Le 248. pl. 436. Mich. 33 Eliz. B. R. Lincoln (Bifhop) v. Cowper.

Cro. E. 216. pl 13 S. C. held accordingly. —— Le. 300 pl. 411. Trin. 31. Eliz. B. R. Per Wray. S. P — Ow. 39. S. P Per Wray.

6. A *mere Layman* who *was not capable of Tithes in Pernancy*, yet *was capable of a Difcharge* of Tithes *at common Law in his own Land*, as well as a Spiritual Perfon; Per Cur. cites 8 E 4 14. a. b. and the Regifter fol. 38. that this may be *by Grant* as by the Patron, Parfon and Ordinary, *or by Compofition*, as where a Parifhioner gave Part of his Land to the Parfon for Difcharge of Tithes of the Refidue; *but not by Prefcription* to be difcharged of Tithes; For it is commonly faid in the Law Books that he may prefcribe in Modo Decimandi, but not in Non Decimando. 2 Rep. 44. a. b. Pafch. 38 Eliz. The Bifhop of Winchefter's Cafe.

7. In Cafe of a Prohibition it was refolved, That *Unity of the Eftate and not in Occupation of the Land and Rectory at the Day of Diffolution of the Abbey*, was not a Difcharge of Payment of Tithes by the Statute 32 H. 8. but if the Abbot held the Land at the Time of the Diffolution in Fee, and the Rectory alfo, thofe Lands were always difcharged; but if the Lands were *in Leafe for Years*, although but for a fmall Term of Years, the Lands fhould pay Tithes; and fo it was faid it was adjudged in Knightley and Spencer's Cafe; and in Green and Buskin's Cafe. Mo. 528. pl. 799. Mich. 40 & 41 Eliz. B. R. Benton v. Trot.

8. As for the *Councel of Lateran* I never knew it pleaded in my Life; Some fay that Tithes were payable of Right before; but how an Ecclefiaftical

clefiaftical Conftitution can inftitute or create a temporal Right is fomewhat ftrange; befides if this created the Parfon's Right it would deftroy all the Prefcriptions and Modus's in the Nation; Per Holt a Counfel. Arg. 2 Show. 440. pl. 403. Mich. 1 Jac. 2. B. R. in Cafe of James v. Trollop.

9. There are *five Ways* or Means *whereby Abbey Lands are holden difcharged of Tithes*, that is to fay, *Compofition, Bull, or Canon, Order, Prefcription of Difcharge, and Unity of Poffeffion of Parfonage and Land Time out of Mind*, together with Payment of Tithe; of thefe Five, *the four firft Difcharges the Abbots themfelves had, or might have* them, but *the fifth was no Difcharge in the Hands of the Abbeys, but it made a Difcharge of Payment of Tithes to the King, and thofe that claim under him by the favourable Conftruction of that Claufe of* 31 *H.* 8. for fo much as that Claufe extends to; which Opinion was long controverted, being confeffed of all Hands, that it was no full and perfect Difcharge in Law.

Now of the other *four, the firft three*, that is, *Compofition, Bull or Canon, and Order were granted* and affixed *unto the Body of the Monaftery*, and were granted unto them *as perfonal Privileges*, in refpect of their Spiritual Abilities or Functions, and their Capacity of Tithes, and Difcharge of Tithes for that Caufe; and therefore thefe *had all vanifhed and expired with the Diffolution of the Body*, if they had *not* been *preferved to the King and his Patentees by that Claufe. But Difcharge* of Tithes of the Lands of Monafteries *by Prefcription is of another Nature*; for having been always (as Prefcription prefumes) in Spiritual Hands, *the Law judges that it was never charged with Tithe*; as *the Pleading is*, That the Lands were *Immunes a Solutione decimarum Negative, non Privative*, fcilicet, *uncharged, not difcharged*, as if they had been once chargeable; the Reafon whereof was, That being Spiritual Perfons they were able to minifter to themfelves Spiritual Rites, and therefore performing Officium they might retain Beneficium; and this Non-charge ftanding upon Prefcription was inherent to the Land, not as a Thing given, but *as a Non ens*, Lands that never yielded Tithe, and Land of the little Monafteries fo free of Tithes, the King by the Statute 27 H. 8. and his Patentees were to hold free, not by Reafon of any Privilege which did need to be preferved by any Statute, but ever by the Grant of the Land by any Kind of Conveyance.

And therefore though I faid that *Difcharge of Bull, or Compofition*, was to die with the Corporation, yet *if it were once run out Time out of Mind, it was* then *to be pleaded* and ufed *as a Non-charge by Prefcription*, which was a Title of Difcharge by the Temporal Law, and if it were impugned it were to be drawn by Prohibition to a Trial at the common Law, and this without the Help of any Statute. And therefore in the Bifhop of **Winchester's Cafe** it was refolved, That the Bifhop holding Lands of his Bifhoprick, difcharged of Tithes by Prefcription, his Farmer being a Layman fhall have a Prohibition for his Difcharge; and fo fhall the Bifhop have himfelf though he be a Spiritual Perfon. And yet Bifhopricks, and their Lands, are in Point of Difcharge of Difcharge of Tithes at the common Law out of all Statutes; fo then the Conclufion is, That of the five Ways of Difcharge of Tithes, three, that is to fay, *Order, Compofition, Bull or Canon, are preferved* and kept alive *by the Claufe of Difcharge in the Statute of* 31 *H.* 8. and a fourth which is *Unity, is created by that Branch*, and the fifth, which is *Prefcription, ftands by the common Law, and has no Need nor Ufe of any Statute*; Per Hobart Ch. J. Hob. 309. Hill. 15 Jac. in Cafe of Wright v. Gerrard and Hilderfham.

10. There be *divers Difcharges* of Tithes, 1ft, *Real Compofition*, which a Layman may have. 2dly, Difcharge by Reafon of *Order as Cifterci*

ans

ans &c. 3dly, By Reafon of *Papal Bulls.* 4thly, By *Prefcription*, which ought to be only by a Spiritual Corporation; And if the Statute 31 H. 8. had not been made, the perfonal Difcharge, as by Bulls, or by Reafon of Order, had been difcharged alfo, for that the Perfons to whom they were annexed were diffolved, therefore to prevent it the Statute was made, which ordains, That where any Monaftery was difcharged from the Payment of Tithes, in fuch Cafe the King fhall hold the Lands difcharged, notwithftanding the Corporation to which fuch Privileges were annexed be diffolved; And there is not any Claufe to this Purpofe in 27 H. 8. And this Statute of 31 H. 8. does not extend to Monafteries diffolved by the Statute of 27 H. 8. therefore this Reafon of Unity of Poffeffion is not any Difcharge in itfelf of the Tithes; and the Statute of 31 H. 8. does not extend to give a Difcharge but to the Lands which come to the King of the 4th of February 27 H. 8. Cro. J. 608. pl. 3. Hill. 18 Jac. B. R. Gerrard v. Wright.

11. Pope Innocent the 3d. by his Bull difcharged thofe of the *Order of Premonftratenfes* of the Payment of Tithes of fuch Lands as were of their own Manurance or other Improvement. Note, *About the Year of our Lord* 1150 *moft of all religious Orders were exempt* from Payment of Tithes out of their Poffeffions kept in their own Hands, *which Pope Adrian the 4th. about that Time reftrained to Cifterciences, Templarii, Hofpitularii*, and that all other Orders fhould pay Tithes &c. 2 Inft. 652.

S. P. Per Sir John Davies Arg Poph. 157

S. P. Per Noy. Arg. 2 Roll Rep. 479. 80.

12. The *King is not* by Virtue of his Prerogative *difcharged of Tithes for the ancient Demefnes of the Crown*; Held upon Evidence by Hale Ch. B. and the whole Court. Hardr. 315. pl. 7. Mich. 14 Car. 2. in Scacc. Compoft's Cafe.

13. *One Tithe in specie cannot be a Difcharge of another* Tithe in Kind; Per Holt Ch. J. 12 Mod. 498. Pafch. 13 W. 3. in Cafe of Selby v. Bank.

(Y. a) Difcharged by Statutes.

1. 31 *H.* 8. *cap.* 13. *S.* 21. ALL *Perfons which fhall have any Monafteries &c. or any Manors, Meffuages, Parfonages appropriate, Tithes, Penfions, Portions or other Hereditaments which belonged unto the Monafteries &c. fhall hold the fame difcharged of Tithes in as ample Manner as the Abbots &c. held the fame at the Days of Diffolution &c.*

2. An *Abbot had a Rectory impropriate, and alfo Land within the fame Parifh* &c. and *fo paid no Tithes becaufe he could not pay them to himfelf, and for no other Caufe was difcharged*; and after the Diffolution the Rectory is granted to one and the Land to another; It was holden by Egerton Solicitor upon the Statute 31 H. 8. that in fuch Cafe the King nor his Patentees fhould not be difcharged of Tithes, for the Lands were not difcharged in Right; But if the Lands in the Hands of the Abbot were difcharged in Right, as by Compofition or lawful Means, there the King and his Patentee fhould be difcharged from Payment of Tithes. 4 Le. 47. pl. 124. Mich. 30 Eliz. in the Exchequer. Prowes's Cafe.

3. And

3. And it was faid by Burleigh Ld. Treafurer, That if the *Compofition or Cuftom was that the Abbot and his Succeffors fhould be difcharged*, without extending to Farmers or Leffees if the Abbot made a Leafe, and the *Leffee paid Tithes* as he ought, and after the Reverfion comes to the King the Leffee fhould pay Tithes during his Leafe, but after the Leafe determined the King and his Patentee fhould not pay, but fhould be difcharged by the faid Statute. 4 Le. 47. pl. 124. Mich. 30 Eliz. Prowes's Cafe.

4. The like Matter was in Chancery Trin. 30 Eliz. The *Abbot of Tewkesbury having the Rectory impropriate of Tewkesbury* 11 *H.* 7. *purchafed Lands within the faid Parifh to him and his Succeffors*; after the Diffolution the King granted to G. the Rectory and to W. the Lands; and if W. fhould pay Tithes was referred to Manwood and Periam, who gave their Refolution, That Tithes were payable. 4 Le. 47. pl. 124. Mich. 30 Eliz. Prowes's Cafe.

Mo. 913. pl. 1291. Quarles v. Spurling, S. C. adjudged accordingly. —— Jo. 186. pl. 5. Trin. 4 Car. B. R. in Cafe of Whitton v. Wefton, S. C. cited by Winch and Warburton as adjudged, but the Reafon was, becaufe it was not found by Verdict (the fame being fpecial) that the faid Lands came by the Diffolution to the King, neither was any Mention made of the Statute of 32 H. 8. and then if it was not a Diffolution, (as it was in the faid Cafe) the Fermor fhall pay Tithes, and that after the Judgmnnt in Spurling's Cafe, and after the Cafe of Urry v. Bowyer, in which the Court was divided, it was made a Point in the Serjeant's Cafe, which proves that the Cafe never was adjudged; for it is not ufed to put any Cafe adjudged in the Serjeant's Cafes but a Point of Doubt which is in Controverfy.

5. In Debt upon 2 Ed. 6. cap. 13. for not fetting forth of Tithes; the Cafe was, that the Lands were Parcel of the Poffeffions of the *Knights Templars who were diffolved in E. II.'s Time, and their Poffeffions and their Lands annexed to the Priory of St. John of Jerufalem, with all Privileges &c. They had a fpecial Privilege to be difcharged of Tithes* for all their Lands *quamdiu propriis manibus excoluntur*, and thefe Poffeffions were afterwards given by general Words, In tam amplis Modo & Forma &c. as the Abbot had them, to the King, by the Stat. 32 H. 8. cap. 24. and from the King thefe Lands came to S. the Defendant. Adjudged that the *Grantee fhall not have the Privilege* to be difcharged; for by the Common Law a Lay Perfon was not capable of fuch a Privilege, *nor fhould the King have Benefit of that Privilege until the Statute* 31 *H.* 8. *cap.* 13. that the King and his Patentees fhall hold the Lands difcharged of Tithes, in as ample Manner as Abbots &c. held the fame at the Time of the Diffolution; But *this Statute extends only to fuch Poffeffions as came to the King by Surrender &c. and fhould be vefted in him by that Act*, and not to fuch as vefted in him by another Act of Parliament, and thofe Lands were given to the King by a fpecial Act of Parliament of 32 H. 8. which hath the fame Words in the firft Claufe as 31 H. 8. hath, but hath not the fecond, and therefore is no Caufe of holding them difcharged of Tithes. Cro. J. 58. pl. 3. Hill. 2 Jac. B. R. Cornwallis v. Spurling.

Debt on the Statute 2 E. 6. for Tithes The Lands were Parcel of the Poffeffions of the Prior of St. John of Jerufalem, and came to the Crown by the 32 H. 8. cap 24. and Parcel of St. John W. in the Parifh of M. and H. and whether they were difcharged from Payment of Tithes by 32 H. 8. cap. 24. was the Queftion on a Trial at Bar, and a fpecial Verdict found. Hale Ch. J. thought that they fhould not pay Tithes by reafon of the Word (Privileges) and in Whitty v. Wefton. Bridgm. 32. Lat. 99. Godb. 392. pl 478. the Court was divided, but that Cro J. 57. Mo. 913 Cornwallis v. Spurling. In Debt on 2 E. 6. Judgment was, that the Lands are tithable, and fo 2 Brownl. 8. 20. Urrey v. Bowen; Et adjornatur; but D. 277. pl 60. is, that they are not tithable; and afterwards refolved that the Lands are not tithable, and Judgment for the Defendant. Raym 225 Mich. 25 Car. 2. B. R. Foflet v. Franklin. —— 3 Keb. 217. pl. 23. the Court conceived that the Prefcription muft be found for the King, his Farmers and Tenants, and that Nonpayment by the Under tenants of the King's Fermor is fufficient Evidence; So of Cefterciars, it not appearing that they ever paid Tithes, and yet in Tenant's Hands.

Godb. 392. to 399. pl. 478. S. C. argued; and Jones and

6. Debt upon the Statute 2 Ed. 6. for not fetting out Tithes brought by the Parfon of Merrow; The Defendant *pleaded, that the Prior of St. John of Jerufalem in England was feifed in Fee of the Lands &c. in the Right of his Hofpital, and that he was of the Order of the Hofpitallers*, and that he

he and his Predeceffors ratione Ordinis fui, had Time out of Mind been difcharged of Payment of Tithes; then he pleads the Stat. 31 H. 8. for the Diffolution of Monafteries, and the Stat. 32 H. 8. for the Diffolution of Hofpitals, and that by thefe Diffolutions the Lands were vefted in the King, and that he ratione Statutorum held them difcharged of Tithes, who granted them to the Anceftor of the Defendant, under whom he claimed; and upon a general Demurrer the chief Queftion was, Whether the Lands were difcharged or not? And that depended upon the Expofition of the Statutes 31 & 32 of H. 8. viz. whether the Claufe of Difcharge of Tithes in the Statute 31 H. 8. fhall extend to thefe which were given to the King by the Statute 32 H. 8.? 2. When the Hofpitallers were diffolved by the Statute 32 H. 8. and all their Poffeffions, Hereditaments, and Privileges given to the King, his Heirs and Succeffors, whether this extends to his Patentees or Affigns, for that they are not named in the Statute? Upon the firft Point two Judges held, that thefe Lands were not difcharged of Tithes by the Statute 31 H. 8. becaufe that Statute did not give any Lands or Monafteries, but only fettled them in the Crown, which then were, or hereafter fhould be diffolved, as it was held in the **Archbifhop of Canterbury's Cafe**, and the Intent of that Act was to difcharge thofe Lands only, and not any which came to the King by virtue of any other Statute, and therefore this Claufe of Difcharge did not extend to thofe Lands which came to the Crown by the Statute 27 H. 8. for diffolving the leffer Monafteries, and fo it was adjudged in **Wright and Gerrard's Cafe**, nor to the Chantry Lands, which came to the King by the Statute 1 Ed. 6. as it was adjudged in the faid Archbifhop's Cafe; nor to the Lands which came to the Crown by the Statute 32 H. 8. as it was adjudged in **Quarles and Spurling's Cafe**; Now it is plain, that thefe Lands did not come to the Crown by the Statute 31 H. 8. becaufe they did not come by Diffolution, Surrender, or renouncing, but by Act of Parliament; it is true there are other general Words in the Statute 31 H. 8. viz. or by any other Means, but thefe Words cannot be intended of an Act of Parliament, but by fome other inferior Means. Two other Judges of a contrary Opinion, to whom one of the other having changed his former Opinion, agreed that thefe Lands came to the Crown by the Statute 31 H. 8. by Diffolution, and by other Means, for the Word (Diffolution) includes a Diffolution by Act of Parliament, and thefe general Words, (by any other Means) include likewife an Act of Parliament, efpecially in this Cafe, becaufe great part of the Hofpitallers being beyond Sea, there was no other Means to convey their Lands to the Crown but by Act of Parliament, for thofe who were beyond Sea could not be compelled to furrender; then as to the fecond Payment, the Privileges of the Hofpitallers being given to the King, his Heirs and Succeffors, and the Privilege to be difcharged of Tithes being given to them by an ancient Council, and explained by the Council of Lateran to extend only to thofe Lands which they had at the Time that this Privilege was granted, was held by one Judge to be a Perfonal Privilege, and that the Hofpitallers being diffolved, this Privilege is gone, and could not be transferred to another; but 3 other Judges were of Opinion, that this Privilege was given to the King by Act of Parliament before the Hofpitallers were diffolved, and if fo, it is not a Perfonal Privilege in the King, but a real Difcharge of the Lands by virtue of an Act of Parliament, and fhall go with the Lands in whofe Hands foever they come, for the Privilege is to be difcharged quamdiu propriis manibus excolunt, and when the King granted it over it fhall be propriis manibus of the Patentee, and Judgment was given [by the Opinion of Hide Ch. J. Doderidge and Jones, contra Whit-

Doderidge held, that they of St. John's of Jerufalem were Ecclefiaftical Perfons, though they were divided from the Jurifdiction of the Bifhop, but the Cafe was adjourned to be further argued. — Lat. 89. S. C. argued; and Jones J. faid it was well evidenced to the Jury that they were Ecclefiaftical, and the Judges are not to take Notice whether they are fo. — Bridgm. 32 S. C. argued.

Whitlock, that these Lands were discharged of Tithes. 3 Nels. a. 302, 303. pl. 19. cites W. Jones 182. [to 192. Trin. 4 Car. B. R.] Whitton v. Weston.

7. The Prior of Hatfield and his Predecessors, Time out of Mind, were seised of the Parsonage of Hatfield, and of a Farm in the Parish called D. Farm at the same Time. The Priory being under 200 l. per Ann. was given to the King by the Statute 27 H. 8. The King gives the Abby and Farm to the Abbess of B. The Abbess surrenders all to the King. The Question was, whether the King and those that claim under him shall hold this Farm discharged of Tithes by Force of the perpetual Unity. A Consultation was granted. Resolved by 3 Justices, (Warburton e contra) that the Impropriation was given to the King by the 27 H. 8. tho' no Impropriation is there named, but only Tenements, Churches, Tithes and Hereditaments 2dly, If it was not granted and given to the King by the 27 H. 8. then it was given by 31 H. 8. For by the Dissolution in 27 H. 8 the Body to which the Appropriation was made was dissolved, and consequently the Appropriation gone, as in 3 E. 3. in the Case of the Templars, and the Statute 31 H. 8. extends only to those Appropriations which were not dissolved till 4 February 27 H. 8. 3dly, It was agreed that the Statute 27 H. 8. does not of itself give any Discharge of Tithes. 4thly, That Unity of Possession perpetual, and Time out of Mind, of the Lands, and of the Rectory, does not by itself make a good Discharge of Tithes without the Benefit of the said Clause. 5thly, They resolved, that the Clause of Discharge in 31 H. 8. does not extend to those Monasteries that were dissolved, but only by way of Exclusion to those which were dissolved after 4 Feb. 27 H. 8. Jo. 187, 188. cites it as Wright's Case.

Jo 2 pl. 3. Mich 18 Jac. C. B. Wright v Gerrard, S C. and a Consultation awarded — Hob. 306. pl. 388. S. C. and a Consultation granted by the uniform Consent of all the Judges — Cro. J. 607. pl. 3. Gerrard v. Wright, S. C held accordingly by 3 Justices, but Warburton J. e contra, for he held that Appropriations were not given to the King by the Statute 27 H. 8. and therefore to supply the Defect the Statute 31 H. 8. was made, wherefore those Appropriations being given by Statute 31 H. 8. the said Discharge extends unto them. 2dly, The Intent of the Statute 31 H. 8. was to give equal Discharge to the one as well as to the other, as well to the Land given by the 27 H. 8. as to that given by 31 H. 8. and that upon this Reason is the Case of the Land of the Land of the Prior of St. John's of Jerusalem in 10 Eliz. Dyer. But notwithstanding a Consultation was granted. —— S. C. cited and relied upon by Jones and Brampston. Cro. C. 424, 425. Mich. 11 Eliz. B. R.

8. An *Abbot or Ecclesiastical Person* might prescribe in Non Decimando, but when the Corporation was dissolved, or when the Corporation granted the Land to a Layman, he shall not have Benefit of the Prescription; because *it was Personal to the Abbot*, resolved. Jo. 373. pl. 10. Mich. 11 Car. B. R. Sydowne v. Holme.

9. And it was also resolved per tot. Cur. that this *Privilege by Prescription, and other Personal Privileges by Bull or Order*, that Abbeys under 200 l. a Year, and which were dissolved by 4 Feb. 27 H. 8. cap. 28. *were not* preserved and *given to the King or his Patentee* by the said Statute. Ibid.

10. But 3dly it was resolved, that Privileges by Prescription, or by Order or Bull, *are preserved by the Clause of* 31 *H.* 8. cap. [13.] and the King nor his Patentee shall not pay Tithes, *but it extends only to Monasteries dissolved after the* 4 *Feb.* 27 *H.* 8. and therefore the lesser Abbies under 200 l. dissolved by 4 Feb. 27 H. 8. are not included within the said Clause of 31 H. 8. Ibid.

11. An *Abbot was Parson imparsonee* of the Church where the Scite of the Monasteries and Tithes were, and *the Abby was dissolved. The King granted the Monastery to one, and the Parsonage and Rectory to another.* It was the Opinion of the Justices, that if the *Land of the Abbey was the Glebe of the Parson before the Appropriation*, then this Land is discharged of Tithes by 31 H. 8. cap. 13. for it remains notw-

ftanding the Appropriation, and the *Glebe cannot be gained by Prefcription*, and the Glebe was never chargeable to pay Tithes; But the *Demefnes* of the Abbey *were of other Lands not Parcel of the Glebe*, and therefore fhall be chargeable to pay Tithes if they were *not difcharged* in the Hands of the Abbot, but *only by Unity of Poffeffion*; but *if in Right by a Compofition*, then they fhall be difcharged afterwards, as they were in the Abbot's Hands. Mo. 46. pl. 140. Pafch. 5 Eliz. Anon.

12. Thofe *Abbies that came to the Crown by* 27 H. 1. ought to pay Tithes, and tho' no Payment hath been at any time fince the Diffolution for the Lands of fuch Abbies, that fhall *not free them* when they come in queftion, for they were fpared in former Times becaufe the reafon of the Law was not then known. Clayt. 41. pl. 70. 11 Car. before Vernon J. Anon.

13. A Prohibition was granted to ftay a Suit for Tithes in the Ecclefiaftical Court, upon a Suggeftion that the Lands were *Part of the Poffeffions of the Priory of St. John's of Jerufalem*, and fo difcharged by Statute 32 H. 8. [cap. 24.] And though there be Difference of Opinions in the Books, yet the later Judgments are that they are difcharged. Freem. Rep. 299. pl. 357. Mich. 1680. Star v. Ellyot.

14. *Abbot feifed in Right of his Abbey of a Rectory with all Tithes &c.* The Abbey is diffolved, and the Crown grants the Tithes &c. The Parfon difputes the Tithes with the Patentee, but Bill difmiffed. MS. Tab. March 21. 1715. Turner v. Wray.

(Z. a) Difcharge by Unity of Poffeffion. Prefcription.

1. ONE *Man in a Vill cannot prefcribe to be quit of* Tithes, becaufe it is particular. *Contra* if *the whole Country* fo prefcribe. Br. Difmes, pl. 14. cites Doct. & Stud. lib. 2.

2. A *Compofition was betwixt an Abbot and a Parfon, that in Recompence of the Tithes of all the Woods within the Manor whereof the Abbot was Owner, he fhould have to him and his Succeffors 20 Loads of Wood every Year, in 20 Acres of the Manor, to burn and fpend in his Houfe; Afterwards the Parfonage was appropriate to the Abbey*, and after that the *Abbey was diffolved*; and the King granted the Parfonage to one, and the 20 Acres to another. It was held, that by the Unity the Eftovers were not extinct, for if they be Tithes they are not extinct by this Unity of Poffeffion, for that Tithes run with the Lands, and Tithes de jure Divino & Canonica Inftitutione do appertain to the Parfon. Mo. 50. pl. 151. Pafch. 5 Eliz. Anon.

3. In Cafe of a Prohibition, it was refolved, that an *Union of Copyhold Lands, and of the Parfonage in the Hands of the Parfon, as Parfon imparfonee*, was no Difcharge of the Tithes of the Copyhold Lands. Mo. 219. pl. 356. Mich. 28 Eliz. in the Court of Wards. Branche's Cafe.

4. Prohibition, and *fuggefted that he and all his Predeceffors &c. were feifed of the Manor* of which Tithes were demanded, *difcharged of Tithes, and that the Manor in Time of E. 6. was conveyed to the Duke of S. and* was *afterwards re-granted to the Bifhoprick again*. It was the Opinion of the Juftices, that the Prefcription was not determined when it came to the Bifhop again, for Tithe is not a Thing iffuing out of Land, and Unity of Poffeffion doth not extinct them, nor a Releafe of all Right

Right to the Land. Cro. E. 216. pl. 13. Hill. 33 Eliz. B.R. Wickham v. Cooper.

S. C. cited Mo. 534. per Popham. —— 2 Rep. 46 a. Trin. 38 Eliz. B. R. the Arch-Bishop of Canterbury's Case, S. P and a Consultation granted, and Ibid. 49. b. cites the principal Case by the Name of Green v. Bushkin, and that a Consultation was granted accordingly. —— S. C. cited Jo. 4 in pl. 3. —— Pollexf 9. cites the Arch-Bishop of Canterbury's Case, 2 Rep 48. and says that it proves, that if the Farmers paid Tithes, then no Discharge by reason of Unity, and likewise expressly, that if the Lands were in Lease, and no Tithes paid by the Farmer, that then they are discharged by the Unity.

5. The *Statute* 31 *H.* 8. gave all Colleges dissolved &c. to the Crown, with a Clause, that the King and his Grantees should hold them discharged of Tithes, as the Abbots held the same at the Time of the Dissolution. Afterwards, by the *Statute* 1 *Ed.* 6. all Colleges whatsoever were given to the Crown, but in this Statute there is no Clause of Discharge of Tithes. Upon a Libel for Tithes the Farmer of the Lands of Maidstone College in Kent moved for a Prohibition upon the Statute 31 H. 8. The Court held clearly that the King had the Lands of the College by the Statute 1 Ed. 6. Another Question was, whether these Lands which the King had by Virtue of the Statute of 1 Ed. 6. shall be discharged of Tithes by the Statute 31 H. 8. but as to this the Justices doubted; for though the Statute 1 Ed. 6. enacts, *that the King shall have the Lands in as ample Manner as the Colleges* &c. yet that Clause *extends only to the Estate in the Lands, and not to the Tithes.* Another Question was, whether *the Unity of Possession without Composition or Prescription was a sufficient Discharge of Tithes by the Statute* 31 *H.* 8.? And agreed by all that it was. Mo. 420. pl. 579. Mich. 37 & 38 Eliz. B. R. Green v. Bosekin.

Mo 532. cites S. C. as resolved accordingly.

6. In a Prohibition the Plaintiff *suggested that the Queen and all those whose Estates she had* &c. *used to pay the Rector of K.* 2 *s.* 4 *d. yearly, in Satisfaction for all Tithes of the Lands called Cowley in K.* in Wiltshire; and Issue being taken upon this Prescription, and upon Evidence at Bar it appeared that the *Queen had the Estate of the Abbot of K. who was Owner of the Lands, and also Rector in Fee in the Right of his Abbey*; on which *it was insisted*, that the Plaintiff had not proved his Prescription, because neither the Abbot could pay Tithes to himself, nor the Queen who had the Estate of the Abbot, but *that the Allegation should have been, that when the Queen let the Lands, the Occupiers used to pay* 2 *s.* 4 *d. in Satisfaction* of Tithes. But Curia contra; for they were clear that the Unity of the Inheritance, both of the Lands and Rectory in the Abbot, is not a perpetual Discharge of the Tithes; and if so, then *the Retainer of them by the Abbot shall be taken to be a Payment to himself.* Mo. 527. pl. 697. Mich. 40 & 41 Eliz. B. R. Chambers v. Hanbury.

7. Unity of Inheritance of both is no Discharge perpetual of Tithes, nor of the recompence for them, and if so, then *Retainer* may be said *Payment for a Man's self.* Mo. 528. pl. 697. Mich. 40 & 41 Eliz. B. R. Chambers v. Hambury.

* Hob. 300. in Case of Slade v. Duke. Hobart Ch. J. observes that Ld. Coke in this Case of Priddle says that if the Abbey itself were founded since Memory, then he cannot pre-

8. Resolv'd and adjudg'd that perpetual Unity Time out of Mind until the Dissolution prima facie discharges the Land from Payment of Tithes. 1st. Because the *Statute* 31 *H.* 8. *c* 13. *does not say Discharge of Tithes, but of Payment of Tithes*; and divers other Reasons, whereof the Principal was *for the infinite Impossibility*, and impossible Infiniteness *of such Immunities and Discharges which such religious Houses had cannot be known*, and that *general Allegation of Unity at the Time of the Dissolution* &c. *without Averment that it was Perpetual is not sufficient.* And such Unity *ought to have four Qualities*; 1st. It ought to be *Just and Rightful*, and not by Tort. 2dly, *Equal*, viz. a Fee in both. 3dly, It ought to be *perpetual* Time out of Mind. 4thly, It ought to be *free of Payment of any Tithes*; For if their Farmers at will, or for Years &c. paid any Tithes to them the Unity will not serve. And if the Appropriation

priation was made in Time of E. 4. H. 6. H. 4. R. 2. E. 3. &c. it is not fufficient upon the Point of Unity; For it ought to be perpetual; But in fuch Cafe he may *allege the faid Branch of* 31 *H.* 8. *of difcharge of the Payment of Tithes, and that the Abbots &c. time out of Mind till the Diffolution have held the Land difcharged* of Tithes (as he well may prefcribe by the Common Law) and gives fuch Evidence that he may approve it; and fo if in Truth the Land be difcharg'd he has fufficient Remedy to relieve himfelf; * and fays, fee the Bp. of Winchefter's Cafe. 2 Rep. 44. b. 45. a. But if the Abbey &c. was founded within Time of Memory, then he cannot prefcribe at all, and fince the Appropriation was made 20 H. 8. it cannot be difcharged. 11 Rep. 14. b. Mich. 10 Jac. C. B. Priddle v. Napper.

* 11 Rep. 14. b. which is but a Year after the 2 Rep. was publifhed, he fays he may prefcribe at all in the general Difcharge, and fo leaves it as a Cafe defperate where the Abbey was founded fince Time of Memory, which yet he might eafily have reliev'd if he might plead a Difcharge at the Time of the Diffolution without fhewing How, which is either a Retraction or an Explanation of his former Report of the Bifhop of Winchefter's Cafe 2 Rep. 43. b.

9. An *Abbot* having a Privilege to be *difcharged of Tithes* of Lands, *quamdiu propriis manibus excolunt*, in the Time of Ed. 4. *made a Gift in Tail*, and 31 *H.* 8. *the Abbey was diffolv'd.* The Donee of the Iffue Iffue in Tail fhall not be difcharged of Tithes, becaufe the Statute 31 H. 8. difchargeth none, but fuch as were difcharged at the Time of the Diffolution, fo that they muft claim the Eftate and Difcharge under the Abbot fince the Statute; But if the Land had returned to the Abbot or the King before or after the Statute, it had been otherwife. Hob. 244. pl. 320. Mich. 16 Jac. Farmer v. Shereman.

10. If *one has a Portion of Tithes out of a Rectory and afterwards he purchafes the Rectory*; The Portion of Tithes *is not extinguifh'd* but remains grantable; Agreed per Cur. and the Council of both Sides. And Haughton J. gave this Reafon for it, viz. *becaufe the Portion of Tithes may be more ancient than the Rectory*; *and* that *the Rector in antient Times had no Title to the Tithes*; For *before the Council of Lateran* every one might pay his Tithes to what Parfon he would. 2 Roll Rep. 161. Pafch. 18 Jac. B. R. Sir Edward Coke's Cafe.

11. A perpetual *Unity of a Church appropriated and the Land* is not any Difcharge of Tithes of itfelf; And the Statute 27 *H.* 8. *doth not give any Difcharge but* gives *only the Poffeffions as they were in the Hands of the Abbots*, and that refers to the Poffeffions, and not to the Tithes out of them, which are collateral Things, and there is *no Claufe of difcharge of Tithes in the Statute of* 27 *H.* 8. *as there is in* the Statute of 31 *H.* 8. and the Statute of 31 *H.* 8. *does not extend to the Statute of* 27 *H.* 8. And therefore refolved, that the Unity of Poffeffion of itfelf is not a Difcharge of Tithes. Cro. J. 607. pl. 3. Hill. 18 Jac. C. B. the fecond Refolution in the Cafe of Gerrard v. Wright.

Hob. 306 pl. 388. S. C. & S. P. by Hobart Ch. J.—Jo. 3. Wright v. Gerrard. S. C. & S. P. refolved.—S. C. cited Cro. C. 425 Mich. 11 C. B. in Cafe of Sydown v. Holme, and agreed by all the four Juftices to be good Law, that the Abbeys which came to the King by the Statute 27 H. 6. were not within the Privilege of 31 H. 8. nor to have Benefit of that Statute.——S. C. cited Jo. 373. in S. C. of Sydown v. Holme.

12. Unity of Poffeffion *of a Manor and Rectory* will not exempt the Demefne Lands from the Payment of Tithes when they come to be fever'd. Comyns's Rep. 498. pl. 213. Pafch. 8 Geo. in Scacc. Fox v. Bardwell.

(A. b) Difcharge. By Order.

1. WHERE the *Ciftercians* had a Privilege to be difcharged of Tithes arifing from their Lands, which propriis manibus excolebant, but their Farmers fhould pay Tithes, and that Order is now diffolved, by the Statute 31 H. 8. the King and his Tenants of thofe Lands fhall be difcharged of fuch Tithes as the Spiritual Perfons were. For *the King cannot excolere, and therefore his Farmers fhall be difcharged, and fo long as the King has the Freehold his Farmers though Leffees for Years or at Will fhall have fuch Privilege;* But if the King grants over the Reverfon then the Farmers fhall pay Tithes. 2 Le. 71. pl. 95. 29 Eliz. in Scacc. The Countefs of Lenox's Cafe.

2. Where a *Difcharge* was *by reafon of the Perfons* that were to pay Tithes as the *Ciftercians* &c. there the Patentee fhould pay Tithes; But if it was by reafon of *Unity* it fhall then be difcharged by the Statute in the Hands of the Patentee, for that Privilege runs with the Poffeffion. Per Popham; and Judgment for the Plaintiff. Cro. E. 578. pl. 1. Mich. 39 & 40 Eliz. B. R. Blinco v. Barkfdale.

Where the *Prefcription* in an Abbot was *meerly Perfonal* it would not extend to the Alienee, but if it was *in refpect of any real Compofition* it is otherwife, but this real Compofition ought to be fhewn the fame in the Cafe of the King and his Alienee. Lev. 185. Trin. 18 Car. 2. B. R. Bolls v. Atkinfon.——Sid. 320. pl. 13. Bowles v. Atkins. S. C.

3. So long as the Land is occupied by him that has the Fee Simple which did formerly belong to the *Order of Ciftercians*, it fhall *pay no Tithes*, but if he let it for Years or Life the *Tenant* fhall pay Tithes. Brownl. 44 Trin. 15 Jac. Anon.

4. When Tumor Papalis was here in England all *Monks* were in refpect of their Orders *difcharged* of Tithes, who after increafing to fo great a Number and having here great Revenues, the Holy Church was thereby impoverifhed, and Filia Devoravit Matrem; for Remedy whereof *Pope Pafchall II. ordained* that *Ciftercians*, *Templars and Hofpitallers* fhould be only difcharged, and that all other Orders fhould pay their Tithes which alfo in refpect of their great Revenues was found to be an Impoverifhment to the Church, and therefore *Pope Adrian conftituted* that the Land of Ciftercians, Templars and Hofpitallers fhould be only difcharged *Quæ Propriis Manibus excoluntur.* Per Montague Ch. J. Cro. J. 454. pl. 30. Mich. 15 Jac. B. R. in Cafe of Doubitoft v. Curteen.

Land may be faid to be manur'd Propriis Manibus by Servants if fo be it was in Poffeffion and ufed as a Farm by the Prior &c. Clayt. 16. pl. 26 March 1633. before Vernon Judge of Affife, in Horn's Cafe.

5. If the *Impropriation* did *not come to the Crown till* 31 *H.* 8. yet it was an Abby under the Value mentioned in the 27 *H.* 8. and given to the Crown, the King fhall be in now by the Statute of 27 *H.* 8. and fhall not participate of the Privileges given by 31 *H.* 8. for difcharge of Tithes. Clayt. 68. pl. 117. Aug. 1639. Sir Marmaduke Stricklands Cafe.

6. Where Land was *difcharged* of Tithes *by reafon of Order*, and there was a *Common* belonging thereto, Land *taken* of late Time *out of the Common*, and which was no Part of the Poffeffions of the Abbot is not difcharged. See Clayt. 11. pl. 20. March. 8 Car. Bells Cafe.

7. The

7. The Land which the *Priors of St. John* of Jerufalem held in their Hands in Fee *at the Council of Lateran*, are only capable of difcharge of Tithes, and not what they purchafed after, and where it was *in a Farmers hands*, though he purchafed the Fee afterwards he fhould not hold it difcharged as a Lord Abbot. Clayt. 16. pl. 26. March 1633. before Judge of Affize. Horn's Cafe.

Land *efcheated* afterwards fhall not partake of the Privilege, but Lands *then in Leafe* or *Copy* when the Leafe endeth after the Counfel or Copyhold comes to the Lord, it fhall be privileged as thofe then in their Hands fhould be. Clayt. 107. pl. 181. April. 8 Car. Whitfield Judge of Affife. Hodgfon's Cafe.

8. In Cafe of Tithes and Defence made by Priviledge of the *Ciftercian Order*, viz. Dum *Propriis Manibus* excolunt &c. 1ft. It muft be for thofe that are *Owners of the Inheritance* of fuch Land. 2dly, A *Truftee* of Land though another has the Eftate in Law, *is fuch* an Inheritor and *Owner* of Lands &c. 3dly, This extends to Meadow as well as Arable, and this Priviledge was for *great Tithes* as Corn or Hay &c. and did not *extend to fmall Tithes*, and therefore Payment of fmall Tithes is no Evidence to prove the greater Tithes to be due. Clayt. 53. pl. 92. Aug. 13 Car. before Barkley Judge of Affife. Anon.

9. In Prohibition the Priviledge of the *Ciftercian Order* came in Queftion; The Land was Parcel of the Abby of Rivaux, and no Tithes had been paid Time out of Mind &c. nor was any paid at the Diffolution of the Abby, the Judge fpared the giving in *Evidence* Dum Propriis Manibus Excolunt, and held it *fufficient to fhew the difcharge of Paymant of Tithes Time out of Mind*, and though the Order is put in the Declaration which is fufficient of itfelf, *yet he may take Advantage of the Statnte of* 31 *H.* 8. which is the beft Courfe. Clayt. 95. pl. 161. Aug. 23. 1641. before Whitfield J. Fofwick v. Bulmer.

10. Lands were *difcharged of Tithes, the Abbot being of the Order of Cifterians*, Dum propriis manibus excolebant; The Lands were *Parcel of the Demefnes of a Manor but in Leafe for Years at the Time of the Diffolution*; Refolved, that although the Farmer paid Tithes at the Time of the Diffolution, yet Quoad the Abbot, the Inheritance was difcharged of Tithes, and therefore that now the *King or his Patentee fhould hold them difcharged.* Cro. J. 559. pl. 6. Hill. 17 Jac. B.R. Porter v. Bathurft.

2 Roll Rep. S. C. held accordingly. ——— Palm. 118. S. C. adjudged.

11. If Land was difcharged *in the Hands of an Abbot* at the Time of the Time of the Diffolution, be it which Way it will, and without fhewing how by Union &c. and if he hath fo continued to be difcharged it fhsll be difcharged, and the 2 E. 6. gives no Remedy but in fuch Courfe and Manner as then he might have had. Clayt. 67. pl. 117. Aug. 1639. Sir Marm. Strickland's Cafe.

12. The Cafe upon a feigned Iffue out of Chancery was, Whether fuch Lands were difcharged of Tithes which formerly belonged to *Fountaine Abbey* in Yorkfhire, *which was of the Ciftertian Order*; and it was held clearly that *the Council of Lateran which freed that Order from Payment of Tithes was a General one received in England*; And if thefe Lands were difcharged of Tithes from the Time of that Council, that *no after Covenant or Contract made by the Abbot to pay Tithes could difpenfe with this Privilege*, or make them liable to Tithes; for once difcharged by this Council, and always difcharged for *this Council is as forcible as an Act of Parliament, which concludes all Parties*; and the Court were alfo of Opinion, That if there were any fuch Agreement for Payment of Tithes before the Council, yet this Council as a general Law, which includes all Mens Confent, had diffolved it, and the Lands were difcharged. Hardr. 101. pl. 5. Pafch. 1657. in Scacc. Stavely v. Ullithorn.

13. Upon

Hardr. 190. pl. 17. Pafch. 13 Car. 2. in Scacc. S. C. Says an Iffue was directed to try whether the Lands out of which they were demanded had belonged to any religious Order which claimed to be difcharged, Quam diu propriis manibus &c. It was clearly held by the Court, That if fuch Lands were in Leafe at the Diffolution &c. or an Eftate for Life or in Tail were out upon them; yet he in Reverfion fhould have the Benefit of fuch Difcharge after the Determination of thofe Eftates; becaufe *the Difcharge was not interrupted, but only fufpended during the Time that they were in the Hands of particular Eftates*.

13. Upon a Bill in Equity the Queftion was, Whether *Lands* were difcharged of Tithes as having been *Part of the Poffeffions of an Abbey of the Ciftertian Order*; The Court held that a Tenant for Life or Years is not within the Statute, but that a Tenant in Tail who hath an Eftate of Inheritance is difcharged, Quamdiu propriis manibus &c. Hard. 174. pl. 4. Mich. 12 Car. 2. in Scacc. Wilfon v. Redman.

So in the Cafe of *Commoning*. Ibid.

14. Upon a Bill in Equity for the *Tithes of Pafture Ground*, Parcel of the Poffeffionss of the Abbey of Fountaine, being of the Ciftertian Order; it was held per Cur. that Tithes *for Agiftment of Cattle were payable by the Owner of the Cattle*, becaufe they take the Profits and Herbage of the Soil, and therefore it cannot be faid that the Profits are taken by the Owner of the Soil, or that the Ground is in propriis manibus. The Chief Baron faid, that the Owner of the Soil might pay them, but clearly the Agiftor is compellable to pay them. Hardr. 184. pl. 10. Pafch. 13 Car. 2. in Scacc. Pory v. Wright.

(B. b. Difcharge by Payment of other Tithe or Thing.

1. WHERE the *Parifhioner does any Thing* which he *is not compellable by the Law to do, which comes to the Benefit of the Parfon*; there if he demand Tithes of the Thing in Lieu whereof this is done, Prohibition fhall be granted; Per Barkley, who faid it was a Rule. Mar. 65. pl. 100. Mich. 15 Car. In Skinner's Cafe.

2. And there is another Rule; That *Cuftom may make that thitheable which of itfelf is not titheable.* Mar. 65. in the S. C.

3. The Inhabitants of the Parifh of H in which there was a Chapel of Eafe, fuggefted a Cuftom, That thofe who lived in fuch a Precinct of the faid Parifh *ought to find a Rope for the third Bell and to repair Part of the Mother-Church.* in Confideration whereof they have been freed from Payment of Tithes to the Mother-Church. Whether this was a good Cuftom, Quære, for it was adjourn'd. Mar. 91 in pl. 151. Hill. 16 Car. Anon.

(C. b) Difcharge. Pleadings.

Cro. E. 206. pl. 42. S. C. and per Cur. A Spiritual Man may prefcribe in Non Decimando; and by the Sta-

1. LIBEL &c. for the Tithe of Wood; the Defendant fuggefted that the *Lands were Parcel of the Priory of Cree-Church, and that the Prior thereof and his Succeffors Time out of Mind held the fame difcharged of Tithes.* Exception was taken becaufe it did not fay any particular Difcharge, as Compofition, Unity of Poffeffion, or Privilege of Order, as Templars &c. Per Wray; though *the fpecial Manner of Difcharge is not fet down*, yet it *fhall be intended to be by lawful Means*,

Means, as Compofition or otherwife? for the Statute is that the King fhall hold difcharged as the Abbot &c. and we ought to take it that it was a lawful Difcharge of the Tithes at the Time of the Diffolution. Le. 240. pl. 325. Mich. 32 & 33 Eliz. B. R. Nafh v. Mollins.

tute of 31 H. 8. he fhall hold it difcharged as the Prior hold it, and if he held it difcharged, non refert by which Means; for it fhall be intended lawful Means.

2. Prohibition, the Plaintiff *fuggefted that the Prior of B. was feifed of the Rectory and of the Lands, out of which* the Tithes were demanded, *in Fee fimul & femul, from Time whereof &c. and at the Time of the Diffolution*, and for that Reafon the Land is difcharged &c. The *Defendant traverfed the Unity at the Time of the Diffolution* &c. Fenner and Clench (cæteris abfentibus) held that the Traverfe was good; for though there had been an Unity of Poffeffion Time of Mind, yet if it was not at the Time of the Diffolution Tithes fhall be paid; but *if the Difcharge had been pleaded generally by Prefcription, and not by Unity* &c. then *the Prefcription ought to have been anfwered and not the Unity*. Cro. E. 534. pl. 14 Mich 39 & 40 Eliz. B. R. Button v. Long.

3. In a Prohibition the Plaintiff *fuggefted, That the Abbot of Vale Royal was feifed in Fee of the Parfonage of W. and of the Grange of D. out of which the Tithes were demanded by the now Parfon of W.* and by Reafon thereof the faid Abbot and his Predeceffors Time whereof &c. were feifed of the Parfonage and Grange in their Demefne as &c. in Right of the faid Abbey, & ratione inde fhewed the Unity of Poffeffion and Difcharge of Tithes upon the Statute 31 H. 8. The *Defendant pleaded that the Abbey was founded 5 E. 1. within Time of Memory, and confeffed the Unity* of the Parfonage and Grange *after the Time of its Foundation*. The whole Court held the Plea in Bar good, and that he need not traverfe the Prefcription; For the *fhewing the Abbey to be founded within Time of Memory is a fufficient confeffing and avoiding; But if the Defendant* againft the Suggeftion of the perpetual Unity, *would fhew that the Demefnes before the Statute, and in the Time of the Abbot, were in the Hands of the Farmers* &c. there *he ought to traverfe the Prefcription*; for though the Poffeffion was chargeable in other Hands, yet as to the Fee-Simple, which repofed in the Abbot, it is a Difcharge in Right. Yelv. 31. Hill 45 Eliz Gibfon v. Holcroft.

S. C. cited 2 Mod 60.

4. *Libel for Tithes of two Acres*, Parcel of the Poffeffion of fuch an Abbey, which came to the King by the Statute 27 H. 8. the Defendant *pleaded the Statute 31 H. 8. and averred that the Abbey from the Time of the Foundation to the Diffolution had been difcharged of Tithes of thefe two Acres*; and upon Demurrer to this Plea it was objected that it was ill, becaufe the *Difcharge fhould be pleaded only to the Time of the Diffolution, by Reafon of the Uncertainty of the Commencement* of the Difcharge; Sed per tot Cur. a Confultation was granted; But Doderidge faid, That *if he had alleged that the Abbey was founded before Time of Memory, and that the Foundation, till the Diffolution, was difcharged it had been good*, quod Coke conceffit. Roll Rep. 54. pl. 27. Trin. 12 Jac. B. R. Prowfe v. Layfield.

5. S. fues a Prohibition againft D alleging, *That an Abbot &c. was feifed of that Land difcharged of the Payment of Tithes at the Time of the Diffolution*, and fo conveyed it to the King, and from the King to him. The Defendant demurs and it was refolved that the Abbot's holding of it difcharged of Tithes &c. was not good *without fhewing how*; for note the Statute 31 H. 8. cap. 3. is in as large and ample Manner as the Abbot held it &c. and the Statute pinches upon that; ergo he ought to take Notice by what Manner the Abbot was difcharged; alfo fuch a Claim of Difcharge of Tithes is contrary to common

Jo 6. pl 5. S. C. and Hobart, Hutton and Winch, held that he ought to fhew how the Abbot was difcharged at

mon Right, and therefore fhall be ftrict. Noy. 97. Hill. 15 Jac. C. B. Slade v. Drake.

the Time of the Diffolation; For that Statute gives Difcharge yet for pleading it as it was at common Law, the Party ought particularly to fhew how; But Warbuton held e Contra, and Error was brought et pendet Quære de eco. —— Hob. 295. pl. 378. S. C. adjudged for the Defendant and a Confultation awarded t Warbuton diffentiente.

6. *Libel for Tithes* the *Defendant fuggefted* for a Prohibition *that the Abbot of &c. and his Predeceffors before and at the Time of the Diffolution, hold the Lands difcharged* of Tithes *by Reafon of the Unity of Poffeffion*; it was infifted that this Suggeftion need not to be proved within the Statute of 2 E. 6. For by that Statute the Suggeftion fhall not be proved, unlefs the Caufe be determinable in the Spiritual Court for the not proving the Suggeftion, and that this Cafe is not determinable there by the exprefs Words of the Statute; Sed per Cur. *Though precife Proof may not be made of the Difcharge, yet the Defendant might fwear that always fince the Statute* 31 *H.* 8. *the Lands have been reputed to be difcharged by Unity, or that he had heard it commonly reported to be fo vel Similia.* And Doderide faid he had known divers Precedents of Proof made in this Court in fuch Manner. 2 Roll Rep. 125. Mich. 17 Jac. B. R. Congley v. Hall.

7. 7. Upon a *Bill for Tithes* the *Defendant* by his Anfwer *fet forth, That the Lands* of which the Tithes were claimed, *were Parcel of the Priory of . . . and that the Lands belonging to that Priory were difcharged by Order*; *without faying any more* this was held fufficient, Quod Nota; becaufe of the Uncertainty. Hardr. 322. pl. 5. Hill. 14 & 15 Car. 2. in Scacc. Page's Cafe.

8. Suggeftion of a Difcharge by the Ceftertian Order in a Suit for Tithes *ought to aver pofitively that thefe Lands were in the Abbot's Hands at the Time of the Diffolution, and now in the Patentee's own Hands*, otherwife no Prohibition will be granted; And it is not fufficient to fay that the Vills were, unlefs of which are Parcel. Keb. 830. pl. 9. Hill. 16 & 17 Car. 2. B. R. Barrington v. Boucher.

(D. b) Reviv'd.

1. A *Prefcription was laid in an Abbot and Convent to be difcharged of Tithes*, and it appear'd that *the Body corporate was diffolved, becaufe all the Monks were dead, and the Lands came to Laymen*, it was adjudged that they fhall pay Tithes in Kind, becaufe the Prefcription continues no longer than the Lands remain'd in the Abbot's and Convent's Hands. Godb. 211. pl. 301. Mich. 11 Jac. C. B Windfor (Canons) v. Webb.

(E. b) Trefpafs juftifiable in order to fetting them out and carrying them away. And Pleadings.

1. *TRESPASS* lies by Parfon againft him who *carries away Tithes fever'd* from the nine Parts; *contrary where he will not fever* his Tithes, and carries them all away; there Suit lies in the Spiritual Court. Br. Trefpafs, pl. 108. cites 38 E. 3. 5.

2. In

2. In Trefpafs *of Corn* taken the *Defendant juftified for Tithes as Servant of the Parfon* of M. fo *he took the Tithes of his Mafter abque hoc, that he took the Corn of the Plaintiff* and others e contra. Br. Trefpafs, pl. 49. cites 44 Ed. 3. 39.

3. Trefpafs *de Claufo Fracto on D. in the 6th Day of July* the *Defendant juftified foras Tithes fever'd from the nine Parts as Parfon the 10th Day of Auguft, abfque hoc that he is guilty unlefs after the Tithes fever'd and till they were carried away*, and it was held clearly that every Parfon may *enter to collect his Tithes, and to turn them till they are dry*, and of this the *reafonable Time fhall be tried*, and a good Plea, and *fhall not be compell'd to fay that he is not guilty before nor after*; For he is guilty every Year after the Tithes fever'd, and the Plaintiff *reply'd, That the Day the Defendant juftified, the Defendant was not Parfon, or that the Tithes this Day were fever'd*; and fo fee that the Plaintiff was not compell'd to reply to the abfque hoc taken by the Defendant. Br. Traverfe per &c. pl. 242. cites 12 E 4. 6.

Br. Replication pl. 61. cites S. C.— A Parfon fhall have *reafonable Time to take his Tithes* fevered from the nine Parts, *and to turn them till they are dry, and that he* carries them away. Br. Trefpafs, pl. 325. cites 12 E. 4. 6.

In *Trefpafs* where the *Defendant juftifies as Parfon and collected the Tithes which were fevered from the nine Parts*, it is a good *Iffue* that *the Tithes were not fevered from the nine Parts.* Br. Iffues joines, pl. 69. cites 12 E. 4. 6.

4. Trefpafs of *Grafs cut*, the Defendant *juftified as Parfon of the Parifh*, and took *as Tithes fever'd* from the nine Parts, the Plaintiff faid, That De fon tort demefne without fuch Caufe. Per Brian this is no Plea, no more than *where the Defendant juftifies as his Franktenement*, or by Leafe, or for Years, fuch Replication De fon tort &c. is no Plea. Pigot faid, this is true *there*; For the *Defendant claim'd Intereft in the Soil and the Occupation there*; contra here, by which he *reply'd* as above, *abfque hoc, that they were fever'd from the nine Parts.* Br. De fon tort &c. pl. 21. cites 16 E. 4. 4.

5. In *Trefpafs in D.* the *Defendant juftified as Parfon of D. for Tithes*, the *Plaintiff faid that they grew in another Place, and not in the Place in the Bar*, and no Replication unlefs they had faid *that the Place is out of the Parifh of the Defendant*; For he may take his Tithes in any Place in this Parifh, by which he faid that it was in another Parifh, and not in the Parifh of the Plaintiff. Br. Replication, pl. 54. cites 21 E. 4.

Br. Traverfe per &c. pl. 267. cites 21 E. 4 65. that he ought to traverfe the Parifh, and not the Place; For prima facie if they grow in the Parifh the Parfon fhall have them.

6. *Trefpafs* for breaking his Clofe and treading his Grafs &c. and taking and carrying away five Loads of his Hay; The Defendant as to all except breaking the Clofe and fpoiling the Grafs pleads Not Guilty, and as to the Reft he *juftified, for that he is feifed of the Tithe-Hay arifing in the faid Clofe; and for that the Hay, (viz.) five Cart-Loads were cocked feparately for Tithes of the faid Hay, he entered* the Clofe *and carried away the Hay, doing as little Damage as he could, Quæ funt eadem* &c. the Plaintiff *replied, That the Defendant took the Grafs which the Plaintiff had cut and made it into Hay upon the Land, and carried it away, and fo five Cart-Loads of his Hay mentioned in the Declaration, he took and carried away, and traverfed that there were five Cart-Loads of Hay in the faid Clofe feperated for Tithes*; the Defendant demurred fpecially, for that the Plaintiff traverfed the Quantity of Hay feperated for Tithes which is not traverfable; and of that Opinion was all the Court, for the Defendant having pleaded Not Guilty as to all except the fpoiling the Grafs, and juftified this by entring and taking Tithes of Hay, it is good whether they were loaded in one or two or five Carts; and it was lawful for the Defendant to make the Hay on the Land after it was feparated, and Judgment was given for the Defendant by the whole Court. 3 Lev. 228. Trin. 1 Jac. 2. C. B. Paine v. Brigham.

2 Lutw. 1313, and 1316. S. C. Curia advifare vult.

7. In

7. In Trefpafs Defendants as Servants of the Parfon, juftified their Entry into the Land *with their Horfes and Molliter chafed the Cattle in the faid Clofe to fee what Tithes were due for the Cattle.* It was objected that this was not juftifiable, becaufe there were other Means to come to the Knowledge thereof. But the Court delivered no Opinion as to that, Judgment being given on another Matter. Cro. J. 360. pl. 21. Mich. 12 Jac. B. R. Rolls v. Boulting and Roberts.

(F. b) Remedy for Recovery of Tithes. And in what Court.

1. OF Tithes there *is not any Form to demand at the Common Law.* But you will find in the Regifter fol. 165. a Form of Writ of Covenant De decimis Garbarum ad Ecclefiam ipfius Prioris de N. qualitercunque fpectant'. Thel. Dig. 68. Lib. 8. cap. 9. S. 1.

2. *In Affife a Plaint is made of the tenth Part of all manner of Corn growing in* 100 *Acres of Land, and of the tenth Part of all Manner of Hay in* 10 *Acres of Meadow cut after the Tithes of the Parfon affigned* &c. Thel Dig. 68. Lib 8. cap. 9 S. 2. cites Hill. 44 E. 3. 5. *But* fays, that *now by the Statute of* 32 *H* 8. *cap.* 7. *a Man fhall have Præcipe quod redat, and all Manner of Writs real of all Profits called Ecclefiaftical or Spiritual,* as Parfonages, Vicarages, Portions, Penfions, Difmes &c. After the making of which Statute Theloall fays, he has feen Writ of Covenant of fuch Form to levy a Fine, Quod teneat Covent' &c. de Rectoria Ecclefiæ Parochialis de M. ac de omnibus decimis granorum, garbarum, & fœni eidem Rectoriæ fpectant' &c. five cum omnibus decimis granorum garbar' & fœni eidem Rector' fpectan' &c.

3. And in *Præcipe quod reddat omnes & omnimodas decimas majores mixtas et minutas infra Villam five Hamlet' de B. in Parochia de A. quoquomodo crefcen' contingen' ac annuatim renovan'* &c. Quære of thefe Forms and of others now ufed. See Præcipe quod reddat *quartam partem decimarum & oblationum Ecclefiæ Sancti* &c. Thel. Dig. 68. Lib. 8. cap. 9. S. 3. cites 16 E. 3. Quare Impedit 147. and fays, See Fine levied of a Parfonage 2 H. 3. Grant 89.

Br. Affife, pl. 19. cites S. C.

4. *Affize* was maintain'd *of Tithes by Name of Profit Apprender,* notwithftanding the Defendant demurr'd to the Jurifdiction. Br. Jurifdiction, pl. 7. cites 44 E. 3. 5.

5. If the *King grants Tithes which grow in great Forefts,* as Englewood *by Letters Paeents, and another takes them he fhall have Scire Facias againft them in Chancery, and fhall be at Iffue there, and then* it fhall *be fent into B. R. to try* as in other Cafes. *But* if the *Suit* be *againft them who ought to render the Tithes and fet them out* and fever the nine Parts, *then lies the Suit in the Spiritual Court*; note the Difference. Br. Difmes, pl. 10. cites 22 Aff. 75.

6. 32 *H.* 8. *cap.* 7. *S.* 2. *All Perfons of this Realm and other his Majefties Dominions fhall truly fet out and pay all Tithes and Offerings, according to the Cuftoms and Ufages of the Places where fuch Tithes or Duties fhall grow; and in Cafe any Perfons, of their ungodly and perverfe Will, with-hold any Tithes or Offerings, the Parfon, or Party Ecclefiaftical or Lay, having Caufe to demand the faid Tithes or Offerings, may convent the Perfons offending before the Ordinary, his Commiffary or other competent Judge, according to the Ecclefiaftical Laws. And the Ordinary &c. having the Parties, or their lawful Procurators before him, fhall proceed to the Examination, Hearing and Determination, of fuch Matter, ordinarily or fummarily, according to the Courfe of the Ecclefiaftical Laws.*

7. 32. *H*

7. 32 *H.* 8. *cap.* 7. *S.* 3. *In Cafe any of the Parties appeal from the Sentence of the Ordinary &c. the Judge fhall adjudge to the other Party reafonable Cofts, and fhall compel the Party appellant to pay the fame by compulfory Procefs and Cenfures of the Laws Ecclefiaftical, taking Surety of the other Parties to reftore the Cofts, if the principal Caufe be adjudged againft him; and fo every Ordinary, or other Judge Ecclefiaftical, fhall adjudge Cofts to the other Party upon every Appeal in every Suit of Subftraction or detention of Tithes, or in any other Suit concerning the Duty of fuch Tithes or Offerings.*

8. *S.* 4. *If any Perfons, after Sentence definitive given againft them, obftinately and wilfully refufe to pay their Tithes or Duties, or fuch Sums of Money wherein they be condemned for the fame, two Juftices of Peace of the Shire, whereof one of the Quorum, fhall have Authority, upon Information, Certificate or Complaint, made in Writing by the Ecclefiaftical Judge that gave the Sentence, to caufe the Party refufing to be attached and committed to the next Gaol, till he fhall have found Surety to the Ufe of the King to perform the Sentence.*

9. *S.* 7. *Where any Perfons which fhall have any Eftate of Inheritance, Freehold, Term, Right or Intereft, in any Parfonage, Vicarage, Portion, Penfion, Tithes, Oblations, or other Ecclefiaftical or Spiritual Profit, made Temporal, or admitted to be in Temporal Hands by the Laws of this Realm fhall be diffeifed, or otherwife put from their lawful Inheritance or Intereft by any Perfon claiming Title to the fame, the Perfons fo diffeifed or put from their Right, their Heirs, Wives, and fuch other to whom fuch Injury fhall be done, fhall have their Remedy in the King's Temporal Courts, or other Temporal Court, as the Cafe fhall require, for the Recovery of fuch Inheritance or Intereft, by Writs of Præcipe quod reddat, Affife of Novel Diffeifin, Mortdanceftor, Quod ei deforceat, Writs of Dower, or other Writs original, as the Cafe fhall require; and Writs of Covenant, and other Writs for Fines, and other Affurances of any fuch Parfonage, Vicarage, Portion, Penfion, or other Profit called Ecclefiaftical or Spiritual, fhall be granted in the Chancery, as hath been ufed for Lands.*

By this Act a Layman having Tithes or Offerings may either fue for the Subftraction, or with-holding of the fame in the Ecclefiaftical Court, or at the Common Law, at his Election; and feeing that no fpecial Writ is given by the Statute, the Party muft have a general Writ of Affife de libero Tenemento, and make a fpecial Plaint; But his Præcipe muft be Quod reddat omnes & Omnimodas Decimas majores, minimas & minutas infra Dale quoquo modo crefcent' contingent' ac annuatim renovant' &c. according to his Cafe. But neither Affife nor any Præcipe did lie of them, as of Tithes or any other Ecclefiaftical Duty at the Common Law; for the Affife brought of any manner of Corn growing in an hundred Acres of Land after the Tithes of the Parfon taken was a Lay Profit Apprender, and no Ecclefiaftical Duty. But Tithes, or other Ecclefiaftical Duties that came to the Crown by the Statutes of 27 H. 8. 31 H. 8. 37 H. 8. and 1 E. 6. are by thofe Statutes, and this of 32 H. 8. and of 1 & 2 P. & M. in the Hands of Laymen Temporal Inheritances, and fhall be accounted Affets, and Husbands fhall be Tenants by the Curtefy, and Wives endowed of them, and fhall have other Incidents belonging to Temporal Inheritances, only that they have this Ecclefiaftical Quality, that the Owner or Poffeffor thereof may fue for the Subftraction of the fame in the Ecclefiaftical Court. Co. Litt. 159. a.

No *Præcipe* lies for fetting out Tithes at Common Law; and I doubt not, *by the Statute* 32 *H.* 8 *cap.* 7. tho' Sir Edw. Coke in his Litt. fol. 159. a feems to be of Opinion, that *a Man may at his Election have Remedy* for with-holding Tithe after that Statute *by Action or in the Ecclefiaftical Court*, by that Statute doubtlefs he has *for the Title of Tithe*, as for Tithe of Land, or for the taking them away, but not, perhaps, for not fetting them out; Per Vaughan Ch. J. Vaugh. 195. Hill. 18 & 19 Car. 2. C. B. in Cafe of Holden v. Smallbrooke.

10. *S.* 8. *Provided that this Act fhall not give Remedy or Suit in the Courts Temporal, againft any Perfon which fhall refufe to fet out his Tithes, or detain his Tithes or Offerings.*

11. The *compelling the Appellant to pay Cofts, is to be underftood when the Cafe appertains properly to the Spiritual Court*; but if the Suit did not originally or properly appertain to them, as in Cafe for *Tithes of Trees fpent in Fuel*, a Prohibition fhall be awarded, as well to the Cofts as the original Suit, notwithftanding this Statute. Noy 137. Anon.

12. When *Tithes* were *ſet out*, they *are Lay-Chattles*; and *if a Stranger carries them away, Action lies not in the Spiritual Court but here*; otherwiſe where they are not ſevered from the 9th Part; Per Doderidge J. and Ley Ch. J. 2 Roll Rep. 440. Trin. 21 Jac. B. R. Gwyn v. Merryweather.

13. The Parſon exhibited *his Bill in the Exchequer for predial and other Tithes*, and *upon Proof of the Quantity and Value, had a Decree for the whole*; and the Clerks ſaid that this was the *conſtant Practice where* a Bill is exhibited for predial Tithes, and *the ſingle Value is only demanded.* Hardr. 4. pl. 4. Trin. 1655. in the Exchequer, Hardwick v. Newte.

14. 7 & 8 *W.* 3. *cap.* 6. *Impowers two* Juſtices of Peace *to determine Complaints for Nonpayment of* ſmall Tithes. *And the Money adjudged due ſhall be levied by Diſtreſs and Sale. But the Complaint muſt be made within two Years.* Appeal *may be to the Seſſions, and no* * Certiorari *ſhall be allowed unleſs the Title be in Queſtion.*

In Caſe of a Modus *the Juſtices are not to intermeddle.*

The Judgment ſhall be inrolled, and be a Bar to any other Proceſs. Party removing into a foreign County may be followed if adjudged againſt him. If the Complaint be vexatious, *Defendant ſhall have Coſts not exceeding* 10 *s. and any Perſon ſued for any thing done in purſuance of this Act, and the Plaintiff be nonſuit &c. ſhall have double* Coſts, *if no Suit be begun in the Exchequer or Eccleſiaſtical Court.*

* In the Conſtruction hereof it has been adjudged, that if the Party inſiſts on any Matter of Law before the Juſtice of Peace, which is any way doubtful, As on a Cuſtom in a Pariſh to be diſcharged of a certain kind of Tithe &c. the Order may be removed within the Intent of the Statute. 2 Hawk. Pl. C. 289. cap. 27. S. 38. cites Hill. 6 Geo. The King v. Furnace.

(G. b) Remedy for Recovery of Tithes. How; And in what Caſes. And Pleadings.

1. A Parſon ſues in the Spiritual Court for Tithes of Wheat and Rye growing on 60 Acres of Land. The *Defendant ſuggeſted for a Prohibition that the ſaid* 60 *Acres were barren*, and that by his Induſtry they became fruitful, and that 7 *Years are not expired* according to the Statute 2 E. 6. for Tithes of barren Lands. The *Jury found, that* 30 *Acres of the ſaid Lands were barren, but that* 30 *Acres of the ſaid Lands had yielded Tithes of Wool and Lambs* to the Parſon. The Parſon ſhall not have a Conſultation for them; for he has not ſued for them in the Spiritual Court; By the Judges of both Benches. Jenk. 218. pl. 65. cites D. 171. 2 Eliz.

By the Opinion of all the Juſtices of both Benches, (except Whiddon) the Party who ſued in the Spiritual Court ſhall have Conſultation for the ſaid Reſidue, ad quod Saunders Ch. B. conceſſit D. 171. a. pl. 6. Pells v. Saunderſon. —— S. C. cited Hob. 192. in pl 242. that a Conſultation was denied, becauſe he ſhould not have ſued for Tithes in Kind, which if they ſhould grant, a Conſultation ſhould be allowed but for the ſmall Tithe only.

2. An Action of *Debt* was brought upon this Statute by G. *againſt two Tenants in Common*, and it appeared that *one of them ſet out his Tithe, and* that *the other afterwards took it and carried it away*; and adjudged that the Action lies only againſt him which carried it away. Hutt. 122. cites it as a Caſe ſhewn Mich. 8 Jac. Sir John Gerrard's Caſe.

4 Le. 7 pl. 30. 26 Eliz. B. R. Gerrard's Caſe, is of *Tithes ſevered and carried away by a Stranger*, and that the Pariſhioner may plead the ſame Matter in Bar in the Spiritual Court.

3. In Debt on the Statute 2 E. 6. for not fetting out Tithes, the *Declaration recited the Statute as made Nov. 2. Anno* 2 & 3 *E.* 6. whereas it could not be in two Years of the faid King, and therefore after Verdict Judgment was arrefted. Mo. 302. pl. 452. Mich. 33 & 34 Eliz. in Scacc. Langley v. Haynes.

4. *Action* on this Statute *may be brought in any of the King's Courts*; Refolved by all the Barons. Sav. 131. pl. 206. Pafch. 36 Eliz. in Scacc. Anon.

5. *Defendant pleaded Not Guilty*, and held well enough, the Action of Debt being founded on the Statute for a Wrong done, and *Debt lies* on it tho' a certain Penalty is not given thereby, but the treble Value, which is uncertain. Cro. E. 621. pl. 11. Mich. 40 & 41 Eliz. B. R. Johns v. Carne.

Cro. E. 766. pl. 4. Trin. 42 Eliz. B. R. Wortley v. Herpingham, S. P. refolved accordingly; for it is not for a Non-feafance, but for a Male-feafance wherein the Tort is fuppofed —— Mo. 302, pl. 452. Mich. 33 & 34 Eliz. in Scacc. Langley v. Hains, S. P. adjudged. —— Brownl. 31. Pafch. 10 Jac. Anon S. P. —— Ibid. 65. Trin. 8 Jac. Pain v Nichols, S. P. —— For Wool or Lambs no Action lies upon the Statute; for they are not predial Tithes, nor fmall Tithes by the Statute of E. 6. Brownl. 70. Hill. 9 Jac. Mortimer v. Freeman. —— Palm 222. Arg. cites it as refolved 40 & 41 Eliz. Sharman v. Beadle, that Action of Debt lies upon this Statute for Tithe of Lambs; and thence infers that Lambs is not fmall Tithe.

6. *Baron* poffefs'd of a *Leafe for Years in Jure Ux'* may fue alone and recover the treble Value, and need not mention the Quality of the Grain. Jenk. 279. pl. 2. cites the Cafe of Bedel v. Smith.

Cro. E. 608. pl. 9 Pafch. 40 Eliz. Beadle v. Sharman. S. C. held accordingly. —— 2 Inft. 650. cites S. C. & S. P. refolv'd accordingly. —— Husband and Wife *join'd* and held good. 13 Rep. 48. Bedel v. Sherman. —— *But* where the Action is for *Tithes fet out* they cannot join, though for Tithes not fet out they may. Jo. 325. pl. 5. Mich. 9 Car. B. R. Anon.

Baron and Feme were Leffees of a Parfonage &c. A Parifhioner fets forth the Tithes and prefently takes them away again. Refolv'd that the Husband and Wife ought to have join'd in the Action; becaufe it is not for a Thing in Poffeffion; and if the Husband dies the Wife fhall have the Damages, and not the Execu or of the Husband. Noy 136. Hill. 7 Jac. B. R. Ford v. Pomeroy. —— 2 Brownl. 9. S. C. Curia advifare Vult; but feem'd of Opinion that the Wife ought to join; For the Statute fays that the Proprietor fhall have the Suit for the not fetting forth &c. and the *Hufband in this Cafe is not intended Proprietor as the Statute intends, but the Wife.*

7. After Verdict on this Statute for the Plaintiff, it was *moved in arreft* of Judgment *that the Suit for the treble Value ought not to be brought at the Common Law, but in the Spiritual Court* as it ought to be for the Tithes before they are fet out; but refolv'd that the Action was well brought, and Tanfield faid it was ruled in the Exchequer in Manwood's Time, that it lay well at the Common Law. Cro. E. 608. pl. 9. and 63. pl. 1. Trin. 40 Eliz. B. R. Beadle v. Sherman.

Mo. 912. pl. 1288. S. C. ruled accordingly. —Jenk. 279. pl. 2. S. C. & S. P.— Mo. 912. pl. 1289. Hill. 34 Eliz. B. R. Wentworth v. Crifpe. S. P. adjudged.

8. Refolv'd, that the Statute which gives treble Damages does not allow the Jury to give other Damages. No Cofts being given by the Statute, the Jury can affefs no Cofts. Mo. 915. pl. 1294. Trin. 44 Eliz. B. R. Day v. Peckvell.

Cro. J. 70. pl. 12. Dagg v. Penkevon. S. C. Pafch. 3 Jac. in Cam. Scacc. adjudg'd.

9. Debt upon the Statute of 2 E. 6. *by the Plaintiff (a Farmer)* for not fetting forth of Tithes, *and demanded the treble Value*; The *Jury upon Non-debet* pleaded, *find for the Plaintiff*. It was *affign'd for Error that the Statute does not give the treble Value to the Farmers* of the Parfonage, fed non allocatur. Cro. J. 70. pl. 12. Pafch. 3 Jac. in Cam. Scacc. Dagge and Kent v. Penkevon.

Mo 915. pl. 1294 Day v. Peckvell. S. C. refolv'd accordingly that he fhall have Action by the Equity of the Statute, becaufe he has Right to the Tithes though the Statute does not give Action to the Farmer.

Jenk. 316. pl. 4. S. C. Mo. 915. pl. 1294. Day v. Peckvell S. C. refolv'd accordingly. —Agreement with one Farmer fhall bind his Companion; Refolv'd. Mo. 915. pl. 1294 S. C.

10. Action was brought *by two [joint] Farmers who demanded the Forfeiture for carrying away the Corn without fetting forth of the Tithes or agreeing with them for the Corn*, but *without faying* that he did not agree with them *nor either of them*, yet held good and Judgment for the Plaintiff, and affirm'd in the Exchequer Chamber; For if he agreed with one of them, he ought to fhew it. Cro. J. 70. pl. 12. Pafch. 3 Jac. Dagg v. Penkevon.

11. If a *Parifhioner fets forth his Tithes and prefently takes them away again*; Debt lies for treble Damages upon fuch a fraudulent fetting forth, though the Statute fpeaks nothing of the Fraud. Noy. 136. Hill. 7 Jac. B. R. Ford v. Pomeroy.

12. An Action of Debt brought upon the Statute of E. 6. for not fetting forth of Tithes, and the *Plaintiff declared as well for the predial Tithes, for which he might well bring his Action, and for other Tithes, as of Lamb and Wool for which no Action would lie*, and upon Trial the *Jury found for all* as well for thofe that would, as would not bear an Action; and after a Verdict this Exception was taken, and *Judgment arrefted.* Brownl. 65. Trin. 8 Jac. Pain v. Nichols.

13. Upon the Statute of 2 E. 6. cap. 13. In a Prohibition to ftay Proceedings by a Parfon in a Suit in the Spiritual Court againft one of his Parifh, for hindring him in his Way in the Carriage of his Tithes, the Court all agreed that *if a Parfon has his ufual Way ftopt fo that he cannot come to take away his Tithes being fet out for him, he may have his Remedy by Suit in the Spiritual Court; But if the Queftion be whether the Parfon be of Right to have a Way one Way or another, this is triable by the Common Law*, and not in the Spiritual Court; but if he has a certain Way granted to him and fet out by the Common Law, if he is at any Time difturb'd and hinder'd by any of his Parifhioners or by any other in the Ufe of this his Way, he may fue in the Spiritual Court. Bulft. 67. Mich. 8 Jac. Anon.

14. Debt on the Statute &c. after a Verdict for the Plaintiff, it was moved in arreft of Judgment that the *Declaration* was ill, becaufe the Plaintiff *did not allege that he was Parfon*, for he ought to bring the Action according to the Name by which he claims the Tithes; for if a Man will bring an Action as Heir, Executor, or Sheriff, he muft name himfelf fo; but upon producing two Precedents to the contrary, it was adjudged per tot. Cur. for the Plaintiff. Brownl. 98. Mich. 9 Jac. Willot v. Spencer.

A Parifhioner privately fet forth his Tithes, and takes Witnefs of it, and immediately after he carries them away; *this is not a fetting forth within the Statute.* For the Words are, Truly, Juftly and without Fraud or Covin. Noy. 152. in Cafe of Rochefter v. Porter cites 43 Eliz. B. R.

15. A Man poffeffed of Corn fells it, and *before two Witneffes fets out his Tithes and afterwards privately takes away his Tithes*; and the Parfon fues him upon the Statute of Treble Damages, for not fetting forth of Tithes; and rhe Defendant proves by Witneffes, that he fet forth his Tithes; yet the Fraud is helped; for *the Words are without Fraud or Deceit.* Brownl. 34. Hele v. Frettenden.

S. C. cited by Coke Ch. J. 2 Bulft. 184. Hill. 11 Jac. — 2 Inft. 649. cites S. P. refolv'd. Trin. 44 Eliz. B. R. in Cafe of Sprat v. Heale. —— Noy 152. in Cafe of Rochefter v. Porter. S. P.

16. So One *fecretly fells his Corn to one who was not known*, and *afterwards the Vendee commands the Vendor to cut the Corn, which he does, and takes away the whole Corn without fetting forth his Tithes*; and the Queftion was, Who fhould be fued for the Tithes? And the Court held *the firft Vendor fhould be fued*, for it was fraudulent. Brownl. 34. Hele v. Frettenden.

S. P. and that the Parson shalt not be compelled to sue the Vendee, who it may be was not known to him, cites 44 Eliz. B. R. Baker's Case. ——— And it is not traversable, if the Tithes were set forth according to 47 Eliz. resolved in Trin. 7 Jac. B. R. Brickendine v. Denwood. Ibid.

17. In Debt upon the Statute of 2 E. 6. the Case was, *A. was possess'd of Tithes in Jure Uxoris as Executor of her former Husband, and granted totum Jus, Titulum* & Interesse suum de et in Decimis prædictis; Resolv'd unanimously that the Grant was good, and the Lease he had in the Tithes in Right of his Feme did thereby pass; And Judgment for the Plaintiff. Cro. J. 318. pl. 1. Hill. 10 Jac. B. R. Arnold v. Bidgood.

18. Debt upon the Statute 2 E. 6. cap. 13. for not setting out Tithes; *the Words of the Statute are, Every of the King's Subjects*; and the *Plaintiff in reciting it, declared that Quilibet Subjectus Dicti Domini Regis*; adjudged this was a Misrecital. 2 Bulst. 119. Trin. 11 Jac. Tipping v. Swan.

Brownl. 123. Kipping v. Swaine. S. C. & S. P. held accordingly, and that it was a Fault incurable; For *the Statute refers Subditus to his politick Capacity, but (dicti) goes to his natural and sole Capacity*, and by such Construction the Force of the Statute shall be determined by the King's Death; By three Justices but Houghton doubted and so it was adjourn'd. ——— Cro. J. 324. pl. 5. S. C. held accordingly & adjornatur.

19. If the Plaintiff declares in Debt for not setting forth Tithes, as of a *Lease made to him for 20 Years where it was but for 10 Years*. This is good, for it is not material in this Case how he doth declare, so as Tithe is to be paid to him out of the Land. Per Coke Ch. J. 2 Bulst. 86. Tin. 11 Jac.

20. As to the Word *Proprietor* in the Statute, *if a Rectory be leased for Years* the *Lessee may well say Possessionatus fuit, though he can take no Profits before Harvest*, and the shewing the Lease, and pleading that by Force thereof he was possess'd and so continued, is clearly good; Per Doderidge, quod tota Curia concessit. 2 Bulst. 67. Mich. 11 Jac.

It was mov'd in arrest of Judgment that the Declaration was that the Plaintiff was Primo Die occupator ac postea eodem Die &c. so that it appears not that he was Proprietor, and therefore the Action does not lie; For he may be Occupator wrongfully and so not Proprietor; But it was answer'd that the Declaration is that tali Die Possessionatus fuit & ab eodem Die occupavit, and this shall be judged of a rightfull Estate, and it is said that he is Rector Ecclesiæ and so shall be intended that he is Proprietor of the Tithes if the contrary be not shewn; and Judgment Nisi. Sty. 107. Trin. 24 Car. [Hobart v. Boraston.]

21. A *Parson may sue for the double Value in the Spiritual Court* and no Prohibition will lie; For that is given by the express Words of the Statute of 2 E. 6. and so it was adjudged in **Manwood's Case** in the Exchequer; Per Coke. Godb. 211. pl. 301. Mich. 11 Jac. C. B.

22. Plaintiff declared in Debt on the Statute that he was Proprietor for seven Years of the Rectory out of which the Tithes were issuing, and that *Defendant was Occupier of Lands there for six Months from March* 10, *and cut his Corn in August following, and carried it away 10th of September after*; Though by Plaintiff's own shewing Defendant's Interest in the Land was *determined before* he carried away the Tithes, yet he still continuing Owner of the Corn the Action lies. Cro. J. 324. pl. 5. Mich. 12 Jac. B. R. Kipping v. Swain, als', Stone.

Brownl. 123. S. C. & S. P. held accordingly — — 2 Bulst. 119. Tipping v. Swan, S. C. adjudged.

23. In Debt upon the Statute of E. 6. of Tithes Plaintiff *declares, That he was seised in Fee of a Portion of Tithes of Corn and Hay growing upon such a Grange, whereof Defendant was Occupier, and also of* 40 *Acres sown with Wheat, Rie and Barley, and reaped the Corn and carried it away without setting forth the Tithes*, which were worth 40 s. and the treble Damages 6 l. after Verdict it was moved that the Declaration was not good, because he *intitles himself being a Lay Person to a Portion of Tithes, and does not shew how*; and it being a Profit in another's Soil he ought to make a good Title to himself; Sed non allocatur; For this

Action is grounded on a Tort for not fetting out the Tithes, for which he demands the Penalty of the Statute, and the Seifin in Fee is only a Conveyance, and for this Action he needs not make a Title, and therefore it is ufual to bring the Action as Firmarius or Proprietarius without fhewing any particular Title and Judgment for the Plaintiff. Cro. J. 437. pl. 9. Mich. 15 Jac. B. R. Sanders v. Sandford.

24. And it was alfo objected not to be good, becaufe he did *not fhew the Quantity of every Grain in Specie*, and fo it is uncertain, and the Court knows not how to judge of it; Sed non allocatur; For he fhews the Value of the Tithes which is the Wrong fuppofed for the carrying them away, which is fufficient. Ibid. 438.

25. The *Abbot* of Evifham *feifed both of Rectory and Land time out of Mind 26 H. 8. demifed the Land for fix Years, and by the fame Leafe demifed all Tithes with a Covenant that the Leffee fhould not fet forth the Tithes [of] Corn and Hay* to the Leffor [and his Succeffors] *but that he fhall pay Tithe of Wool and Lamb to the Leffor, and fmall Tithes to the Vicar.* It was adjudged that the Lands fhall pay Tithes, 1ft, Becaufe the Tithes were demifed, and therefore the Lands were not difcharged, but the Tithes were payable. 2dly, Becaufe there was a Covenant that the Leffee fhall not fet forth his Tithes to the Leffor which fhews that they fhould otherwife have been fet forth. 3dly, Becaufe there is a Provifion for Payment of Tithe Lamb, Wool &c. all which are ftrong Evidences that the Lands were not difcharged, as ftrong as if there had been actual Payment, and the finding of all thefe do ftrongly imply that if there had been nothing elfe but a Leafing that that had not been fufficient, but that it was neceffary to find Payment, or that which amounted to Payment, difcharges by Grants and Covenants exprefs. Pollexf. 8. cites Car. 2. [Cro. J.] 453. [Mich. 15 Jac. B. R.] Dobitoft v. Courteen.

26. Debt upon the Statute 2 E. 6. for not fetting out Tithes, the Defendant pleaded *nil debet*; and this was *adjudged a good Iffue.* Hob. 218. pl. 285. Mich. 15 Jac. Bawtry v. Ifted.

Brownl. 52. Bawkey v. Ifted. S. C. and tho' Exception was aken to the *Venire facias*, becaufe ie was of Horfted-Parva, and not of the Parifh of Horfted Parva, yet Judgment was given for the Plaintiff, becaufe both the Town and Parifh were named in the Record, and the Venire facias may be either of the Town or Parifh.

27. In Debt upon Statute 2 E. 6. of Tithes, the Plaintiff in his *Declaration demanded more than the treble Value did amount unto, and did not fhew Satisfaction for the reft*; But all the Court held it good enough, for there is a *Difference when an Action is grounded upon a Specialty or a Contract which is a certain Sum, or upon a Statute which gives a certain Sum for the Penalty*, for there he may not vary from the Specialty. *But when the Demand is of no Sum certain, but only fo much as fhall be given by a Jury*, although he varies from the firft Valuation it is not material, for *he fhall not recover according to his Demand in his Declaration, but according to the Verdict*; Judgment for the Plaintiff. Cro. J. 498. pl. 6. Trin. 16 Jac. B. R. Pemberton v. Shelton.

2 Roll Rep. 54. S. C. adjudged accordingly.—S. P. held accordingly, Comb. 283. Trin 6 W. & M. in B. R. Auftin v. Burfcoe.

28. In an Action brought upon this Statute of 2 E. 6. it was *laid to be Tam pro Domino Rege quam pro Seipfo*, and upon Exception taken thereto it was refolved to be good; becaufe the King is to have a Fine. Hetl. 121. Mich. 4 Car. C. B. Luvered v. Owen.

An *Information* was brought by *the Queen only* upon this Statute, and the treble Value was demanded, and adjudged that it lay not; for the Statute gives it to the Party grieved and not to the Queen; and afterwards it was brought by the Party grieved, and he had Judgment to recover. Cro. E. 608. in pl. 9. cites It as ruled in the Exchequer in the Time of Manwood, in the Cafe of Wood v. Hilton. ——— Debt tam quam lies not on this Statute; For the Queen

Queen cannot have any Benefit thereof, nor is it given to her by the Statute but to the Party grieved only, and thereupon the Court commanded Judgment to be ftayed. Cro. E. 621. pl. 11. Mich. 40 & 41 Eliz. B. R. Johns v. Carne. ——— Mo 911. pl. 1285. Anon. but feems to be S. C. held accordingly, and that Action of Debt non competit Reginæ but rather a Fine for the Contempt upon an Information or Indictment, the Statute being a Prohibition not to carry away the Tithes till the nine Parts are fevered.

29. A *Leafe* was made *to two, they enter and occupy and fet not out their Tithes*, *Debt* was *brought againft one* of them, it *lies not*; *But* here *it was found that one only occupied the Land, and therefore the Action well lies.* Hutt. 121, Mich. 8 Car. Cole v. Wilkes.

30. Debt upon the Statute for not fetting forth Tithes; After Verdict it was moved that the *Declaration was* too general and uncertain, it being *for fuch a Quantity of Grain, but did fhew what Sort* of Grain; *and fo it may be for Grain not titheable*, for the Word *Grain comprehends Rape-Seed, Cole-Seed* &c. there is a very good Authority that it comprehends *Muftard-Seed*; but adjudged, That *the Declaration was good, for it was for Grain growing in fuch a Field*; and the Word Grain *in common Underftanding is taken for Corn.* Styles 103, 108. Trin. 24 Car. B. R. Southcott v. Southcott.

All. 80. S. C. refolved accordingly. And it being further objected that the Plaintiff had intitled himfelf as Proprietarius Decimarum Garbarum, and demands for Tithe of Grain in general, whereas (Garbarum) is a Word of uncertain Signification, and divers Sorts of Grain are not wont to be bundled up as Rape-Seed, Muftard Seed, and Cummin-Seed, which ufed to be threfhed in the Field; But refolved that Garba in its prime and proper Signification is intended of Corn; And fo Roll faid it was refolved in Baxter's Cafe upon Confultation with the Civilians, where one upon a Grant of Decimas Garbarum would have had Tithe Hay, but they did agree that the Word in its Latitude did comprehend any Thing that ufed to be bundled as Wood &c. but the Ambiguity of the Word here is taken away by the Verdict, and is to be intended of Grain that is Garbable. 2dly, The Word Grain is certain enough; for that it is exprefs'd to be fown upon a certain Number of Acres.———Grano feminat' was held good without mentioning the Quality of the Grain. 13 Rep. 39 Eliz. Bedel v. Sherman.

31. *In Debt* upon the Statute 2 E. 6. for Tithes, the *Plaintiff declared, That he was Rector of* M. A. *and by Reafon thereof ought to have the Tithes of* 100 *Acres of Land in that Parifh, and of* 80 *Acres of Land in the Parifh of M. G. without fhewing how he was entitled to the Tithes of the Lands out of his Parifh*; The Court held this to be *well enough after a Verdict*; *befides* that *a general Allegation* without fhewing a Title *is well enough in this Action.* Another Exception was, That the Plaintiff did not allege that the Defendant was Subditus Domini Regis as the Statute requires; Sed non allocatur, becaufe it is alleged, that he was *Occupator Terræ*, which *implies that he was Subditus.* Hardr. 173. Mich. 12 Car. 2. in Scacc. Phillips v. Kettle.

32. A *Tenant in Common of Tithes brought Debt* and declared *for the 20th Part of the Tithes.* Exception was taken that the Tithe is but the 10th Part; But per Windham J. though it be improper to the Signification of the Word, yet one may declare for the 20th Part of the Tithes or the 15th Part of them; For *the calling them Tithes is only to fhew and defcribe the Nature of the Thing demanded.* Sid. 49. pl. 11. Mich. 13 Car. 2. B. R. Cole v. Banbury.

33. Debt for not fetting out of Tithes lies for *Executor of Parfon*, but not againft Executor of the Parifhioner; Per Twifden. Sid. 88. in pl. 5. Mich. 14 Car. 2. B. R. faid that fo it was adjudged lately in C. B.

34. Where a Suit was in the Spiritual Court *for double Damages upon* 2 *E.* 6. *for not fetting out of Tithes, pending which Suit Defendant dies*, and then they *fue the Executors for double Damages*, it was infifted for a Prohibition, that this was a perfonal Offence and Tort of the Teftator, for which by the common Law the Executors fhall not anfwer; And of this Opinion were Windham and Keeling J. Sid. 181. pl. 20. Hill. 15 and 16 Car. 2. B. R. Weekes v. Truffell.

35. Defendant

Vent. 126. S. C. by the Name of Pellow v. Kingsford.

35. Debt upon the Statute 2 E. 6. for Tithes, and declared, that he is Rector of the Churches of Dale and Sale, and the Defendant occupied 400 Acres of Land in D. and S. sowed them, and *took away the Corn not tithed*; after Verdict for the Plaintiff it was moved in Arrest of Judgment, that he *should have shewn what Part of the Lands were in Dale, and what Part in Sale*, so that the Defendant might know how to answer particularly to each severally, and perhaps he has good Title to one Church and not to the other; But per Hale Ch. J. and Cur. it is good, for the Action is in Nature of *Trespass* founded on the Tort; and the Exception disallowed, and Judgment given for the Plaintiff. 2 Lev. 1. Pasch. 23 Car. B. R. Fellows v. Kingston.

S. d. 407. pl 19. Morton v. Hopkins, S. C. & S P. held accordingly that such Action lies for Executors but not against Executors.

36. M. brought *Debt as Executor upon 2 E. 6. for not setting forth Tithe due to his Testator.* It was insisted that this Action though for a Forfeiture for a Tort done to the Testator was maintainable within the Equity of the Statute 4 E. 3. that gives the Executor Trespass de Bonis asportatis in Vita Testatoris; and the Court were clear of Opinion for the Plaintiff, and said that it had been formerly resolved so in the Exchequer Chamber. Vent. 30, 31. Pasch. 21 Car. 2. B. R. Justice Moreton's Case.

35. If the *Executor of a Parson* brings a *Bill in Chancery* for Tithes, he, not being entitled to the treble Value by the Statute, need not *offer to accept the single Value*, as the Parson suing there ought to do if his Bill be for carrying away the Corn &c. without setting forth the Tithes according to the Statute. Vern. 60. pl. 57. Mich. 1682. Anon.

Cro. J. 68. pl. 6. S. C. adjudged accordingly, and held the Action well brought, in regard the Plaintiff had both Titles in him, and he is to have the intire Tithes. —— Nov 3. Champion v. Hill, S. C. resolved accordingly; for it is Personal, and one intire Debt for one Wrong. —— Yelv. 63. S. C. held accordingly. —— Brownl. 86. S. C. seems only a Translation of Yelv.

36. In Debt upon the Statute 2 E. 6. for not setting forth of Tithes; Plaintiff *declared upon two Leases, one of the Parson who had two Parts, and another of the Vicar who had the third Part.* The *Defendant pleaded Not Guilty, which was found against him.* It was moved in Arrest of Judgment, that *Not Guilty* was no good Plea, but nil debet; but *adjudged well enough.* Then it was *moved that the Plaintiff ought to have brought several Actions*, his Title being by several Demises; *sed non allocatur; for that the Suit was for the Tort as well as upon the Title*; so Judgment was for treble Damages. Mo. 914. pl. 1293. Hill. 2 Jac. B. R. Sir Richard Champernoon v. Hill.

Comb 283. Austin v. Burscoe, S. C. and Judgment affirmed nisi.

37. In an Action of *Debt upon the Statute 2 E. 6. of Tithes*, wherein the *Plaintiff demanded the treble Value* &c. *Upon nil debet pleaded the Plaintiff had a Verdict* in C. B. and upon a Writ of Error brought in B. R. it was very much insisted on that the Declaration was ill, because the *Plaintiffs had only alleged that the Defendant had carried away the Corn without setting out the Tithes, but did not aver that the Defendant had not made any Agreement with them for the Tithes*, for the Statute gives the Penalty where the Tithes are carried off without any Agreement made for so doing; therefore if the Defendant had agreed with the Plaintiffs for carrying off the Corn without setting out the Tithes, (as it does not appear but he might) then it had been no Forfeiture; And the Court was of that Opinion, viz. that the Declaration was ill for the Reason supra if it had been upon a Demurrer; but *this was helped by the Verdict; for if there had been any Agreement proved at the Trial, the Plaintiff could not have obtained a Verdict.* Carth. 304. Pasch. 6 W. & M. in B. R. Allston & al' v. Buscough.

38. Suit

38. Suit in the Spiritual Court for Tithes may be well brought *in Name of the Curate and Sequestrator.* 2 Lutw. 1066. Mich. 13 W. 3. Burton v. Cookerman.

(H. b) Count and Pleadings.

1. IT was awarded, that where *a Lay Man brings Trespass,* and the *Defendant claims as Lord of the Parsonage for Tithes,* the Spiritual Court shall not have Jurisdiction, but shall answer in Banco. Br. Jurisdiction, pl. 10. cites 47 E. 3. 17.

2. The *Bounds of a Parish* were put in Issue *in Trespass of Sheaves taken* where the Defendant claimed them as his Tithes as Parson of D. Br. Issues Joines, pl. 48. cites 50 E. 3. 20.

3. If a Man *leases Tithes* for Years, rendring Rent, there in Debt he *ought to count that he was Parson,* or otherwise *convey to himself the Tithes.* Br. Count, pl. 96. cites 10 H. 7. 21.

4. In a Suit for Tithes, *unless the Plaintiff demands the single Value only,* the *Defendant shall not be compelled to answer so as to discover the Quantity and Nature of prædial Tithes;* Arg. Hardr. 137. Hill. 1658. in Scacc. says, that it had been often resolved in this Court, and that so it was adjudged here 1 Jac. in Case of Fenner v. Robinson.

5. In *Ejectment* of *Tithes,* he must shew that it was by Deed, because that it cannot pass without Deed. Cro. J. 613. pl. 3. Pasch. 19 Jac. B. R. Swadling v. Piers.

But in *Debt on 2 & 3 Ed. 6. cap. 13.* the Statute gives the Action to the Proprietor, and when he names himself *Proprietor* he need not shew any other Title. Roll Rep. 13. pl. 16. Pasch. 12 Jac. B. R. Babington v. Mathews. —— 2 Bulst. 228. S. C. adjudged, and Man Secondary informed the Court, that to say generally Possessor, Occupator, Firmarius or Proprietarius is good and sufficient Pleading upon this Statute, which gives the Action to the Proprietor, and that so it had been several Times adjudged.

(I. b) Suits in the Ecclesiastical Court allowed or not. In what Cases.

1. 9 *E.* 2. *cap.* 1. FOR *Tithes, Oblations, Obventions or Mortuaries, when they are propounded under those Names the King's Prohibition shall not hold Place, albeit for the long with-holding of them they come to a pecuniary Estimation, but if an Ecclesiastical Person lodge his Tithes in his Barn, and then sell them for Money, if that Money be demanded before a Spiritual Judge, for this a Prohibition lieth; for by the Sale they are Temporal.*

2. 9 *E.* 2. *cap.* 2. *If Debate arise upon the Right of Tithes, (having his Original from the Right of the Patronage) and the Quantity of the same Tithes do amount to a fourth Part of the Goods of the Church, for this a Prohibition lieth; but if a Prelate injoin corporal Penance, and the Party afterwards commutes for Money, that Money is recoverable in the Court Christian, and in that Case a Prohibition lieth not.*

3. 9 *Ed.* 2. *cap.* 5. *No Prohibition shall be granted where Tithes are demanded of a* New Mill.

4. Where a Man *will not tithe his Corn*, Suit lies in the Spiritual Court; But where he *fevers the Tithes* from the 9 Parts, *and a Man carries it away*, Trefpafs lies at the Common Law. Br. Difmes, pl. 6. cites 38 E. 3. 6.

5. *Trefpafs by a Lay Man againft W. N. Clerk, of Corn taken*, the *Defendant faid that he is Parfon there*, and the Place is within his Parifh, *and the Corn were Tithes fevered from the* 9 *Parts*; Judgment if the Court will take Conufance; et non allocatur; for a *Lay Man by Intendment cannot have Tithes*; By which he faid, that Debate was in the Spiritual Court between him and the Prior of D. who claimed Tithes there, and the faid W. N. faid, that the Prior himfelf was feifed of the Land, and infeoffed another, fo that in his own Land he could not have Tithes, by which Judgment was given for W. N. and after the Plaintiff claiming by the Prior got Poffeffion, and the Defendant took them as his Tithes; Judgment if the Court will take Conufance; and no Plea, but the Defendant was compelled to anfwer over, becaufe the Plaintiff was a Lay Man. Br. Jurifdiction, pl. 6. cites 42 E. 3. 12.

6. *Affife of Novel Diffeifin* was maintained of Tithes as of Lay Profit Apprender, and was brought *by a Prior*, and therefore the Defendant demanded Judgment if the Court would take Conufance, and yet the Affife was awarded to inquire of the Truth; And there Ludlow faid, that *in ancient Time every Man might grant his Tithes to what Church he would* quod verum eft, *and of fuch fuch Tithes the Jurifdiction belongs to the Spiritual Court notwithftanding the Grant.* Br. Difmes, pl. 1. cites 44 E. 3. 5.

7. *But* where a Man *Grants the tenth Part over and above the Tithes which he ought to pay to the Church*, there of this the Lay Court fhall have Jurifdiction. Br. Difmes, pl. 1. cites 44 E. 3. 5.

8. 45 *E.* 3 *cap.* 3. *A Prohibition (and an Attachment thereupon) fhall be granted, where a Suit is commenced in the Spiritual Court for the Tithes of Underwood above twenty Years Growth in the Name of Silva Cædua.*

9. 27 *H.* 8. 20. *Perfons* fubftracting *Tithes fhall be convened before the Ordinary, and bound over by two Juftices to obey the Sentence.*

10. A Man fhall have Prohibition *upon a Surmife*, and fo it was agreed 31 H 8. that if a Man be *fued* in the Spiritual Court *for Tithes of feafonable Wood*, the Party grieved may make *Suggeftion* in Chancery or in B. R. *that he is fued in the Spiritual Court for Tithes of great Trees which is paft the Age of* 20 *Years, by Name of Silva Cædua which is feafonable Wood* ufed to be cut *where in Fact it is great Trees*, and pray a Prohibition, and fhall have it. Br. Prohibition, pl. 17. cites F. N. B. 43. and H. 31. H. 8.

11. 2 & 3 *E.* 6. *cap.* 13. *S.* 13. *Perfon fued in the Spiritual Court, and not obeying the Sentence fhall be* excommunicated *and the Writ of Excommunicato capiendo fhall iffue.*

12. *Where it appears by Libel that the Ecclefiaftical Court ought to hold Plea*, there *Prohibition* of the King *does not lie. Contra where it appears that they ought not to hold Plea.* Br. Difmes, pl. 14. cites Doct. & Stud. lib. 2.

13. Where this is *no Parfonage* Houfe or *Barn*, and a *Difpute* is *about a Way by which the Tithes fhould be carried*, the Way to *plead* is, that J. S. is feis'd in Fee of the Rectory of D. and that time out of Mind he and thofe &c. have ufed for them and theirs formerly to have a Way to carry their Tithes from fuch a Place over the Land where &c. unto fuch a Highway, and name the Way which is the next to the Place where the Trefpafs was done. 2 Le. 10. pl. 13. Mich. 19 & 20 Eliz. B. R. Anon.

Le. 128. pl. 175. S. C. cited accordingly.

14. Spiritual Court cannot try an *Agreement between the Parfon and Parifhioners* for Tithes. Arg. Cro. E. 136. Trin. 31 Eliz. in Cafe of Gomerfal v. Bifhop, fays it was fo ruled in the Cafe of Pendleton v. Hunt.

15. The

15. The Spiritual Court will not allow of any Plea for a *Modus Decimandi.* Per Coke Arg. Cro. E. 511. pl. 35. Mich. 38 & 39 Eliz. B. R. in Case of Wright v. Wright.

Mo. 907. pl. 1268. Pasch. 36 Eliz. B. R. Fryer v. Bestney. S P.

16. It was surmised for a Prohibition that the Parson or Proprietor of the Rectory and his Predecessors had 20 Acres of Pasture, and 20 Acres of Wood in satisfaction of Tithes. If the Witnesses *prove the 20 Acres of Pasture, but do not prove the 20 Acres of Wood* it is Proof sufficient. For the Substance is proved that he held Land in satisfaction. Cro. E. 736. pl. 4. Hill. 42 Eliz. B. R. Austen v. Pigot.

Mo 911. pl. 1284. S. C. accordingly, and no Consultation granted.

17. On a Prohibition *Plaintiff surmised a Custom time out of Mind to pay 3 s. 4 d. for all great Tithes except Corn growing on 70 Acres of Land, and made Proof by two Witnesses according the Statute, but they testified* that *the Custom* was *to pay* 4 s. yet a Prohibition was awarded; For though he had fail'd in Proof of the Prescription, yet *so much is prov'd that the Spiritul Court had no Cause to proceed for Tithes in Specie.* D. 171. a. Marg. pl. 6. cites Mich. 42 & 43 Eliz Rot. 227. B. R. Webb v. Beal.

Ibid. says that Doderige said that Mich. 34 & 35 Eliz. Bird v. Collingworth a Consultation was awarded in such Case, but Popham answered that the Opinion of the Justices of C. B. now is e contra; For *when a Modus Decimandi is surmised to be in one Manner and it is proved to be in another* Manner, *we ought not to award a Consultation* to give them Authority to sue for Tithes in Kind, *but only to sue for Tithes in such Kind as is proved.*

18. *Libel for Tithes of Cows and Calves* &c. the *Defendant suggested a Modus to pay a Half-penny for the Tithes of every Calf, and* 1 *d. for a Cow, and that upon a certain Day they used to bring those Tithes to the Church, and there pay them to the Vicar, who libelled now to compell them to bring the Tithes to his House*; It was held by Winch (he only being in Court) that since they agree in the Modus, and differ only in the Place of Payment, that is not matter of Substance, and therefore no Prohibition will lie. Win. 33. Trin. 20 Jac. C. B. Anon.

19. Where the *Right of Tithes comes in Question* a Prohibition shall not be granted; Per Ley Ch. J. and Doderidge J. 2 Roll Rep. 440. Trin. 21 Jac. B. R. in Case of Gwynn v. Merryweather.

20. It belongs to the Spiritual Court to determine *who shall pay Tithes for Agistments,* whether the Owner of the Land or the Proprietor of the Cattle. Jo. 254. pl. 5. Hill. 7 Car. B. R. Facy v. Longe.

21. A *Consultation was pray'd upon a Suit for Tithes of two Mills* in Newcastle, *suggesting that they were ancient,* and per Curiam *this, nor no other Suggestion, but only of a Modus, need not be proved within six Months* by the Statute 2 E. 6. cap. 13. and Twisden said he knew it thus ruled heretofore in this Court, and this is on a Discharge at Common Law, and on reading the Statute, though the Words were general, yet the Court would not grant Consultation for this Cause, but ordered that if the Plaintiff did not declare on his Suggestion, the Defendant appearing thereto, a Consultatien should go by the first Day of the next Term. 2 Keb. 134. pl. 100. Mich. 18 Car. 2. B. R. Eaton v. Naylor.

22. Upon the Suggestion of a Modus the Court uses to grant a Prohibition without *Notice given to the other Party.* Freem. Rep. 78. pl. 95. Trin. 1673. Anon.

23. A Prohibition was prayed to stay a Suit for *Tithes of Wood.* The *Plaintiff suggested he had a House in the Parish, and that the Wood was cut for Fuel burnt in his House.* But the Court said, that this would not serve, unless it were *expressed, that the House was for Maintenance of Husbandry, by reason of which the Parson had Ulteriores Decimas.* Vent. 75. Pasch. 22 Car. 2. B. R. Tilden v. Walter.

Sid. 447. pl. 8. S. C. held accordingly. —— Mod. 150. pl. 105. S. C. but S P. does not appear —— 2 Keb 628. pl. 31. Tilders v. Walker, S. C. & S P per Curiam.

24. The

See Tit Prohibition (F) pl 17 20. (M) pl. 9. (Q) pl. 14, 15. (U) pl 1. and the Notes at the several Places.

24. The Ecclesiastical Court cannot *try a Modus* tho' the original Suit be for a Modus, because the Prescription differs; but if the Question be *Payment or Non-payment*, then they may proceed; Per Holt Ch. J. Cumb. 427. Trin. 9 W. 3. B. R. Godfrey v. Mathews.

25. One may libel in the Spiritual Court for *Tithe of Rakings of Corn* if it *never was gathered into Sheaves*; but otherwise after Corn has been gathered into Sheaves, and there was *no Fraud* in the gathering, and Prohibition would lie; Per Holt. 12 Mod. 235, 236. Mich. 10 W. 3. Anon.

The Jurisdiction arising to the Spiritual Court by Matter disclosed in the Libel cannot be taken from them, but by other Matter disclosed in the Plea, and therefore in the principal Case, which was a Libel for Tithe of Silva Cedua, *the Suggestion that they were Timber Trees, and of 20 Years Growth, ought to have been set forth in the Plea*; and a Prohibition was denied. Barnard. Rep. in B. R. 71. Trin. 2 Geo. 2. Bouton v Hurfler.

26. The *Spiritual Court has general Jurisdiction of Tithes, and if any special Matter deprives them of their Jurisdiction, it must be pleaded there; As* in Case of a Suit there *for Tithes of Faggots cut from the Stumps of Timber Trees above the Growth of 20 Years*; if this had been pleaded there, and Issue joined upon it, and on the Trial it had been found not to be Sylva Cædua it had been well; But *if they had refused to admit the Plea a Prohibition should be granted.* 2 Ld. Raym. Rep. 835. Mich. 1 Ann. Dike v. Brown.

(K. b) Where the Parson shall have them; And where the Vicar.

Before this Council there were no Parishes, nor Parish Priests that could claim Tithes, but a Man might give them to what Spiritual Person he would, but to the Church he must give them; But since Parishes were erected they are due to the Parson (except in Spiritual regular Cases) or Vicar of the Parish; Per Hobart Ch. J. Hob. 296 in Case of Slade v. Drake.

1. BEFORE the *Council of Lateran* Men might have given their Tithes where they pleased, and by this Council they shall give it only to the Curate of the Parish where they grow or come. Br. Dismes, pl. 21. cites 10 H. 7. 18.

2. *Libel &c. by the Parson for Tithes in Specie in the Parish of N.* The *Defendant for a Prohibition suggested, that he was an Inhabitant in the Parish of S. and that time out of Mind every Inhabitant there had paid Tithes for their Lands which they had in the Parish of N. to the Vicar of S. and that the Vicar of S. had paid to the Parson of N. 2 d. for every Acre.* The Court held that a Prohibition lay, and it is as if he had prescribed to pay 2d. for every Acre. Cro. E. 136. pl. 4. Trin. 31 Eliz. Coteford v. Pease.

3. If a *Vicar is endowed of Tithe-Hay*, and *the Land is sown with Corn*, the Parson shall have Tithe in Kind, and when the same is in Hay, the Vicar shall have the Tithe-Hay. Godb. 194. pl. 278. Trin. 10 Jac. C. B. Brown's Case.

4. A Modus pleaded *to pay so much to the Parson in discharge of Tithes claimed by the Vicar* was disallowed; and per tot. Cur. a Consultation was granted. 3 Bulst. 220, 221. Mich. 14 Jac. Wintel v. Child.

5. *Alteragium* will pass Tithe-Wool &c. to the Vicar; certified by the Doctors Win. 70. Hill. 21 Jac. C. B. in Case of Bret v. Ward.

6. *Payment*

6. *Payment is Evidence of Endowment* of a Vicarage, and no Man can prove other Endowment; Per Cur. 2 Keb. 729. pl. 13. Hill. 22 & 23 Car. 2. B. R. Brigham v. Robfon,

7. A *Modus to the Rector* is a *good Difcharge againft the Vicar*; Per Cur. Mod. 216. in pl. 3. Trin. 28 Car. 2. C. B. Anon.

8. A *Suit* was in the Spiritual Court *by the Vicar againft the Leffee of the Impropriator of a Rectory for the fmall Tithes* of the Parifh, *and the Hay-Tithe of the Glebe, which the Vicar claims by Prefcription and Endowment.* Eyre Ch. J. held it to be good; becaufe the Glebe may be charged by an exprefs and particular Charge. Gibb. 79. Trin. 2 & 3 Geo. 2. C. B. in Cafe of Barton v. Hollis.

(L. b) What Words will pafs or extinguifh Tithes.

1. RELEASE *of all Right of Land* is no Extinguifhment of Tithes. Le. 248. pl. 336. Mich. 33 Eliz. B. R. Lincoln Bifhop v. Cowper.

Cro. E. 216. pl. 13 S. C. & S. P. —— Le. 300. pl. 411. Trin. 31 Eliz. B. R. Stile v. Miller, S. P. —— Ow. 39, 40 Stile v. Miles, S. C. & S. P. per Wray.

2. If the *King makes a Grant of Tithes, all Sorts of Tithes pafs thereby.* Hardr. 305. Arg. cites it as held clearly Pafch. 12 Car. 2. C. B. in Cafe of Effington v. Barker, and fays the Doubt in that Cafe was occafioned by a *Videlicet in the Grant*, viz. of fuch and fuch Things; and the Queftion was, Whether Tithes of other Things, which were not named, would pafs? But if the Viz. had been out of the Cafe there would have been no Scruple, but that all Sorts of Tithes had paffed.

(M. b) Equity.

1. LORD Chancellor declares that Matters for *Tithes* are *determinable in this Court.* Toth. 282. cites Moone v. Bond, 3 Eliz. li. A. 10. 621.

2. A *Demurrer* becaufe the Matter concerneth Tithes *over-ruled* and ordered. Toth. 283. cites Windham v. Noris. 17 Eliz. li. a. fol. 282.

3. Cuftom proved of 16 Pence an Acre for Tithe of Wood, and no Wood in Kind, yet the Court would not decree a Cuftom. Toth. 111, 112 cites 38 Eliz. Wingfield v. Bedford.

4. A Bill for the Manner and Cuftom of Tithing difmiffed. Toth. 113. cites 10 Jac. Knivet v. Freeman.

5. Point of Tithes *determinable in this Court, and Parcel or not Parcel.* Toth. 283. cites Decanus & Capit' Ecclefiæ Chrifti in Oxon v. Grant, June 11 Jac.

6. Bill *to eftablifh certain Cuftoms of Tithing* within a particular Parifh which never had been tried. The Bill difmiffed as not proper for Equity. N. Ch. R. 10. 5 Car 1. Gawle v. Lake.

7. Tithes *in Kind decreed*, notwithftanding a Decree in Lord Bacon's Time. Toth. 131. cites 12 Car. Farmer v. Troft.

8. A Decree for *Tithe Conies* and *Wood.* Toth. 132. cites 13 Car. Shires v. Burgaine.

9. In an *Information* in the Exchequer Chamber *by English Bill for fmall Tithes appertaining to the Rectory of S. in D. The Defendant in his Anfwer did not admit the Plaintiff's Title, but alleged an Extinguifhmt of the Tithes by Unity of Poffeffion.* And the *Plaintiff made no Proof of the Value of the Tithes, nor what Cattle had been depaftured in the Place where* &c. and for that Caufe *the Court* upon hearing of the Caufe *refufed to direct a Trial at Law, becaufe no particular Damnification appeared to them* whereon to ground a Decree for the Plaintiff if the Verdict fhould pafs for him; and hereupon the Bill was difmiffed. Hardr. 4. pl. 3. Trin. 1655. The Att. Gen. v. Straite.

10. Upon a *Bill* in Equity *for Tithes of Corn and Grain* and a *Demurrer* to it *becaufe the fingle Value was not barely demanded, but it was a Bill of Difcovery only to enable the Plaintiff to recover the treble Value*; Sed non allocatur; for that Tithes were fuable for in this Court before the Statute; Quod Nota & Quære, becaufe it is contrary to the common Practice and Ufage to have fuch a Bill without alleging that the Plaintiff is contented to receive the fingle Value only. Hardr. 190. pl. 18. Pafch. 13 Car. 2. in Scacc. Driver v. Man.

11. In a *Bill for Tithes* due to the Complainant *as Vicar and Incumbent of* ——— in Effex; the *Complainant did not fhew how he was intitled* to them, viz. By Prefcription, Endowment or otherwife. And the *Court held it to be good notwithftanding*, as well as in an Action at Law for Tithes upon the Statute of 2 E. 6. where the Plaintiff is not obliged to fet forth his Title. But the Reporter adds quod Nota for it is againft feveral Precedents in this Court, which he fays he has known of Demurrers for thst Caufe held to be good. Hardr. 321, 322. pl. 4. Hill. 14 & 15 Car. 2. Stone v. Ludlow & al'.

Hardr. 130. Mich 1658. in the Exchequer, Button v. Honey. S. P. and the Exception was over-ruled becaufe the Defendant by his Anfwer admitted him to be Vicar, and that the Tithes in queftion were his Due, but infifted only upon Payment and Satisfaction. But there is a Note added, that it has been often ruled contrary, it being the Ground and Foundation of the Plaintiff's Title.

12. Chancery will *not decree* a *Rate Tithe*, though it was infifted that it was frequent to do fo in the Exchequer. Chancery Cafes 187. Mich. 22 Car. 2. Bufh v. Rifhley.

13. A Bill was exhibited for Tithes, and *the Jurifdiction of the Court demurred to*; *but the Demurrer over-ruled*, and the Defendant ordered to anfwer. And it was faid by Finch Lord Keeper, that the Court of Exchequer did not hold Plea by Englifh Bill until the Statute of 33 H. 8. cap. 39. Freem. Rep. 303. pl. 371. Trin. 1674. in Chancery. Anon.

14. Sir John Churchill as Amicus Curiæ faid that a Suit for Tithes, efpecially *fmall Tithes*, was not proper in Chancery, and had not been ufed; yet Finch C. pronounced a Decree for them, the Bill for Refufal to anfwer being taken pro Confeffo. 2 Chan. Cafes 237. Mich. 29 Car. 2. Anon.

Ld. Chanceller declared that this Court had Cognizance of Tithes as well as the Exchequer, and that the Plaintiff had Electionem Fori. 2 Freem. Rep. 27. pl. 29. Anon. feems to be S. C.

15. Bills to eftablifh a *Modus Decimandi* have been feveral Times difmiffed, but where it is only to preferve Teftimony North K. thought it reafonble that the Defendant fhould anfwer, and over-ruled the Demurrer. Vern. 185. pl. 184. Trin. 1683. Somerfet v. Fotherby.

S. P. as to the eftablifhing the Modus and Demurrer allowed. Chan. Rep. 27. 4 Car. 1. Browne v. Thetford. ——— Such Bills have been feveral Times allowed; agreed by Counfel and Court; But the Bill being likewife to compel the Parfon to give Receipts on Payment of the Modus, it was difmiffed at the Rolls. Mich. 1738. Wood v. Farington. ——— It was formerly doubted whether a Bill in Equity would lie to eftablifh a Modus or cuftomary Manner of paying Tithes, efpecially if the Cuftom had not been found good at Law; and fometimes on a Demurrer to fuch Bills they have been difmiffed; but the conftant Practice now is to retain fuch Bills and

and to decree on the Pleadings, or to direct a particular Point to be tried at Law, concerning the Reality of such a Custom or the Legality of it. Equ. abr. 367. (B) in the Note in Marg. against pl. 1.

16. Bill to be relieved for *Tithe Oar*; The Court directed a Trial if any and what Custom within the Township. 2 Vern. 46. pl. 43. Pasch. 1688. Buxton v. Hutchinson.

17. In a Bill for Tithes brought *in the Exchequer*, though the Right be ever so plain yet *the Decree* there *is*, *That he shall account and pay what Tithe is due to the Time of bringing the Bill*, but *not that he shall pay* Tithes *for the future*; *But in Chancery* it is *to the Time of the Decree*. 2 Wms's Rep. 463. in a Nota there says that it was said and admitted Trin. 1728. in Case of Carleton v. Brightwell.

The Editor makes a Quære if this be the established Rule of Chancery, or done only of late in some few Instances. Ibid.

For more of Dismes [or Tithes] in General, See Tit. Glebe, Presentation, (C.) &c. Prohibition, and other proper Titles.

Disseisin.

(A) Disseisin *of* a *Rent*.

[And where it is by one it shall be said to be by others.]

1. If I have a Rent-Charge issuing out of Lands of which there are several Tertenants, and I distrain upon any of the Lands and one of the Tertenants makes a Rescous without the Consent of the others, yet the others are Disseisors also, for the Distress is a Demand in Law, and the Non-payment a Denial, and so a Disseisin. 39 Ass. 4. adjudged.

Fol. 658.

Br. Disseisin pl. 60 (59) cites S. C. and though one only made the Rescous that all were adjudged Disseisors. Br. says that it seems the Reason is because all of them detain'd the Rent.——Fitzh. Assise, pl. 335. cites S. C. & S. P. but he that made the Rescous only was awarded to Prison —— Ibid. pl 339. cites 40 Ass. 3. S. P. ——Co. Litt. 161. b. S. P. as to a Rescous by one Jointenant, but he that made the Rescous is only the Disseisor.

2. If the Grantee of a Rent-Charge demands the Rents, and after distrains, and a Stranger without the Assent of the Tenant makes Rescous, yet this is a Disseisin in the Tenant, for the Non-payment was a Denial, and the Distress has not waived this Disseisin. The Case aforesaid of 39 Ass. 4. proved this. * 29 Ass. 51. dubitatur.

* Br. Disseisin, pl 60 cites S C — Fitzh. Assise, pl. 335. cites S C.—

3. If he who ought to have a Rent-Charge comes to the Proctor of the Tenant of the Land out of which the Rent issues, and demands the Rent, and he refuses to pay it, this is a Disseisin. 18 E. 3. Assize 78. adjudged.

4. If I have a Rent-Charge issuing out of Land, of which there are several Tertenants, a Demand upon the Land in the Possession of one of the Tenants, and Non-payment, is a Disseisin by all, for all the

Br. Disseisin, pl. 60 (59) cites S. C. —See supra, pl. 1

the Rent issues out of every Part. 39 Ass. 4. admitted by the Judges.

5. It was said that *Detainer* of *Rent-charge* is a Disseisin, but not of *Rent-service*, quod nota. Br. Disseisin, pl. 17. cites 3 Ass. 8.

6. Assise of Rent-charge against A. and B. in B. R. the Assise said, that the Plaintiff was seised and *came to distrain*, and *A. would not suffer him*, and after *A. alien'd to B.* and the *Plaintiff demanded the Rent of B. and he would not pay it*, and both were awarded Disseisors, and the *Disseisin* of A. was *with Force and Arms*, and *countervails Rescous*, and that *B. is a Disseisor by his Contradiction*, by which the Plaintiff recover'd, quod nota. Br. Disseisin, pl. 23. cites 9 Ass. 7.

7. In Assise it was awarded a sufficient Cause of Disseisin of Rent, because the *Tenements* out of which the Rent is issuing were so *inclosed that the Lord could not enter* to distrain for the Rent, quod nota. Br. Disseisin, pl. 58. cites 36 Ass. 7. & concordat Littleton tit. Rents.

8. In Assise it was held by Parle that if *Rent issues out of* certain *Land* which is *inclosed in a Park of ancient Time* so that none can come to distrain because the Gate is always lock'd, that of this Inclosure Assise does not lie, because it is not inclos'd for this Purpose, and also it was made of ancient Time so that the Seisor is dead; therefore Quære, where a Man at this Day keep such Land inclos'd of Anciently, and the Rent is demanded, if he shall not be a Disseisor as well by the keeping it inclos'd, as if he himself had inclos'd it. Br. Seisin, pl. 6. cites 49 E. 3. 15.

Br. Disseisin pl. 2. cites S. C. ——— In Assise the best Opinion was, That if a Man has *Rent issuing out of three Acres of Land inclosed in a Park of ancient Time*, and *comes to distrain and cannot for the Inclosure*, and the *Tenant denies to let him enter*, that this is no Disseisin; For Denier is no Disseisin for Rent-Service, and the Inclosure which is the Cause was not done by this now Tenant. Br. Disseisin, pl. 88. cites 49 Ass. 6.

9. *Assise of Rent* by Prioress which was *taken for Default*, and she made Title as to the Rent-Service, and it was found that the Tenant held of the Prioress, and that the House was never out of Possession, but the Predecessors had been seised of Land &c. And that the *Bailiff* of the Prioress *came to distrain*, and the *Tenant said, that he should have no Rent nor Distress there before he had recover'd it by Law, by which he dared not to distrain for doubt of Death.* And the Seisin in the Time of her Predecessors is taken as well as Seisin in her own Time. And *this Menace is* taken a good Disseisin, and this in the Time of this Plaintiff, and therefore she recover'd by Award. And she recover'd likewise upon the like Title in three other Assises. Br. Assise, pl. 39. cites 46 E. 3. 14.

10. *And* where a Man *comes to enter* into Land *where he has Right* of Entry *and makes his Claim and dares not enter for fear of Death*, it shall be adjudg'd Seisin, and Disseisin by this Claim, quod nota, per Persey. Ibid.

11. Denier is a Disseisin of *Rent-charge or* Rent-*seck*, but *not of Rent-service* unless there were a Rescous made; Note the Diversity. Br. Disseisin, pl. 8. cites 8 H. 6. 58.

Denial is a Disseisin of a Rent-Charge as well as of a Rent-Seck; Albeit he may distrain for the Rent-Charge as well as for a Rent-Service. Co. Litt. 161. b.

So if none be ready upon the Land *to pay it*, when it is demanded &c. Br. Disseisin, pl. 103. cites Littleton, tit. Disseisin.

12. If the Lord is going to the Land holden of him to distrain for the Rent behind, and the Tenant hearing this encountereth with him, and *forestalls him in the Way with Force and Arms, or menaces him* that he dare not come to the Land to distrain for his Rent behind, for doubt of Death or bodily Hurt, this is a Disseisin, because the Lord is disturbed of the Mean whereby he ought to come to his Rent. Litt. S. 240.

13. There

13. There be *three Causes of Disseisin of Rent-service*, viz. *Rescous*, *Replevin*, *and Enclosure*. Litt. S. 237.

You may make *six Disseisins of a Rent-service*, viz. *Rescous* of a Distress, *Resistance* to distrain, *Replevin*, *Inclosure*, *counterpleading* of the Title, and *vouching of a Record*, *and failing*. Co. Litt. 160. b.

Denier is no Disseisin of a Rent-service without *Rescous* or *Resistance*. Co. Litt. 161

14. If by forestalling or *menacing* he that has a Rent-charge or Rent-seck is forestalled or dare not come to the Land to ask the Rent behind it is a Disseisin. Litt. S. 240.

15. *Denier of Rent-charge upon the* * *Land* is a Disseisin. *Contra if it be off from the Land*, quod non negatur. Br. Disseisin, pl. 69. cites 14 E. 4. 4.

* Orig. is (Tenant.)

16. *And* if *Lease* be made *rendering Rent*, *and for Default* of Payment *a Re-entry* there if the Tenant denies the Rent upon the Land, the Lessor may re-enter, but Contra off from the Land; *Quære* inde. Br. Disseisin pl. 69. cites 14 E. 4. 4.

17. If a Man grants a *Rent-Seck out of Land in one County payable at a certain Day and Place in another County*, and the Grantee is seised thereof, if the *Grantee comes to the Place appointed for the Payment*, and there demands the Rent upon the Day accordingly, if the Rent be denied this is no Disseisin of the Rent as it shall be upon a Denial upon the Land where the Rent is payable upon the Land. Plowd. Com. 71. a. an Inference by the Reporter from what went before. Hill. 4 & 5 E. 6. in Case of Kidwellie v. Brand.

The Father granted a Rent-Seck of 4 l. per Ann. to B. his Son, issuing out of House call'd the Unicorn in L. payable at Lady-Day and Michaelmas, at the House of the said B. in L. to begin at Michaelmas after his Decease, and gave 6 d. in Name of Seisin. The Jury found the Grant and the Seisin, and the Demand at the said House called the Unicorn, and that none was there to pay it. Resolved it was a good Demand, being made at the said House out of which it was issuing, though not made at the House where it was payable, and a Disseisin for Non-payment of it. Cro. C. 507. pl. 12. Trin. 14 Car. B R. Smith v. Smith.

18. Disseisin *cannot be* of Rent but *at a Man's Pleasure*. Kelw. 113. a. pl 46. Casus incerti Temporis.

3 Rep. 85. a. — 2 Sid. 75.

19. Note, that when Books say that a *Detainer* of a Rent-charge or Seck is a Disseisin, it must be intended *upon a Demand* made. Co Litt. 161. b.

20. *There be two Causes of Disseisin of a Rent-Seck*, viz. *Denial and Inclosure*. Litt. S. 239.

Inclosure is a Disseisin of a Rent-Seck because the Grantee cannot come upon the Land to demand it. Co Litt. 161. b.

21. The Mirror saith, that *Disturbance of one that is in peaceable Possession* doth amount to Disseisin; as if the *Lord* that is in quiet Possession of his Rent cometh to distrain, and is by the Tenant *disturbed so as he cannot take a Distress*, this Disturbance is a Disseisin of the Rent. 2 Inst. 414.

22. So when the Lord taketh a Distress, and the Tenant pays not his Rent, but disturbs him by unjust Suit of a *Replevin*. 2 Inst. 414.

And though a Replevin be brought and thereupon the Sheriff makes a Redelivery of the Distress to the Party by the Course of Law, yet this is a Disseisin of the Rent-Service, because by the Rescue and the suing the Replevin the Lord is disturbed of the Means by which he ought to have and come at his Rent, viz. Of the Distress. Litt. 161. a.

23. There are four Causes of Disseisin of a *Rent-charge*, viz. *Rescous*, *Replevin*, *Inclosure and Denial*; for a Denial is a Disseisin of a Rent-charge as is said before of a Rent-Seck. Litt. S. 238.

You may *add a Fifth*, viz. *Resistance* to distrain, *Counter-pleading* and *vouching a Record and failing*. Litt. 161. b.

24. A *Distress* for the Rent is a Demand in Law, and then the *Non-payment is a Denial and Disseisin.* Co. Litt. 161. b.

25. Wheresoever there is a lawful Demand of a Rent, and the same is not paid, whether the Tenant be present or absent yet this a Denial in Law although there be no Words of Denial. It appears here that the Demand must be made upon the Land, and although the Tenant or any for him be there, yet must the Grantee demand it, because *without a Demand there can be no Denier* in Deed, nor any in Law. Co. Litt. 153. b.

(A. 2) Of what Estate it may be. Particular Estate.

1. IF one who is only *Lessee for Years enters upon him that has a good Title* he is a Disseissor of all the Fee Simple; Per Anderson and Periam J. Goldsb. 43. in pl. 22. Mich. 29 Eliz.

2. Note, It was said by Sir Francis Bacon the King's Solicitor, that it was adjudged the 40 Eliz. in the Exchequer, that where *Lessee of the King for Life* was ousted by a Stranger it should be said a Disseisin of the particular Estate, against the common Maxim, that a *Disseisin cannot be of a less Estate than a Fee Simple.* Godb. 138. pl. 166. 40 Eliz. in the Exchequer.

If the *King's Lessee for Years* be ousted by a Stranger, yet the Reversion being in the King he cannot be out of Possession but at his Pleasure. Cro. E. 34 Eliz. C. B. Wingate v. Mark.

(A. 3.) What Possession is an Impediment of a Disseisin.

1. IF A. is seised of a *great Close* where &c. and a *Stranger enters and occupies Part*, but A. continues in the Possession of the Residue, he shall be judged in Possession of the *Residue*, because it is an entire Thing, cites 4 E. 4. 2. 8 E. 3. 13. Seisin of Part of the Services is Seisin of the Whole, cites Betsworth's Case. 2 Rep. Brownl. 230. Mich. 11 Jac. in Dame Pett's Case;

2. The *Possession of a House* is the Possession *of the Land* for the Lessee against the Lessor of that which passes by one Demise; but if a *Stranger enters, severs, and Parts by Metes and Bounds*, nothing is wrought by the Possession of the Residue, Arg. Brownl. 230. Mich. 11 Jac. in Dame Pett's Case.

3. If *Conusor of a Statute* continues to keep Possession after the Return of *Liberari feci*, the Conusee's Estate is turned to a Right like the Case of Disseisee's making continual Claim as soon as ever the *Disseisee* leaves the Premises, the Continuance of Possession by the Disseissor make a fresh Disseisin. See 1 Inst. 156. Litt. 129. and this is not like the Case of *Mortgagor* who continues in *by Consent* and not in Opposition to the Mortgagee; Per Holt Ch. J. 2 Salk. 563. pl. 1. Trin. 3 W. & M. in B. R. Hammond v. Wood.

4 Mod 48. Hannam v. Woodford. S. C. held accordingly. —— Skinn. 300 pl. 4. S. C. held accordingly; Per Holt C. J. and Eyre J. —— 3 Lev. 312. Stephens v. Hannam, held accordingly.

(A. 4)

(A. 4) What is a Disseisin; And what an Abatement; And Pleadings in such Cases.

1. ENTRY *sur Disseisin* by D. against A. who said that Actio non, for he said *that T. was seised and infeoffed two who gave to the Baron who is dead, and to this Feme Tenant then his Feme in Tail*, and gave *Colour*, and the *Plaintiff said, that before the Donors any thing had, L. was seised in Fee, and gave to his Father and Mother in Tail who had Issue the Demandant, and the Father died, and the Mother survived and died protestando seised, and the said T. abated and infeoffed the Donors named in the Bar*, and the *Tenant maintained his Bar and traversed that the Tenant did not abate after the Death of his Mother* &c. prout &c. and per Danby Justice the Title is not good; for he has shewn that his Mother died protestando seised, after whose Death the Tenant abated, which cannot be unless the Mother died seised in Fact; for if she was disseised in her Life, it cannot be called an Abatement but a Disseisin; for he cannot plead Abatement but where there was a dying seised in Fact, which all the Justices agreed; and per Prisot clearly, if the Abatement was well alleged the other may well traverse it, and shall not be compelled to traverse the Gift in Tail, by which the Demandant was intitled, but may traverse the Abatement. Br. Pleadings, pl. 56. cites 38 H. 6. 18.

2. Abatement cannot be but upon Maintenance of Seisin in Fact, and *not by Protestation*; Quod Nota per Cur. Br. Pleadings, pl. 59. cites 39 H. 6. 5.

3. The Case was, that in *Formedon of the Gift of W.* the *Tenant said, that before the Donor any thing had, J. N. was seised, and gave to his Ancestor in Tail, who by Protestation died seised, and W. abated and died, as in the Writ, and the Tenant re-entered as Heir*, and the Demandant said that W. did not abate after the Death of the Father of the Tenant prout &c. and no Issue; for where there is no Abatement then it is not traversable, by which he omitted the Protestation; Quod Nota. Br. Pleadings, pl. 59. cites 39 H. 6. 5.

4. If *after the Decease of the Father* a *Stranger first enters* into Land *and abates*, and the *youngest Son* enters upon him, and *disseises him, and dies seised*, this is an Entry by Disseisin, and not by Abatement, and so shall not bind the Eldest. Co. Litt. 242. b. ad finem.

(A. 5) Of what Estate or Things it may be.

1. OF *Things not manourable*, Hæreditamenta Incorporea, As * Common, Corody, Office, Rent, &c. he that is seised of them has Election to have Assise, and to admit himself to be out of Possession; Resolved. 9 Rep. 51. a. Trin. 8 Jac. in the Earl of Salop's Case.

* S. P. by Hobart Ch. J. Hob. 322.

2. Of *possessory Things* an Expulsion may be made as well as a Disseisin; and therefore if a Man made a *Lease for Years* of Land, and a Stranger puts out the Lessee, he does also disseise him in the Reversion; but if the Lessor put him out, there is no Disseisin committed, and yet the Lessee has lost his Estate, and has but a Right to it, and that

A Termor cannot be disseised. Cro. J. 679. pl. 15. Mich. 21 Jac. Johns v. Ridler.

that whether he will or no; for though it be true, that when two are in Possession the Possession is judged in him that has Right, for he only possesseth though the other be in Possession too, and takes away the Trees, Corn, or the like; yet, when the true Owner is clearly put out and removed, then he has no longer Estate or Possession, but Right only, and has no Election to be in Possession or not in Possession, as that Case stands, and therefore clearly he cannot now grant this Term; And if the Lessor brings an Action of Debt for his Rent due at Michaelmas, the Lessee shall plead that he did enter upon him and put him out, and he continued his Possession at the Term, for he cannot have Rent out of that Land that he himself possesses; and if the Lessor after such Expulsion dies, the Land shall descend in Possession to the Heir, and the Executor shall not claim that that was a Lease; for a Term never bears a Que Estate; but it is true, that there are certain Cases wherein a Possession cannot be gained; Per Hobart Ch. J. Hob. 322. Pasch. 17 Jac. in Case of Elvis v. York (Archbishop) & al'.

(B) Rescous.

[*By whom. Stranger.*]

1. If a Man distrains for a Rent-Service, and a Stranger rescues the Distress in the Name of the Tenant, this is a Disseisin of the Rent. 56 H. 3. Itinere Stafford 16. per Curiam.

2. If Lord and Tenant are, and the Tenant detains the Rent, and the *Lord distrains* for it, and *two Strangers make Rescous, the Tenant being absent*, they are all Disseisors, and yet the Force is only in those two that made the Rescous; Per Dyer and Weston. Mo. 53. pl. 155. Pasch. 5 Eliz.

(C) *What Act* shall be said a Disseisin.

1. If Baron and Feme purchase Lands in Fee, and after the Baron is attainted of Felony, and the King seizes the Land, and after the Lord, of whom it is held, upon his Suggestion hath it delivered to him out of the Hands of the King as his Escheat, this is a Disseisin to the Wife, who had a joint Estate with her Husband; for it was delivered out of the Hands of the King by a false Suggestion, and so a Disseisin to the Feme. 4 Ass. 4. adjudged.

Br. Assise, pl. 114 cites S. C. Brooke says it seems that the King did not take but for Year, Day, and Waste, and then the Entry of the Lord by the Livery obtained by false Suggestion made the Disseisin, and was no Disseisin during the Possession of the King. —— Br. Reseiser, pro Rege, pl. 16. cites S. C. —— Br. Forfeiture de Terres, &c. pl. 28. cites S. C. —— Tit. Assise, (E) pl. 1. cites S. C. —— Fitzh. Assise, pl. 166. cites Mich. 4 E. 3. 47. S. P.

2. If a Man devises Capite Lands to his youngest Son, and dies, which is void for a third Part, and after the Devisee enters into the whole generally, which is an Entry for the eldest Son also, and after leases the whole to another for Years, yet this is not any Disseisin to the Eldest, for one Tenant in common cannot be ousted without

Cro. E. 639. pl. 41. Hemsley v. Price, S. C. & S. P. held accordingly

out an actual Ejectment. M. 40, 41 Eliz. B. R. between *Hempsley and Brice*, per Curiam.

per tot. Cur praeter Fenner. —— Mo. 546. pl. 729. Himley v. Brice, S. C. adjudged no Disseisin because there was no Expulsion, but held that Lease for Life with Livery would have made it a Disseisin ——— Where there were two Copartners of an House, and the one entered generally, and made a Lease for Life by the Name of All that his House &c. The Question was, whether all or the Moiety only of the House passed ? Popham and Fenner held that the entire House passed; for when he says, All that my House &c. that intended the whole House, and by his Livery made he gained the intire and gave the intire, altho' by his general Entry it is not intended that he entered into more than to what he had right; but Gawdy e contra; For as his Entry prima facie does not gain more than he had Right to demand, no more shall this Lease; And Foster at the Bar cited, that it was adjudged in this Court in Reignold's Case according to the Opinion of Popham. Cro. E. 615. pl. 4. Trin. 40 Eliz. Gerry v. Holford.

3. So it will be if the Devisee levies a Fine of the whole. Ibidem, per Curiam.

4. If a Man leases several Acres for Years, rendring one intire Rent, and * the Lessee is ousted of one Acre by a Stranger, and afterwards this notwithstanding pays the intire Rent to the Lessor, yet this shall not continue Seisin of the Lessor of the whole, but he is disseised of the said Acre. M. 11 Ja. B. R. dubitatur.

* Fol. 659.

Brownl 235. Dame Pett's Case, S C. but no Judgment.

5. If a Man hath an House and locks it, and departs, and another comes to his House, and takes the Key of the Door into his Hand, and says that he claims the House to himself in Fee without any Entry into the House, this is a Disseisin of the House. P. 15 Ja. B. *Plot's Case*, admitted clearly upon Evidence at the Bar in an Assise taken by Default.

6. If A. cuts Trees in his own Soil, and B. that has Common there says the Soil is his Soil, and commands him that he cut nothing &c. upon which A. departs out of the Land, yet this is not any Disseisin to him, for he that has no Right cannot be seised of a Freehold by Parol. 26 Ass. 17. adjudged.

Br. Disseisin, pl. 42, (41) cites S. C —— Fitzh Assise, pl. 237. cites S. C. —— Br. Assise, pl. 263. (262.) cites S. C.

7. If a Man that has Right to enter into Lands, in coming towards the Land is disturbed from entering, this is a Disseisin. 26 Ass. 17.

Br. Disseisin, pl. 42 (41.) cites S. C. —— Br. Assise, pl. 263. (262.) cites S. C. ——— Fitzh. Assise, pl. 237. cites S. C.

8. If a Stranger receives of my Tenant by voluntary Payment, without Coercion of Distress, the Rent due to me, this is a Disseisin to me at my Election. 40 Ass. 19.

Br. Assise, pl. 61 (60) cites S. C.— If my Tenant pays his Rent to a Stranger without Coertion he is a Disseisor, and if by Coertion, both are Disseisors. Br. Disseisin, pl 97. cites 23 H. 3. and Fitzh Ass. 434.——— Litt. S. 588, 589. and Co. Litt. 323. b. S. P.——— S. P. by Hobart Ch. J. Hob. 322. ——— 9 Rep. 51. a. S. P. resolv'd ——— Cro. C. 303. Pasch. 9 Car. B R. per Cur. S. P. ——— 2 Sid. 75. Pasch. 1658. B. R. in Case of Crouch v. Wills S. P. and cites Litt.——— If one receives my Rents without my Consent, I may charge him as my Receiver or make him a Disseisor at my Election; Per Roll Ch. J. and Curiam. Sty. 403. Hill. 1654.

9. If a Man enters into my House by my Sufferance, without claiming any Thing from me, this is not any Disseisin. 11 E. 3. Assise 86. adjudged.

10. If the King be seised in Fee of the Manor of B. and a Stranger erects a Shop in a vacant Plat of the Manor, and takes the Profits thereof without paying any Rent to the King, and after the King grants over the Manor in Fee, and the Stranger continues afterwards in

S. C. cited Arg. 2 Le. 147. in pl. 182. Berry v. Goodman

in the Shop, and occupies it as before, yet this Continuance is not any Disseisin, because the first Entry was not any Disseisin. D. 9. 10 El. 266. 10 Co. 4. *Adams and Lambert* 103. resolved.

—— Ow 96. S. P. Arg. in S. C.—— In an Ejectment the Case was, The King was seised of Lands in Fee, and a Stranger intruded, and the King grants this Land to J. S. in Fee, aud the Intruder continues Possession, and dies seized; The Question was if this Descent shall take away the Entry of J. S. Johnson, said it shall not; for none will affirm that an Intruder shall gain any Thing out of the King, but that the Land shall pass to the Patentee, and the Continuance of the Intruder in Possession, and his dying seised shall not take away the Entry; For he cannot be a Disseisor, because he gained no Estate at the Beignning. Cook contra; By this Continuance of Possession he shall be accounted a Disseisor, and the Freehold out of the Patentee, for another Estate he cannot have, for Tenant at Sufferance he is not, for he comes in at first by a Title; But a further Day was given Cook to shew Cause why Judgment should not be given against him. Ow. 95. Hill. 31 Eliz. Beron v. Goodyne.

11. [So] If a Man enters into certain Land, Parcel of a Manor which is in Ward of the King by reason of the Nonage of J. S. and takes the Profits as Owner thereof, and after J. S. sues Livery, and after the Intruder continues the Possession, and the taking the Profits as before, yet the Continuance shall not be any Disseisin to J. S. because the first Entry was not any Disseisin. M. 17 Ja. B. R. between the Lord *Sands and* the College of *Corpus Christi* in *Oxon*, resolved per Curiam, and the Jury directed accordingly.

12. If there be Tenant at Sufferance, and a Stranger not having any Right to the Land makes a Lease to him by Indenture, rendring Rent, without putting the Tenant at Sufferance out of Possession, and the Tenant pays the Rent to the Stranger, this is not any Disseisin to him that had Right. P. 3. Ja. B. R. between *Prenson and Stone*, per Curiam, upon Evidence.

13. If Guardian by Nurture makes a Lease by Indenture to one, being under the Title of the Infant, rendring Rent to himself which is paid accordingly, yet this is not any Disseisin to the Infant. P. 3 Ja. B. R. per Tanfield.

14. If Guardian in Chivalry continues the Possession of the Land in Ward after the full Age of the Ward, without Title, this is a Disseisin to the Heir because he comes in by the Law, and therefore the Continuance beyond the Time which the Law hath limitted, and against the Trust reposed in him by the Heir, and the Law makes it a Disseisin to the Heir, who was never out of Possession, but the Guardian was seised in his Right. 7 H. 4. 42. per Culpepper.

If a Guardian after the full Age of the Heir continues in Possession, he is no Tenant at Sufferance but an Abator against whom an Assise of Mortdancestor lies. Co. Litt. 57 8 —— He is an Abator because his Interest comes by Act in Law. Co. Litt. 271. a.—— Ow. 28. Arg. cites S. C. that the Estate shall be judged in Fee. —— 2 Inst. 134. S. P. and says this is proved there by the Statute of Marlbridge, cap 16. ——— Ow. 96. Arg. says that if a Guardian continues in Possession after the Heir is of full Age he is no Disseisor, nor shall gain any Estate.

15. If Lessee for Years holds over his Term, yet he is not any * Disseisor, because he comes in by the Act of the Party; but he is call'd (*) a Tenant at Sufferance; Tempore H. 8. S. 356. † 9 H. 7. 24. per Curiam. Dubitatur, || 22 E. 4. 38. b.

* Fol. 660.

† Br. Disseisin, pl. 63. (62) cites S. C & S. P. unless the Lessor enters in fact

|| Br. Estates, pl. 46. cites S. C. but Brooke says, that it seems to him that he is not a Disseisor before Regress of the Lessor, but he continues by his first Entry, and therefore this seems to be the Reason why Writ of Entry ad Terminum qui præteriit lies against such Termor as holds over his Term

If a *Termor holds over* his Term there an Estate in Fee is confest to be in him by matter of Law. But it is a Doubt whether he be a Disseisor or not. But it seemeth not, For a *Trespass lies not against him before Regress*. Arg Ow. 28. cites. 22 E. 4 38

16. If

16. If *Guardian takes Feoffment [of the Infant] in Custodia sua* this is Disseisin, and he shall be imprisoned if the Infant will bring Assise against him, and the Matter be found, quod nota. Br. Assise, pl. 451. cites 8 E. 2. and Fitzh. Assise, 395. Itinere Canc.

Br. Disseisin pl. 95 (94) cites S. C.

17. If a Man will *distrain for Rent-Service by Doors and Windows* and one prohibits him, this is a Disseisin, but not with Force and Arms. Br. Assise, pl. 465. cites 3 E. 3. and Fitzh. Ass. 469.

18. If *two Infants are Jointenants*, and the *one releases to the other*, by which *he holds the Whole*, this is a Disseisin as it is said; For it seems that the Release of an Infant is void as to the Interest of the Land; Contra if he made Livery. Br. Disseisin, pl. 19. cites 7 Ass. 17.

19. *Guardian* of an Infant *infeoffed J. N. of the Land of the* Infant, and the Infant brought Assise without Entry, and the Plaintiff recovered; For *the Entry of the Feoffee is a Disseisin*, quod nota, and this seems to be by the Statute of *Westminster 2. cap. 25.* which wills that where a Guardian or Termor makes a Feoffment, that as well the Feoffor as Feoffee shall be taken for Disseisors. Br. Disseisin, pl. 22. cites 8 Ass. 28.

20. If *A. has Common in the Land of B.* and *B. comes with his* Family *and incloses the Land* so that A. cannot use his Common, there *B. and his Family are Disseisors. So if the Family come in Aid of him.* Br. Disseisin, pl. 79. cites 8 Ass. 18.

21. In Assise the *Father infeoffed his Son within Age*, and after the *Father enter'd to the Use of the Infant as his Ward, and* after *infeoffed J. S.* and the Father died, and the *Infant brought Assise* against the Feoffee *without Entry*, and because the Entry of the Father was to the Use of the Infant, and the Feoffee by his Entry was a Disseisor, therefore the Infant recover'd. Br. Disseisin, pl. 94 cites 8 E. 3 432. and Fitzh. Assise 146.

22. Where *a Man is disturbed of the Mean, by which he cannot take his Profit of a Thing, this is a Disseisin of the Thing itself.* As of misturning of Water by which the Mill cannot Grind, Assise lies of the Mill, and of disturbing my Way to my Common, Assise lies of the Common as it is said elsewhere. Br. Assise, pl. 148. cites 9 Ass. 19.

Br. Disseisin, pl 25. cites 9 Ass. 19. S. P.

23. Note, Per Cur. in Assise that where a Man *gives to the Tenant in the Assise all the Tenements which he had in B. except a Chamber in which he lay ill, and after the Seisin he gave the Chamber and removed himself into the Hall*; if this Removal be by the Sufferance of the Feoffee, claiming nothing to his own Use, and so pleaded or given in Verdict, this is not a Disseisin; Quod Nota; and so see that *Entry by Sufferance claiming nothing to his own Use* is not a Disseisin. Br. Tenant per Copie. pl. 7. cites 11 Ass. 6

Br. Disseisin pl. 28. cites S. C,

24. In Assise *Baron and Feme purchased the Land in Fee*, and after the *Baron aliened to his youngest Son in Fee within Age*, and after the *Baron and Feme entered into the Tenements with Assent of the Feoffee* who was yet *within Age*, and after the Baron died, and the Feme continued Seisin and died, and the eldest Son entered as Heir, and the youngest who was infeoffed brought Assise and recovered by Award; for the Assent was void, because he was within Age, and so the *Entry of the Baron and Feme a Disseisin*, Quod Nota. Br. Assise. pl. 169. cites 11 Ass. 14.

Br, Disseisin pl. 30. cites S C.

25. A Man made *Simple Deed of Feoffment* and Letter of Attorney accordingly, and the *Attorney delivered the Seisin upon Condition*, and therefore a Disseisin by Award. Quære, where it is of two Acres and Livery of Seisin of the one, for in one Case he exceeds his Warrant, and in the other he diminishes it. Br. Feoffments de Terres pl. 25. cites 12 Ass. 24.

Br. Disseisin, pl. 34. cites S. C. — So if a Man makes a Deed of *Feoffment with Letter of Attorney to deliver Seisin upon Condition*, and *he delivers it simply* the Attorney is a Disseisor, and the Feoffor may say that nothing passed by the Deed. Br. Disseisin, pl. 71. cites 1 H. 4 3.

26. In Assise it was found that the *Conusor upon a Statute-Merchant after Execution sued against him took the Conusee by Force and swore him that he should render him the Land*, and *after he voluntarily released all Actions of Debt and Trespass, and also voluntarily surrendered the Land*, and this Oath he took for Fear of Death, and therefore notwithstanding that the Surrender was made at Large, yet because it was made by reason of Distress before, therefore Perning adjudged it a Disseisin when the Conusee entered by such Surrender. Br. Duress pl. 11. cites 14 Ass. 20.

27. A Man *leases for Life rendering Rent with Clause of Re-entry for Non-Payment*, and came after and *distrained* for the Rent, *and being possessed of the Distress re-entered*, and this was awarded a Disseisin, inasmuch as he entered being possessed of the Distress. Br. Disseisin, pl. 81. cites 14 Ass. 11.

S. P. nor he has not Day in Court to plead Br. Disseisin. pl. 41. cites S. C.

28. *Tenant in Tail is bound in a Statute-Merchant and dies*, and *Execution is sued against the Issue*, this is Disseisin; because by such Execution there is *no Garnishment* made *to the Heir*. Br. Assise, pl. 214. cites 17 Ass. 21.

Br. Disseisin, pl 92. cites S C.

29. *Tenant in Tail* was *bound in a Statute-Merchant* and *died*, and the *Conusee made his Executors and died*; the *Executors sued Execution against the Issue*, and *made Joint Estate to two*, and *the same Day the Issue brought Assise*, and all this found, by which the Plaintiff recovered, and yet the Jointenancy was pleaded, but because the Joint-Estate was made the Day of the Teste of the Writ, and the Executors were named who were Tenants the Day of the Writ, and the Seisin and Disseisin found, therefore the Plaintiff recovered; for *the Execution was a Disseisin to the Issue*, quod mirum; for it is *made by the Sheriff by Writ* as it seems. Br. Assise, pl. 406. cites P. 18. E. 3. Fitzh. Ass. 77.

30. *Guardian* in Chivalry *assigned Dower to one who was not the Wife of the Ward's Father*; if *she enters* she is a Disseisoress as to the Ward. Br. Receipts, pl. 50. cites 21 E. 3, 4.

S.P. Br. Disseisin pl. 104.

31. *Reaping of Grain with Sickles* is Disseisin with Force. Br. Brief, pl. 430. cites 21 E. 3, 34.

32. *If none inhabit or manure the Land*, and the Rent is demanded, it is Disseisin, and Assise lies thereof, and *Rescous*, *Replevin and Inclosure*, are Disseisins *of Rent-Service*; And Rescous, Replevin, Inclosure and Denier, are Disseisins of *Rent-Charge*; And Denier and Inclosure are Disseisins of *Rent-Seck*; And Menace is a Disseisin of all those Rents; And so see that the suing of Replevin is a Disseisin of Rent-Service and Rent-Charge. Br. Disseisin, pl. 103. cites 21 E. 3, 4.

Br. Distress, pl. 33. cites S. C.

33. In Assise it was said, that *Sovent Distress* is no Disseisin but *where the Lord distrains*; for if a Stranger distrains the Tenant may make Rescous as it seems; Quære, for the Plaintiff durst not demur. Br. Disseisin, pl. 46. cites 27 Ass. 51.

34. If a Man *incroaches* 10 *s. Rent of my Tenant* by Distress *who holds of me by* 10 *s. Rent* yet this is no Disseisin to me; for it cannot be intended my Rent, and if I distrain and the Tenant and he who incroaches make Rescous I shall have Assise against my Tenant alone, and not against the Incroacher; per Thorp. But Brooke says, It seems that he shall have Assize against both if he will. Br. Disseisin, pl. 14. cites 24 E. 3, 40.

35 If a *Ward enfeoffs his Guardian in Socage* the Entry of the Guardian upon this Feoffment is a Disseisin. 2 Roll Remitter, (G) pl. 3. cites 35 Ass. 8. adjudged.

36. *So* if Attorney be to deliver Seisin *after the Feoffor's Death and he delivers it during his Life* he is a Disseisor. 2 Roll 9. (S) pl. 1. cites 40 Ass. 38. Curia.

37. In

37. In an Aſſiſe between two *Tenants in Common* a *Forbidding by Word of Mouth* to the Tenant to pay his Rent was adjudged a Diſſeiſin. Raym. 371. cites Mich. 47 E. 3. 22. a. pl. 51.

38. *Menance of Death*, and *Incloſure of Land*, ſo that the Lord cannot diſtrain, are Diſſeiſins of Rent-Service, Quod Nota. Br. Diſſeiſin, pl. 87. cites 49 Aſſ. 5.

38. If a Man *makes Diſſeiſin and carries away Goods*, he ſhall be adjudged Diſſeiſor with Force, and ſhall be impriſoned; Per Tremail and Hank. Br. Damages, pl. 51. cites 11 H. 4. 16

39. If a Letter of *Attorney be to deliver Seiſin upon Condition, and he delivers it without* Condition, this is not good, but is a Diſſeiſor. 2 Roll. 9. pl. 14 cites 11 H. 4. 3.

40. When any *diſtrains ſo outragiouſly*, that is, ſo often as the Tertenant cannot plough, or duly uſe his Ground, this amounts to a Diſſeiſin. 2 Inſt. 414. cites the Mirror, cap. 2. S. 25.

41. A Diſſeiſin *is* properly where a Man enters into any Lands or Tenements where his Entry is not lawful and ouſts him that has the Freehold. Litt. S. 279.

Co. Litt. 181. a. notes here, that every Entry is not a Diſſeſin unleſs theee be an Ouſter alſo of the Freehold. ——— And. 154. pl. 184. Hill. 27 Eliz. S. P. cites 41 E. 3. 40. and 5 E. 4. 6.

42. Note for Law, if *Tenant at Will, or at Sufferance, makes Feoffment in Fee*, he is a Diſſeiſor, viz. the Tenant at Will, by making of the Feoffment. Br. Diſſeiſin, pl. 64. cites 3 E. 4. 17.

43. Where the *King enters* into my Land *without Title*, the *Franktenement remains in me.* Br. Diſſeiſin, pl. 65. cites 7 E 4. 19.

44. If *Tenant at Will or for Years makes a Feoffment* he is a Diſſeiſor by the Common Law, and the Statute of Weſtm. 2. cap. 25. *Quod vivente altero eorum* is only a Recital of the Common Law. Br. Diſſeiſin, pl. 66. cites 10 E. 4. 18.

45. If *Tenant at Will, or* Tenant *by Sufferance* at Will, *make a Leaſe for Years*, this is a Diſſeiſin to the firſt Leſſor, and the Tenant at Will thereby gains Franktenement; By all the Juſtices. Br. Diſſeiſin, pl. 68. (67.) cites 12 E. 4. 12.

46. If *an Infant makes a Leaſe for Years*, and the *Leſſee enters*, the Infant ſhall have Aſſiſe; Per Brian, and affirmed by Huſſey, Fineux, and Frowicke. Br. Diſſeiſin, pl. 63. cites 9 H. 7. 24

47. *And* if a Man makes *a Leaſe by Dureſs*, and the *Leſſee enters*, the Leſſor ſhall have Aſſiſe. Br. Diſſeiſin, pl. 63. cites 9 H. 7. 24.

48. *But* if an *Infant makes a Feoffment and* makes *Livery*, the Infant ſhall not have Aſſiſe. Br. Diſſeiſin, pl. 63. cites 9 H. 7. 24.

49. *So* of *Feoffment and Livery by Dureſs*, the Feoffor ſhall not have Aſſiſe. Br. Diſſeiſin. pl. 63. cites 9 H. 7. 24.

50. *But* if the *Infant, or a Man in Priſon, makes Letter of Attorney to deliver Seiſin*, there they ſhall have Aſſiſe. Br. Diſſeiſin, pl. 63. cites 9 H. 7. 24.

51. *But* where a Man *leaſes for* Term de *auter Vie, or* for *Years, and Ceſty que Vie dies, or the Term expires*, the Leſſor *ſhall not have Aſſiſe againſt the Occupier without Entry in Fact.* Br. Diſſeiſin, pl. 63. cites 9 H. 7. 24. per Brian, and affirmed by Huſſey, Fineux, and Frowike; quod fuit conceſſum per tot. Cur. and Brooke ſays it ſeems to be good Law.

52. Leſſee for Life makes Deed of Feoffment, and delivers it, and makes Letter of Attorney to A. who *enters and makes Livery accordingly*; Adjudged that the *Attorney* is a Diſſeiſor. 4 Le. 7. pl. 29. 26 Eliz. B. R. King v. Cotton.

53. If a *Wife grants a Rent-Charge*, or makes a *Lease*, and the *Grantee enters*, this is a Disseisin; Arg. Goldsb. 13. pl. 13. Pasch. 28 Eliz.

54. Where a Man has Possession of Lands, his Continuance therein cannot gain to him any Interest, or increase his Estate, without some other Act done of later Time. If the Guardian *continues in Possession* after the full Age of the Heir, he is not a Disseisor, nor has any greater Estate in the Lands. And upon the Book of 21 E. 3. 2. this Case was collected; The Tenant of the King dies, his Heir within Age; a Stranger intrudes; the Heir at full Age sues his Livery out of the King's Hands; the Intruder dies in Possession. The same Descent shall not take away Entry. 2 Le. 147. pl. 182. Trin. 30 Eliz. B. R. in Case of Berry v. Goodman.

55. If *Copyholder in Fee* dies seised, and the Lord *admits a Stranger* to the Land who enters, he is but Tenant at Will, and not a Disseisor to the Copyholder who has the Land by Descent, because he comes in by the Assent of the Lord &c. 3 Le. 210. pl. 274. Trin. 30 Eliz. B. R. Anon.

56. Woman Tenant in Tail marries; Husband makes Feoffment in Fee and dies; *Wife without any Entry made lease for Years.* The Freehold is not reduced without Entry. Le. 122. pl. 165. Trin. 30 Eliz. B. R. Page v. Jordan.

58. *General Entry* amounts to a Disseisin. As if *A. makes Lease* for Years *of the Land of B.* Lessee enters by Force of that Lease; now Lessor *without any Entry* is a Disseisor. Le. 122. pl. 165. Trin. 30 Eliz. B. R. Page v. Jordan.

59. If *Tenant at Will, or* for *Years, or at Sufferance, make a Lease for Years* this is a Disseisin, and a Tenant at Will doth thereby gain a Freehold, and claims a greater Estate than he ought; Per all the Justices. Ow. 28. Rouse's Case.

But if *Lessee at Will makes a Lease for Years to commence in futuro*, it is not a *present Disseisin.* Noy 56. in Case of Cooper v. Columbell.

60. *Lessee Pur auter Vie holds over* after the Death of Cesty que Vie; He is only Tenant at Sufferance, and not Disseisor, and has no Fee. Ow. 27. 29. Rouse's Case.

But if he holds over against the Will of his Lessor, then he is a Disseisor. 2 Le. 45. pl. 59. Hill. 29 Eliz. B. R. Arg. in Case of Rouse v. Artois, S. C. cites 10 E. 4.

So if he does act after such Continuance of Possession contrary to the Will of his Lessor, he is a Disseisor. Ibid. cites S. C.

61. A *Copyholder of Inheritance* of a Manor in the Hands *of the King is ousted* [by J. S.] It was held in such Case, that he [J. S.] has not gained any Estate so as he may make a Lease for Years, upon which his Lessee may maintain Ejectment, but he has only a Possession against all Strangers. 3 Le. 221. pl. 294. Pasch. 30 Eliz. B. R. Anderson v. Hayward.

4 Le. 30. pl. 84. S. C. in totidem Verbis. —— But if a *Stranger enters upon the King's Farmer*, he by such Entry hath gained the Estate for Years, and if he makes a Lease to another, his Lessee may maintain Ejectment. 3 Le. 206. pl. 265. Pasch. 30 Eliz. in the Exchequer. —— It was said by Bacon, the King's Solicitor, to be adjudged, 40 Eliz. in the Exchequer, that where *the King made a Lease for Life, and the Lessee was ousted by a Stranger*, that the same should be said a Disseisin of the Particular Estate contrary to the common Ground, viz. That a Man cannot be disseised of a less Estate than of a Fee-Simple.

62. If *Conusor of a Fine* sur Conuzance de Droit come ceo &c. *continues Possession*, he is a Disseisor, and not Tenant at Will or Sufferance, and a Præcipe lies against him. Goldsb. 82. pl. 24. Hill. 30 Eliz.

63. If

63. If *Tenant pur auter Vie is disseised and dies*, yet he remains a Disseisor, and the Occupancy does not qualify such Disseisin; said Arg. 2 Le. 121. pl. 167. Mich. 33 Eliz.

64. *A. seised* of Land *makes a Feoffment* thereof *to B, upon Condition to convey it to A. for Life*, Remainder *to the eldest Son of A. in Fee. A. takes the Profits, and makes a Lease* of the Land *to C. for Years*, and yet *continues the Possession* in himself. B. acknowledges a Statute to a Stranger. The Years expire. A. makes a Feoffment of this Land with Warranty to his second Son. B. enters in the Life of A. and infeoffs the elder Son. This Feoffment was good and lawful, and so adjudged and affirmed in Error. Resolved, That A's taking the Profits, and making a Lease for Years, was a Disseisin to B. aud suspended the Condition. Cestuy que Use at Common Law, or *Cestuy que Trust*, at this Day, *takes the Profits*; it is not a Disseisin; for the *Feoffee consentit tacendo*, and in the principal Case there was neither Use nor Trust, but an Estate passed upon Condition. Jenk. 253. pl. 44.

65. A. *Tenant for Life*, the Remainder *in Fee to B.—A. made a Lease for Years to* J. S. The *Lessee entered. A. granted* the Tenements *to C. habendum from* the Feast of *Michaelmas following for Life. J. S. attorns. C. enters, and makes a Lease at Will, to whom A. levied a Fine* come ceo &c. *B. entered.* In this Case it was resolved, that when C. entered by Colour of the Grant, he was a Disseisor. 2 Rep. 55. b. the 3d Resolution, Mich. 39 & 40 Eliz. in Buckler's Case.

67. A Disseisin *is* when one enters intending to usurp the Possession, and to oust another of his Freehold. Cro. C. 303. cites Co. Litt. 153. b.

68. If *Tenant at Will grants over his Estate* to another, and the *Grantee enters*, he is a Disseisor, and the Lessor may have an Action of Trespass against the Grantee, for although the Grant was void, yet it amounted to a Determination of his Will. Co. Litt. 57. a.

This Case is questioned, 3 Mod. 150. and says, that it is not known what Ground Lord Coke had for such Opinion, that the Year Books quoted in the Margin will not warrant it; for they are in no Sort parallel; that the Case in 27 H. 6. 3. is no more than that Tenant at Will cannot grant over his Estate, because he has no certain or fixed Interest in it, and much to the same Purpose is the Book of 22 E. 3. there cited.

69. If *Bargainor after Inrolment* continues Possession, he is a Disseisor; for the Statute transfers the Franktenement to the Bargainee. Noy 106. Bellingham v. Alsop.

70. When the *Lessee* by his own Act or Sufferance *does a Thing* in alteration of the Possession, of which by common Intendment the *Lessor* cannot have or take Notice, there the Law will not prejudice the Lessor, so as to make it a Disseisin. Arg. Brownl. 230. Mich. 11 Jac. in Dame Pett's Case.

71. If *A.* be *seised of a great Close*, where &c. and a *Stranger enters and occupies Part* of the Close, yet notwithstanding *A. continues the Possesion of the Residue.* The Question was, Whether this shall preserve his Possession in the Residue and he shall be judged to be in Possession of that because it is an intire Thing? Haughton was of Opinion that it was a Disseisin, and Doderidge said it would be mischievous if it should. Brownl. 230. Mich. 11 Jac. Petts's Case.

72. Father dies, the *eldest Son beyond Sea*, the Youngest may enter; But if he keeps out his Brother after his *Return*, he is now Disseisor Per Doderidge J. Palm. 416. Pasch. 1 Car. B. R. Mayo v. Strumpling.

Such * Entry is a Disseisin though he continu'd his Possession after the Commencement of the Term. Lev. 45 Hennings v. Brabason.——Clayt. 27. Metcalf v. Stavely.——8 Mod. 53. Sheers v. Lammas, but no Judgment.——But adjudg'd, 54 Mackdonald v Weldon; That it is no Disseisin where the Continuance in Possession was † by the *Consent of Lessor.*——If there was any Agreement or Assent that the Lessee should enter it cannot be any Disseisin. Arg. Le 296. in Case of Crisp v. Golding.—— And if *Rent incurrs afterwards*, Debt lies for the Lessor on the Privity of Contract. Cro E. 169. Alexander v. Dyer.——For the Lessee cannot destroy the Contract unless he makes a Feoffment. Per Jones J. Godb. 384. pl. 472. Pasch. 3 Car. B. R. Green v Moody. —— He hath not but for Years in respect of his Claim. See Godb. 385. in Case of Green v. Moody.

* Cro. E. 766. in Case of Douglass v. Shank.

† Cro. E. 906. Waller v. Campion.

73. *Entry of Lessee by Deed for Years before the Term* is no Disseisin, unless an Expulsion is alleged. Cro. J. 684. pl. 2. Hill. 21 Jac. B. R. Brookbank v. Taylor.

Litt. S. 588, 589. S. P.

74. If a Man receives my Rent, it is at my Election if I will charge him with a Disseisin, by bringing an Assise or other Action, or have an Account. Cro. C. 303. in pl. 6. Pasch. 9 Car. B. R.

75. There were *two Tenants in common of an House*, and *one of* them *nailed up the Doors*, and made up a Wall against the House *to prevent the others getting into the House*, and this was resolved no Disseisin, and so the Jury was discharged. All. 8. Pasch. 23 Car. B. R. Water's Case.

2 Le. 121. pl. 167. Mich. 33 Eliz. in the Exchequer. Arg. S P.

76. Lease dated 24 June to commence a Die Datus, *Lessee enters the same* 24 *June*, He is a Disseisor. Sid. 8. pl. 3. Mich. 12 Car. 2. C. B. Goodgaine v. Wakefield.

77. *Lease by Cesty que Trust* to T. is no Disseisin but only at the Election of the Trustee, but it is good between Lessor and Lessee at least. Keb. 24. pl. 71. Pasch. 13 Car. 2. B. R. in Case of Thorn v. Burton.

Two Tenants in comcom of an *Advowson* one alone presents, yet at the next Avoidance they may join, and if they are disturbed, Quare impedit lies as in the Case of Coparceners. Quære. And. 63. Harris v Nicholls —— Cro. E 18. S. C. per 3 J. makes a Difference between Grantees of Copaceners, and meer Tenants in Common, that in the first Case an Usurpation of one shall not put the others out of Possession; but that perhaps would be otherwise in the last, unless they were such as derived their Estates from Coparceners, and yet 22 E. 3. 9 is that between Strangers in Blood or where two make Composition to present by Turn, if one usurp upon the Turn of the other, this shall not put him out of Possession, but Anderson doubted.

78. A Man cannot be disseised of an *undivided Moiety.* 2 Salk. 423. pl. 10. Hill. 1 Ann. B. R. Reading v. Royston.

79. If a *Lease* be made *to A. which in Truth determined before it began*, and *A. leases to B.* the same Land *rendring Rent*, and for Rent arrear *A. distrains*, B. brings Trespass, and A. avows, and in the Pleadings of A. the Determination of the Lease to A. appears, whereupon B. insisted that A. had failed in his Title, and that the Lease to A. failing, the Lease by A. to B. must fail also. But it was answered, that if B. has failed in deriving to himself a lawful Ability to make a Lease to B. then the Consequence will only be that that *Entry* which A. set forth to be *Virtute of such Lease* must be taken to be a Disseisin, and *a tortious Fee Simple sufficient to support the Lease.* See 10 Mod. 265. Mich. 1 Geo. B. R. Potter v. Pinkney.

(C. 2) What is a Disseisin. Act in Law.

1. IF a Man *recovers Land by Default against a Feme Covert* this is a Disseisin, and she and her Baron shall have Assise, and if the Baron dies the Feme shall recover by Assise, and if Scire Facias be sued upon such Recovery by Scire Facias the Feme shall extort the Execution; Per Trench, which was denied because the Judgment stands in Force, and Execution is awarded of Damages, et quod habeat corpus coram Rege at a certain Day. Br. Error, pl 86. cites 24 E. 3. 24. 43. But Brooke says, Quod Mirum, because it seems that the Matter is Error.

2. In Assise if the *Plaintiff makes Title*, and the *Defendant counterpleads it*, the Assise shall not inquire of the Seisin and Disseisin (as was touch'd by the Court) if they find the Title for the Plaintiff, but inquire over of the Damages only; For the Defendant *is a Disseisor by his Counter-plea of the Title of the Plaintiff*, quod nota, and the Title was found for the Plaintiff and he recover'd. Br. Disseisin, pl. 47. cites 27 Ass. 65.

3. In Assise, because the *Tenant had confessed Estate in the Plaintiff, and pleaded in Bar* that which was adjudg'd no Bar, the Assise was awarded in right of Damages, and he adjudg'd a *Disseisor by his Counter-plea*, and was taken, quod nota. Br. Disseisin, pl. 48. cites 28 Ass. 21.

4. An *Infant* shall not be adjudg'd a Disseisor *by his Conusance or Nient Dedire*, and therefore when he had pleaded that Ne unques * Accouple against the Plaintiff, and this is certified against him, the Assise was taken in point of Assise, and found for him, and the Plaintiff barr'd, quod nota. Br. Disseisin, pl. 52. cites 28 Ass. 52.

* Original is (Accompt)

5. A Man *granted a Rent and died before Attornment*, and after the *Tertenant paid the Rent to the Grantee*, and he received it, and *the Heir of the Grantor brought Assise against the Pernor of the Rent*, who *counterpleaded the Assise by the Grant and Attornment*, and it was found as above, and by Judgment the Plaintiff recover'd, and the *Pernor adjudged a Disseisor for the Counter-plea of the Assise without Title*, quod nota. But *if the Pernor* above *had not counterpleaded the Assise* he had not been a Disseisor by the Receipt of the Rent, where the Tenant paid him gratis, *but* there *the Tenant is a Disseisor* as it seems. Br. Disseisin, pl. 61. cites 40 Ass. 19.

(C. 3) Disseisin with Force. What is.

1. MOWING *the Land*, *Fishing*, *Cutting* &c. which cannot be done sine Manu Opere are Disseisins with Force and Arms; Per Wilby. Brooke says, Quære, For they are clearly Disseisins, but *Quære of Force*. Br. Disseisin, pl. 33. cites 11 Ass. 25.

2. Lord and Tenant, and the *Lord came to distrain* for the Rent, and the *Tenant would not suffer him to enter the House to* distrain, *but Interrupted him with Force*, and therefore he was adjudged a Disseisor. Br. Disseisin, pl. 53. cites 29 Ass. 49.

3. A Disseisor made Disseisin but not with Force, and by examining it appeared that *the Disseisor had cut Wood*, but this was *after his first Entry*, and notwithstanding this he was adjudged a Disseissor with Force and Arms, Quære. Br. Disseisin, pl. 55. cites 30 Aff. 50.

4. If a Man levies my Rent of my Tenant by *Coercion of Distress*, this is a Disseisin with Force and he shall go to Prison, quod Nota Bene, and yet the Tenant might have thereof Trespass, for it is a double Tort. Br. Disseisin, pl. 62. cites 43 Aff. 9.

5. *Two* may be *Disseisors*; and the *one with Force*, and *the other not*, As if I command one to make a Disseisin and he makes a Disseisin with Force, and also if one enters with Force to my Use, and after I agree he is a Disseissor with Force and I am not so, and those Cases will answer the Books of Assises, for in those Cases they were present but in these not, and so I hold that he which is *present when Force is made*, is a Disseisor with Force; Per Anderson. Gouldsb. 42. Pasch. 29 Eliz. in Case of Dickley v. Spencer.

(D.) *What Person* may be a Disseisor.

* Br. Disseisin pl. 67. (66) cites S. C. —— Fitzh. Disseisin, pl. 3. cites S. C. —— F. N. B. 179. (G) S. P. —— See (F.) pl. 3. &c.

1. A Feme Covert **shall not be a Disseisoress** by the Act of the Baron. 7 E. 4. 7. b. * 12 E. 4. 9. b.

Br. Disseisin, pl. 43. cites S. C.

2. In Assise the *Father made Feoffment in Fee upon Condition and died*, having *two Daughters*, the *one of full Age* and the *other an Infant*, and the *eldest thinking the Condition broken*, *which was not* broken, *entered claiming for her and her Sister* who was an Infant; she of full Age is *Disseisoress* only, and the other who is an Infant not, for nothing vested in her; Per Skipwith. Br. Ent' Cong. pl. 60. cites 26 Aff. 39.

3. If my *Tenant pays* his *Rent to a Stranger without Coertion*, he alone is Disseisor, and *if by Coertion* both are Disseisors. Br. Assise, pl. 455. (454) cites 23 H. 3. and Fitzh. Assise 439.

‡ But they did not assist in making of the Ditch, 8 E. 3. 39. 30. pl. 3.

4. Assise *by making of a Ditch by the Defendant* where his Servants came in Aid, but they did not ‡ manure the Land, and yet they were Disseisors, Quod Nota. Br. Assise, pl. 448. (447) cites 8 E. 3. and Fitzh. Assise 145.

5. An *Infant purchased*, and *one as his Guardian takes him and made Feoffment and died*, and the *Feoffee was adjudged a Disseisor* by the Statute of *Westminster 2. cap. 25.* For living either of them the said Writ shall hold Place, and therefore the taking of the Infant only as Guardian is no Disseisin, Quod Nota, by Judgment. Br. Assise, pl. 449. cites 8 E. 3.

6. A man *recovered against him who had nothing*, *and infeoffed B.* and one C. deliver'd Seisin, and the Assise was brought against B. and C. and the Plaintiff recovered, the Feoffor not being named; and so see the *Attorney who delivered Seisin was a Disseissor.* Br. Disseisin, pl. 27. cites 10 Aff. 22.

Br. Disseisin, pl. 32. cites

7. In Assise *N. and A. his Feme were seised* and *leased to W. and his Heirs for 17 Years, W. died within the Term, and P. his Son and Heir entered*

entered and levied a Fine to M. who rendered to P. and K. his Feme in Fee, and *P. died*, and *N. died*; the *Term expired*, and *A.* who durst not approach in the Life of N. *offered now to enter*, and *K. disturbed him*, and the said *A. brought Assise against K.* and recovered and Damages to the Time of the Disturbance; for K. was no Disseisor till the Disturbance; for she was Covert before, and *P. was Disseisor alone till K. was Sole and made the Disturbance.* Br. Assize, pl. 172. cites 11 Ass. 21.

S. C. Brooke says, Et sic Vide, that *K made no Disseisin till the Disturbance.*

8. A *Villein made a Feoffment* of his Land which he held in Villeinage, the *Feoffee* is no Disseisor; Per Cur. Br. Assise, pl. 454. cites 20 E. 3.

S. P. Br. Disseisin, pl. 96 cites 20 H. 3. and Fitzh. Assize 432.

9. Assise *against the Baron and Feme and W. N—W. made Default*, and the Assise was awarded against him by Default, the *Baron and Feme pleaded Record in Bar of Assise, which was denied*, and they were *adjourned*, at which Day the *Baron made Default*, and the *Feme was received* notwithstanding the Statute of Westminster 2. cap. 25. Quod habeantur pro Disseisitoribus absque Recognitione Assisæ. And so see that *Feme Covert by Reason of the Receipt is not bound by it to be a Disseisor*; for it seems to be the Act of the Baron. Br. Assise, pl. 186. cites 13 Ass. 1.

Br Coverture, pl. 55. cites S. C.

10. In Assise a Man *leased Land for Life*, *rendering Rent*, and *went beyond Sea*, the *Tenant for Life died*, and *T. N. counselled H. W. the Heir of the Lessor to enter*, *who entered and enfeoffed P.* And the *Lessor came and would have entered*, and *P. disturbed him*, and he brought Assise against P. and the Counsellor, and omitted him who entered, and the Plaintiff recovered, for the *Counsellor is Disseisor*, and so it is sufficient if Disseisor &c. be named in the Writ, quod Nota. Br. Assise, pl. 193. cites 14 Ass. 12.

Br. Disseisin, pl. 37. cites S. C. and 17 Ass 14. accordingly, where the Counsellor was awarded to Prison; for the Disseisin was Vi et Armis. —— Br. Disseisin, pl. 40 cites 17 Ass. 14 —— S. P. and so of him who commands. Br. Disseisin, pl. 45. cites 27 Ass. 30.

11. In Assise, the *Tenant vouched Record and failed* at the Day, he is a Disseisor by the Statute. Br. Assise, pl. 202. cites 15 Ass. 16.

12. In Assise, the *Father made Feoffment in Fee upon Condition and died*, having *two Daughters*, the *one of full Age*, and the *other an Infant*, and the *Eldest thinking the Condition broken*, *which was not* broken, *entered*, *claiming for her and her Sister* who was an Infant, she of full Age is *Disseisoress* only, and the other who is an Infant not, for nothing is vested in her; Per Skipwith. Br. Ent. Cong. pl. 60. cites 26 Ass. 39.

Br. Disseisin, pl. 45. cites S. C.

13. If one *enters claiming as Guardian* of the Body and Land where he had no Right, and after devises over the Wardship, such *Devisee* is a Disseisor as well as his Grantor. Br. Disseisin, pl. 85. cites 28 Ass. 11. but adds quod mirum est! for that he was not the first who entered, but the Devisee of him.

14. Assise *against an Infant who pleaded Record and failed* at the Day, yet he may plead other Matter. and shall not be a Disseisor notwithstanding the Statute wills that they shall be taken for Disseisors, & concord' 33 E. 3. and there per Finch the Assise shall be at large; Quod quære. Br. Assise, pl. 460. cites 36 E. 3.

15. *A. has Right to recover in a Formedon against B.* Tenant of the Land. *A. by Covin* with C. *causes C. to disseise B.* to the Intent that C. should make Default in a Formedon against him, and *that A. should recover by Default.* A. recovers the Land against C. accordingly by this Covin, by Default, or Confession. A. enters. He is not remitted. B enters, and A. ousts him. Resolved, by all the Sages in Parliament, that

that this Covin makes A. a *Disseisor of his own Land.* 3 Rep. 77. Farmer's Case. Coke has many Cases to this Effect. Fraus & Dolus nemini patrocinentur. Jenk. 46. pl. 88. cites 41 Aff. 28.

16. *Lessee for Life is disseised.* He in the *Reversion ousts the Disseisor.* The Disseisor brings an Assise against him; and it well lies during the Life of Lessee for Life. Jenk. 52. pl. 99. cites 44 Aff. 35.

17. Assise against *Baron and Feme*; they *pleaded in Bar and confessed an Ouster*, and the Plaintiff traversed the Bar, and after the *Baron made Default*, and the *Feme was resceived and pleaded the same Plea*, and the Plaintiff traversed it, and the Assise found for the Plaintiff, and that he was seised and disseised, but that there is not any Disseisor named in the Writ. Digg. said the Baron by his Plea confess'd an Ouster, and the Feme has maintained the same Plea, and so Disseisor by Confession; Per Tank. the Assise is not taken upon the Plea of the Baron, and *when the Feme was received the Baron was out of Court*, and his Plea nothing of Record to prejudice his Feme, and a Feme Covert cannot be said a Disseisor by her Plea, & concord' Belke, & adjornatur. Br. Assise, pl. 24 cites 44 E. 3. 23.

18. If *Tenant for Years*, or Guardian, *aliens for Life, the Remainder* over *in Fee*, he in *Remainder* who *enters after Death of Tenant for Life is a Disseisor* as well as the Lessee for Life; for all is but one and the same Estate in Law. Br. Ent. Cong. pl. 27. cites 50 E. 3. 21.

19. If the *King enters* by Title, or *without Title*, the *Party cannot enter upon him*, nor is he a Disseisor; and this seems to be, *where he enters without Record or Office this is without Title*, but there *he shall sue by Petition*, nor the King in this Case is not a Disseisor. Br. Ent. Cong. pl. 95. cites 3 E. 4. 24, 25.

Where the *King* enters by a void or insufficient Office, or enters without Title, and grants the Land by Patent, Assise lies against the Patentee; for the King cannot be a Disseisor, and therefore the *Patentee* is Disseisor; for insufficient Office does not give Seisin to the King. Br. Office devant &c. pl. 42. cites 7 E. 4. 16. and 22. ——— Br. Disseisin, pl. 65. cites 7 E. 4. 17. S. C. & S. P.

20. The *King cannot* be a Disseisor. Br. Office devant &c. pl. 42. cites 7 E. 4. 16. and 22.

21. If a *Monk disseises* a Man *to the Use of a secular Man*, this is no Disseisin; For he has no Capacity to take Franktenement, and it seems that though the secular Man agrees afterwards he has no Franktenement; Per Fineux Ch. J. Keilw. 91. b. pl. 3. Trin. 22 H. 7.

Br. Discent, pl. 15 cites 21 H. 7. 35. S. P. per Fineux. —— 10 Mod. 125. Arg. says that the Authorities are many that a Monk may be a Disseisor; but that it particularly appears to be so for this, that a Writ of Assise lies against a Monk, and the Judgment in such Writ is, Quod recuperet Seisinam, which supposes a Monk to have a Freehold.

22. If I disseise one *to the Use of the Dean and Chapter*, they cannot agree but by Writing. Br. Corporations, pl. 34. cites 14 H. 8. 2. 29.

23. The *King cannot be disseised*, but all Intruders are but Trespassors to him, and if he will he may charge them by Actions of Account, as Bailiffs, yet he may if he will bring a Writ of Right of Advowson; Per Hobart Ch. J. Hob. 322. Pasch. 17 Jac. in Case of Elvis v. York (Archbishop) & al'.

24. An *Infant* cannot be a Disseisor. Arg. Godb. 364. pl. 456. Trin. 2 Car. B. R. in Case of Ashfield v. Ashfield.

25. If an *Infant makes Letter of Attorney to make Livery* and Seisin, and the Attorney makes Livery accordingly, he is a Disseisor. Arg. Godb. 387. in pl. 474. Pasch. 3 Car.

(E) By *Agreement.*

1. As if the Baron disseises another to the Use of the Feme, the Feme is not a Disseisoress by this Act of the Baron. 12 E. 4. 9. b.

Br. Disseisin, pl 67. (66) cites S. C.—Fitzh. Disseisin, pl 3 cites S C.

2. So it shall be though the Wife agrees to it during Coverture, for her Agreement is void.

3. If one Man disseises another to the Use of a Feme Covert, if the Feme agrees during the Coverture, yet she is not any Disseisoress, for her Agreement is void.

4. So if the Baron agrees to the Disseisin, this settles an Estate in the Feme; but she shall not be a Disseisoress by the Agreement of the Baron. 12 E. 4. 9. b.

Br. Disseisin pl. 67 (66) cites S C.—Fitzh Disseisin, pl 3. cites S. C.——Br. Agreement, pl. 4 cites S C.

5. The same Law if both agree, yet the Feme is not a Disseisoress. Contra, 15 E. 4. 15. b. admitted.

Br. Disseisin, pl. 11 (12) cites S. C. but not S. P.——If a Man *disseises another to the Use of Baron and Feme*, and the *Baron after agrees*, the Franktenement by this is in him and his Feme, but thereby the Feme shall not be a Disseisoress. Br. Disseisin, pl. 67. cites 12 E. 4. 9.

6. But after the Death of the Baron, if the Feme agrees to the Disseisin she shall be a Disseisoress. 12 E. 4. 9. b. Curia.

Br. Disseisin, pl. 67 (66) cites S C.—Fitzh. Disseisin, pl. 3. cites S. C.——Br. Agreement, pl. 4. cites S. C.

7. If a Man disseises another to the Use of an Infant, yet the Infant shall not be a Disseisor by his Agreement thereto. Dubitatur, 2 E. 3. 32.

By Disseisin to the Use of an Infant, the Infant is not Disseisor nor Tenant without actual Entry; For *Agreement of an Infant* to a Tort does not make him a tort Feisor et adjournatur Br. Assise, pl. 46. cites 3 H 4. 16. in the written Book —— Br. Disseisin, pl. 5, cites S C. Brook says and so see that he who may agree is a Disseisor by his Agreement, as well as Tenant. Br. Disseisin, pl. 5. cites 3 H. 4. 17. S. C.

It was adjudg'd in Writ of Error that if two disseise *another to the Use of an Infant*, and the Infant agrees to it, yet he is not Disseisor nor Tenant; For agreement of an Infant is void, *But if he enters* then he is by this Tenant, quod nota. Br Agreement, pl. 9 cites 3 H 4. 17. in the written book. —— Brooke says and so see that the Franktenement shall not be adjudg'd in him by the Entry of the two to his Use, till the Infant himself agrees to it by his actual Entry. Ibid.

8. If the *Bailiff of an Infant, who lies in a Cradle*, disseises a Man to the Use of the Infant, the Bailiff only is a Disseisor; and if an Infant commands a Man to enter into another's Land which he does, he who enters only is Disseisor. Br. Disseisin, pl. 16. cites 2 Ass. 2.

9. If a Man makes *Disseisin of Common* &c. and *J. N. comes in Aid* of him, J. N. is a Disseisor. Br. Disseisin, pl. 21. cites 8 Ass. 18.

10. If a Man *grant a Seigniory with Condition of Payment*, and Non-payment, and *the Grantor tenders the Money according to the Condition*, and the *Grantee refuses it*, and after the *Tertenant pays the Rent of the Lord to the Grantee*, and the Grantor brings Assise, this shall be against the Tertenant and the Grantee; For the Grantee is Tenant of the Rent, by the Receipt by him had after the Tender according to the Condition. Br. Disseisin, pl. 82. cites 15 Ass. 22.

11. In

11. In Assise of Rent it was found that the *Rescous* of the Distress taken by the Plaintiff was made *by a Stranger*, to which Rescous the *Tertenant named in the Assise agreed*, and therefore the Assise well brought against him only, and he a Disseisor by the Agreement. Br. Disseisin, pl. 38. cites 15 Ass. 11.

12. Land *descended to an Infant*, and one *J. N. enter'd, claiming Ward only, and devised it to W. N. and died*, and *W. N. enter'd* and the Infant brought Assise against him, and *he was awarded a Disseisor as well as his Grantor.* Quod Mirum; For he was not the first who enter'd, but the Devisee of the Disseisor. Br. Disseisin, pl. 85. cites 28 Ass. 11.

13. If a Man *does an Act in my Right where I have no Right*, there if *I agree thereto* after, I am a Trespassor. And by the same Consequence in other Case Disseisor by Agreement, as it seems. Br. Disseisin, pl. 99. cites 38 Ass. 9.

S. P. For all is but one and the same Estate. Br. Disseisin, pl. 3. cites 50 E. 3. 22.

14. Per omnes Præter Finchden; If *Tenant for* Term of *Years aliens for Terms of Life or in Tail the Remainder over*, and *the Tenant for* Term of *Life dies, or* if the Tenant *in Tail dies without Issue*, and he in *Remainder enters*, there he in Remainder is a Disseisor as well as he who alien'd, and this by the Statute of Westminster 2 cap. 25. For the *Entry of him in Remainder is an Agreement to the first Livery*; For the Statute of Westminster 2 cap. 25. wills Quod Vivente altero eorum locum habet Prædictum breve. Br. Diseisin, pl. 86. cites 43 Ass. 45. & 59; And adds Nota, That there are not so many of the Pleas in this Year.

Br. Assise, pl. 10. cites S. C.

15. If a Man enters into Land and makes Disseisin to my Use, and *takes the Profits to my Use*, this does not make me a Disseisor till I agree to it. Br. Agreement, pl. 10. cites 37. Ass. 8.

16. If I lease Land at Will, and *my Tenant at Will enters into the Land adjoining, claiming to my Use, and pastures the Soil, and cuts Wood, and cuts Oaks*, by which the Tenant of the Franktenement thereof *voids the Possession, and brings Assise*, and this Matter is found, but *the Lessor has nothing of the Profit*, but the Disseisee might have taken the Profits if he would, and that the Lessor *did not command his Tenant so to do.* But the Jury said, that they thought that forasmuch as the Lessor after he knew that his Tenant had so occupied, did not make him to make Gree to the Disseisee, that therefore the Lessee agreed to the Acts of his Lessee at Will. But per Cur. *this is no Agreement*, and therefore by Award the Lessor was no Disseisor; and from hence see clearly, that if there had been an Agreement, the Lessor by this had been a Disseisor, quod nota. Br. Disseisin, pl. 59. cites 37 Ass. 8.

S. P. Br. Disseisin, pl. 104.

16. If my *Bailiff disseises another to my Use*, and I agree to it after, I for this am a Disseissor; Per Clam. Br. Ejectione &c. pl. 8. cites 38 Ass. 9.

Br Disseisin, pl. 67 cites S. C.

17. Where Disseisin is made by the one to the Use of another, this *does not gain Franktenement to the other till the other agrees*, and by Agreement he is a Disseisor, and Tenant of the Franktenement; but *Agreement of the Baron* shall not make the Feme to be Disseisor, but contra, if *she agrees after the Death of her Husband.* Br. Agreement, pl. 4. cites 12 E. 4 9.

Kelw. 91. b. 92. a is a Quære of a Disseisin made by a Feme Covert to the Use of her Baron; Per Fineux.

18. If one who has not Capacity as *Feme Covert disseises another to the Use of her Baron, without his Assent*, the Franktenement is not in him, and Assent after does not make a Disseisin in him; but contra of an Assent before. Br. Disseisin, pl. 15. cites 21 H. 7. 35. Per Fineux.

It is regularly true that a *Feme Covert* cannot

19. Upon Evidence it was held by Anderson, That if a *Feme Covert ejects one*, and that afterwards the *Husband assents*, that yet the Husband is not an Ejector; for an Ejectment is made in an Instant, and has

has not a Continuance; otherwise of a Disseisin. Noy 52. 37 & 38 Eliz. Broth v. Archer.

be a Disseisoress *by her Commandment* or Procurement precedent, *nor by her Assent or Agreement subsequent*, but by her actual Entry or proper Act she may be a Disseisoress. Co Litt 357. b.

(F.) *By what Persons, and to whom* it may be made.

1. AN Infant of the Age of 18 Years may be a Disseisor with Force by actual Entry. 12 H. 4. 22. b.

2. An Infant may be a Disseisor by actual Entry. 3 H. 4. 17.

Br. Assise, pl. 46. cites 3 H. 4. 16. S C. ——— Br. Agreement, pl. 9. cites S. C. ——— Br Disseisor, pl. 5 cites S. C.

3. So may a Feme Covert by actual Entry. 9 H. 4. 6. * 12 E. 4. 9. b. Curia. 7 E. 4. 7. b.

* S. P. Br. Disseisin, pl. 67 (66) cites 12 E. 4 9. S. C. ——— Fitzh. Disseisin, pl. 3. cites S. C. ———Co. Litt. 357. b. S. P. ——— But without actual Entry she shall not. F. N. B. 179. (G)

4. But an Infant shall not be a Disseisor by Agreement to a Disseisin to his use. 3 H. 4. 17. 12 H. 4. 22. b.

Br. Assise, pl. 46. cites S. C. ——— Br. Agreement, pl. 9. cites S. C. ——— Br Disseisor, pl. 5. cites S. C.

5. If the Baron and Feme enter into Land in the Right of the Feme where she hath no Right, the Feme is not a Disseisoress. 9 H. 4. 6. See † 35 Ass. 5. Contra 28 Ass. 37 Curia, for this shall be taken to be the Act of the Husband only.

S. P. Br. Disseisin, pl. 67. cites 12 E. 4 9.— † Br. Assize, pl. 340. (339) cites S. C. ——Br Coverture, pl 41. cites S. C. —-Fitzh Assise, pl. 321 cites S C. but that is that the Writ abated by the not naming of the Feme.——Br. Assize, 287. (286) cites S. C. that where the Baron is dead after the Disseisin is made by them, the Writ shall abate; For the Feme has now lost the Name of the Feme, and in Assise there ought to be Disseisor and Tenant, Quod Nota.

6. If a Man takes a Distress for Rent issuing out of the Land of a Feme Covert, and the Baron and Feme make Rescous, they both are Disseisors. 21 E. 4. 53. Curia.

Br. Disseisin, pl 89 (88) cites S C, and Brooke says, Et sic Vide, that a Feme Covert may be Disseisor, Quod Nota bene.——— Ibid. pl. 70. (69) cites S. C. by Brian Ch. J. Quod fuit concessum.

7. If the Baron discontinues the Land of his Wife, the Feme being in Possession, and disagreeing to the Feoffment, claiming her first Estate, the Feme is a Disseisoress thereby. 21 E. 3. 6. b.

8. In Assise it was found that Land was *given to Baron and Feme in Tail*, the *Baron went out of the Country*, and the *Feme infeoffed O. who leased to the Feme for Life*, the *Baron died, and the Feme died without Issue*, and the *Donor entered*, and O. ousted him, and the Entry of the Donor adjudged lawful; For the Feoffment of the Feme was a Disseisin to the Baron, and by the re-taking of Estate she was remitted, and therefore the Reversion in the Donor, and his Entry lawful; Per tot. Cur. Br Remitter, pl. 17. cites 9 Ass. 20.

Br. Disseisin, pl 24 cites S. C. says it is a Disseisin to the Baron, and therefore a void Feoffment, and therefore the Feoffee only is a Disseisor, as it seems.

9. Assise

9. Assise against an *Infant* who *pleaded Release of the Plaintiff in Bar*, and it was admitted; and it was said there that by his Plea he *shall not be attainted Disseisor by Reason of his Infancy.* Br. Disseisin, pl. 26. cites 10 Ass. 1. & concordat the same Year, p. 13.

10. In Assise it was said, That before the Possession of the King none can make Disseisin to the Tenant of the Franktenement. But by the Reporter, if the *King be seised in Auter Droit* and *a Man abates upon the Possession of the King*, this is a Disseisin to the Tenant of the Franktenement; Quære. Br. Disseisin, pl. 56. cites 31 Ass. 1.

11. A Man cannot gain Franktenement by Entry *upon the King nor upon the Farmer* of the King, nor this cannot vest in him as a Disseisor nor by Disseisin. Br. Disseisin pl. 4. cites 2 H. 4. 7.

12. Where a Man *abates upon the Possession of the King in Land which he has in Ward*, yet the Franktenement remains in the Heir, by which he cannot devest the Possession out of the King &c.; Per Gascoign and Huls. Br. Disseisin, pl. 6. cites 8 H. 4. 17. & concordat H. 21 E. 3. fol. 1. 2. Brooke says, from hence it seems that a Man cannot be a Disseisor so long as his Termor remains upon the Land.

13. Assise against divers, who pleaded Nul tort &c. The Assise found that all the Defendants were Disseisors, but that one of them made the Disseisin with Force. Harper thought the Verdict not good, but Dyer and Weston e contra; for that the Force and Disseisin are two distinct Things; for Force is aided by the Statute, and is not incident to every Disseisin; for it should be inquired by the Assise if they, or any of them, had done the Disseisin with Force; and if Lessee for Years be re-ousted with Force, and he in Reversion brings an Assise, and the Disseisin is found with Force, yet the Force is not punishable; for the Force was to the Lessee for Years. Mo. 53. pl. 155. Pasch. 5 Eliz. Anon.

14. The *Queen as Dutchess of Lancaster* cannot be disseised; for tho' she be not seised in Jure Coronæ, yet it is in Seisin of the Queen, and cannot be taken from her in respect of her Person; Resolved. Ow. 15. Pasch. 36 Eliz. B. R. Rot. 41. Leigh's Case.

(F. 2) Disseisin by one, where it shall be said a Disseisin by others.

1. IF *two Sisters have Title of Action where their Entry is tolled*, and the *one enters for her and her Sister*, this does not make the other to be a Disseisor. Br. Disseisin, pl. 76. (75.) cites 14 E. 3. 3. and 42.

2. If one makes a *Disseisin to my Use without my Commandment with Force*, and *afterwards I agree* to the Disseisin, I am Disseisor, but all *the Force is only in the Coadjutor*; but *if he agrees specially to the Disseisin with Force*, then peradventure he shall be guilty of the Force also; Per Dyer and Weston. Mo. 53. in pl. 155. Pasch. 5 Eliz. Anon.

If A. disseise one to the Use of B. who knows not of it, and B. assents to it, in this Case till the Agreement A. was Tenant of the Land, and after Agreement B. is Tenant of the Land, but both of them be Disseisors; for Omnis Ratihabitio retrotrahitur & mandato equiparatur. Co. Litt. 180. b.

(G) What

(G) What *Person* may be a Disseisor.

To the Use of another.

1. A Feme Covert cannot make a Disseisin to the Use of her Husband. 8 H. 14. b. Curia (because though she gains an Estate by her Entry, yet she has not Power to dispose thereof to another, being Covert, as she ought if she could make a Disseisin to another use.) Contra. 21 H. 7. 35.

Br. Disseisin, pl. 15. cites S. C.

2. A Feme Covert cannot disseise a Man to the Use of a Stranger, for the Cause aforesaid. Contra 21 H. 7. 35.

Fol. 661.

A Feme Covert cannot disseise another but to the Use of another, for she herself cannot take any thing; but she may disseise one to the Use of another. Br. Disseisin, pl. 15. cites S. C.

3. But it seems a Monk may disseise a Man to the use of another, because he is not capable of an Estate to his own use. 21 H. 7. 35. admitted.

Br. Disseisin, pl. 15. cites S. C. —— Keilw. 91. b. pl 3. Trin. 22 H. 7. per Fineux, S. P. that it is no Disseisin.

4. A Corporation aggregate cannot make a Disseisin to the use of another. 8 H. 6. 14. b.

Br Corporations, pl. 24. cites S. C. by Cand. but it seems the contrary if one enters for them by Authority in Writing under their common Seal, where their Entry is not congeable.

5. If a Corporation aggregate disseises one to the use of another Man, they are Disseisors in their natural Capacity. 8 H. 6. 14. b.

Br. Corporations, pl. 24. cites S. C.

6. If a Man brings an Infant with him into the Lands of J. S. and there claims the Lands to the Use of himself and the Infant, yet the Infant is not any Disseisor, because he made no Claim. 26 Ass. 39. per Skipwith.

7. Trespass upon the 5 R. 2. The Defendant pleaded Bar by J. and his Feme, and gave Colour. The Plaintiff said, that before the said J. and his Feme any Thing had, *W. S. was seised in Fee and infeoffed the Plaintiff in Fee, who was seised, till by the Defendant disseised, to the Use of J. and his Feme, to which Disseisin J. and his Feme agreed* &c. Jenney said, that now he ought to plead that all three disseised him by reason of the Agreement; But Littleton J. said No; For there is a *Diversity where a Man is privy to the Disseisin at first, and where not*; for where I *command a Man to enter unlawfully for me*, both are Disseisors, and so it shall be pleaded; for *there the Franktenement is in me immediately*; *But* in the Case of the Disseisin to the Use &c. the Franktenement *is not in Cestuy que Use before Agreement*; Quod Nota. And so it seems that *he who agrees and was not privy before is Tenant only by his Agreement, but not Disseisor.* Contra of him who commands &c. Br. Disseisin, pl. 12. cites 15 E. 4. 15.

8. The *Demandant and others* in a Præcipe *did disseise the Tenant to the Use of the others*, and the Writ did not abate, for the *Demandant was a Disseisor, but gained no Tenancy* in the Land, for that he *was but a Coadjutor*. Co. Litt. 180. b.

9. A Man *disseises Tenant for Life to the Use of him in the Reversion*, and after he in the *Reversion agrees* to the Disseisin; It is said, that he in the Reversion is Disseisor in Fee, for by the Disseisin made by the Stranger the Reversion was devested, which (they say) cannot be revested by the Agreement of him in the Reversion, for that it makes him a Wrong-doer, and therefore no Relation of an Estate by wrong can help him. Co. Litt. 180. b. 181. a.

(H) Who shall be said no Disseisor *at the Election* of the Tenant.

1. If a Man enters into the Land of another, claiming as Guardian where the Land is not held of him, or where he ought to be Guardian, though he is a Disseisor at the Election of the Heir, yet the Heir may elect him to be no Disseisor. 28 Aff. 11. adjudged; for such Guardian after Entry granted the Ward over, and the Grantee entered, and he adjudged a Disseisor, and therefore the first Guardian was no Disseisor by Election, for if he was a Disseisor, the second Guardian could be no Disseisor to him.

S. P. and so if he enters claiming as Guardian by Nurture where he is not, and cites 49 E. 3. 10. 40 E. 3. Accompt, 35. and 32 H. 6. 2. and says, that many other Books are so; Per Jones, Berkley, and Crooke. Cro. C. 303. Pasch. 9 Car. —— S. P. Arg. Cart. 162.

2. If Lessee at Will makes a Lease for Years, this is a Disseisin at the Election of the Lessor at Will that hath the Fee, for if he disposes of the Land as if no Disseisin had been, then it is no Disseisin. P. 9 Car. B. R. between *Blunden and Baugh*, adjudged in a Writ of Error per Curiam; contra Richardson; and the Judgment given to the contrary in Banco by the Court against Harvy reversed accordingly. Intratur, Hill. 7 Car. B. R. Rot. 1106. where after the Lease for Years made by the Lessee at Will, the Lessee at Will and Lessor at Will joined in a Fine, and declared the Uses of a Fee, and adjudged good. This was for the Manor of Bleching ly, which concerned the Earl of Nottingham.

Cro. C. 302. 303. pl. 6. S. C. in B. R. and the Judgment in C. B. was reversed by three Justices, but Richardson Ch. J. e contra. And the Reporter adds a Nota fol. 166 at the End of the Case, that Sir Robert Heath Ch. J, of C. B. and Crawley J. Baron Denham and Baron Trevor agreed with this Judgment in B. R. and conceived, that it would be very mischievous if it should be adjudged otherwise., But Sir Humphry Davenport seemed to doubt whether the Lessee for Years ought not strictly to be taken for the Disseisor and Tenant. —— Jo. 315. pl. 3. Blundell v. Baugh. S. C. in. B. R. and the Judgment in C. B. reversed. ——Litt. Rep. 372. Vaugh v. Blundell, S. C. in C. B. adjornatur.—— Lat. 53 Jones J. said, that if Lessee at Will makes a Lease for Years, and the Lessee enters, there this is a Disseisin at the Election of him that has the Franktenement, and not otherwise; and cited the Case of Parsley [Powseley] v. Blackman, and cited Mich. 7 Car. Blundsden's Case adjudged in C. B. that Lessee for Years only was the Disseisor. ——— S. C. cited Cart. 162. Arg. as resolved that it is no Disseisin but at Election, and if it be a Disseisin, that the Tenant at Will is the Disseisor, and not the Tenant for Years. ——— 3 Mod. 197. cites S. C. held that the making the Lease was no Disseisin of the Freehold; For it was found in that Verdict, that he occupying at Will, and entering by his Father's [the Lessor's] Assent, the Lease was also intended to be made by his Assent.

3. And in the Argument of this Case, another Case was vouched to be adjudged between *Powsely and Blackman* accordingly. Tr. 18 Ja. Rot. 130. B. R.

4. But Judgment was given the 20 Jac. where after a Lease for Years made by Tenant at Sufferance upon a Mortgage, the Devise of the

The Case was, A Man *mortgaged*

the Mortgagee was adjudged good, and so no Disseisin at his Election.

Lands by Deed inrolled upon Payment of Money at the End of five Years, and by the Indenture it was *agreed that the Mortgagor should enjoy and take the Profit* of the Lands *in the Interim* The *Mortgagor made a Lease for six Years*; the *Lessee entered and surrendered his Interest to the Mortgagee*, at the Day *the Mony was not paid*; the Mortgagee without any Entry devised the Term and died Adjudged that the Devise was good, which it could not be if the said Lease was a Disseisin Nolens Volens to the Mortgagee. Jo. 316 Pasch. 9 Car. B. R. cited per Cur as adjudged in B. R. 5 or 15 Jac. Powseley v. Periman [Blackman] ——— Cro. J. 659 pl. 9. Hill. 20 Jac. B. R. the S. C. adjudged per tot. Cur. accordingly.——— 2 Roll Rep 241. 284. 285. S C. adjudged that the Devise was good; but the Reporter says that no Reason was given.——— Bridgm. 12. Ponesley v. Blackman, S. C. after many Arguments adjudg'd accordingly. ——— Palm. 201. S C. adjudged accordingly. ——— S. C. cited per Cur. Cro. C. 304. Pasch. 9 Car. B R.

5. If a Man enters into the Land of an Infant by his Assent, this is a Disseisin to the Infant at his Election; for the Infant cannot prejudice himself by his Assent. 11 E. 3. Ass. 87. adjudged.

Infant leases for Years, rendering Rent and Lessee enters, it is at the Election of the Infant to charge him in Assise, or bring Debt for the Rent, or accept the Rent at his full Age. Cro. C. 303. Hill. 9 Eliz. B. R. per three Justices, cites 1 E. 4. 6 and Ibid. 306. Richardson Ch J. agreed to this Cases

6. If A. be seised of Lands in Fee, and a Stranger enters upon him by Colour of a Lease for Years, which is void, and pays the Rent to him, this is not any Disseisin at Election; for if A. after covenants to stand seised to the use of himself in Tail, the Estate shall well rise. P. 6 Ja. B. *Molineux's* Case, per Curiam.

7. If A. seised in Fee makes a Deed of Lease, by which he demises it to B. habendum a Die datus for Life, with a Letter of Attorney in the Deed to make Livery, and reserving 6s. 8d. Rent, and the Attorney makes Livery the same Day of the Date, according to the Form of the Charter, and the Lessee enters, claiming it by Force of the Indenture and Livery, and pays the said Rent to the Lessor according to the Form of the Indenture; this is not any Disseisin to A. at his Election, though prima facie he was a Disseisor, yet inasmuch as (*) he claimed but a Lease, and paid his Rent accordingly, the Lessor may elect that he shall not be a Disseisor. Mich. 10 Car. B. R. between † *Ball and Wiat*, Intratur Trin. 9 Car. Rot. 514. upon a special Verdict for a Garden in Bristol. The Court seemed at first e contra; but after they gave a peremptory Rule for Judgment for the Plaintiff upon the Non-Attendance of the Defendant, by which they adjudged it to be no Disseisin at Election, where the Case was, That the Heir of the Lessor after the Lease made suffered a common Recovery of the Land upon a Præcipe brought against him without any Entry into the Land, and by Consequence it was adjudged, that this Recovery was good. But it seems that they adjudged it upon the last Point of the Recovery. Et P. 11 Car. B. R. between *Sir Kenelm Digby and Jordan*, per Curiam, upon Evidence at the Bar, resolved, That this is an absolute Disseisin, because the Lessee entered claiming his Estate for Life, and that it had been otherways if he had claimed as Lessee at Will.

† Cro. C. 388. pl. 21. S. C. ruled that if Cause were not shewn &c. Judgment should be entered for Fol. 662. the Plaintiff; For that the suffering a Recovery was an Estoppel to him and all under him to say that she was not Tenant of the Freehold.

8. If A. leases the Demesnes of a Manor for Years to B. and after assures a Jointure of the same Land to his Wife for her Life, and after aliens the Fee, and the Alienee enjoys the Rent by the Hands of the Termor, and after A. dies, and the Wife enters claiming her Jointure, and there keeps Court &c. and B. assents thereto, and attorns to the Wife, and pays to her the Rent; this is a Disseisin to the Alienee or not at his Pleasure, notwithstanding the Continuance of the Possession of the Termor. D. 2 El. 178. pl. 38.

9. In

9. In *Assise of Rent or Common*, be it in *Gross or Appendant*, a Man is in Seisin and out upon Disturbance made at his Pleasure; for he may chuse to take for Disseisin or not. Br. Seisin, pl. 17. cites 8 Ass. 4.

10. In Assise it was found that the *Plaintiff at full Age was disseised, and afterwards came upon the Land, and put his Foot within*, but *took no Profits*, and *the other ousted him*, and by Award he recovered Damages for the first Disseisin; the Reason seems to be inasmuch as it is at the Election of the Plaintiff if he will take this Matter for a Seisin or not, and the *Disseisor, who is a tortious Seisor, cannot plead it*; for this was found by Verdict at Large. Br. Disseisin, pl. 84. cites 26 Ass. 24.

Co. Litt. 55. a.

11. If one enters and *claims as Guardian in Socage*, or by *Nurture*; where he is not, the Infant may bring Assise, or charge him as Guardian, thereby admitting him to be in without Wrong. Cro. C. 303. cites 49 E. 3. 10. 40. E. 3. Accompt. 35. and 33 H. 6. 2.

12. If a Man *receives my Rent of my Tenant*, this is no Disseisin to me, but at my Pleasure; contra if I bring thereof Assise. Br. Disseisin, pl. 100. cites 15 E. 4. 8.

S. C. cited Jo. 317. per Cur.

13 If *Lessee for Years surrenders* his Estate to the Lessor, and *yet continues in Possession, and always after pays the Rent to the Lessor*, this was held not to be any Disseisin to the Lessor, but at his Pleasure. D. 62. a. pl. 33. Pasch. 38 H. 8. Pennington v. Morse.

14. *Lessor by his Bailiff discharged his Lessee at Will*, and neverthelefs he continues Possession and pays his Rent; it is at Lessor's Election to take him as Disseisor. Jo. 317. cites it as 2 Eliz. the Case of Hayman v. Hatch.

4 Le. 48. pl 126. S. C. cited per Coke in the very same Words.—And 134. pl. 184. Hill. 27 Eliz. Skipwith v. Conies, S. C. and states it that after the Father's Death *the Son likewise entered* Generally, *and paid the Rent*, and this was adjudged to be no Disseisin.——The Words (in Tail) are misprinted, and should be (at Will) and so they are in Anderson.

15. *Grandfather Tenant* in Tail [*at Will*] *Father and Son.* The *Grandfather died*; The *Father entered and paid the Rent to the Lessor, and died in Possession*; Adjudged that it was not any Descent. For the Paying the Rent explains by what Title he enter'd, and so he shall not be a Disseisor but at the Election of another; cited by Coke Arg. Le. 121. pl. 163 as adjudged in C. B. Skipwith's Case.

Le. 121. pl 163 S C. in totidem Verbis.

16. L. *Tenant in Tail leased for Years to J. S. who assigned over to P. the Plaintiff's Father. L. died. W. his Son entered upon P. who re-enter'd. W. without other Words demised the Lands to P. for Life* the *Remainder to Joan his Wife for Life*, the *Remainder to P.'s Son for Life with Warranty*, and a *Letter of Attorney to re-enter and deliver Seisin* accordingly. *P. died before the Livery executed*, and afterwards the *Attorney made Livery to Joan. W. died. E. the Son and Heir of W. entered on Joan* his Wife. Joan re-entered and leased to the Plaintiff, who upon Ouster brought an Ejectment. It was insisted that P. by his Entry was not a Disseisor but at the Election of W. for when P. accepted such a Deed from W. it appears his Intent was not to enter as Disseisor; and it was not found that P. had any Son and Heir at the Time of his Death, and if not then there was no Descent, and there is no Disseisin found, that P. expulit L. out of the Land; and Judgment was given against the Plaintiff. 4 Le. 48. pl. 126. Trin. 30 Eliz. B. R. Piers v. Leversuch.

Cro. E. 450. pl. 18. and Ibid. 585. pl. 15. Buckler v. Hardy. S C. adjudged but not on

17. A *Tenant for Life*, the *Remainder in Fee to B. A. makes a Lease for Years*, and afterwards *grants the Reversion to C. Habendum* Tenementa prædict. *from Midsummer next following for the Life of the Grantor.* After *Midsummer the Lessee for Years attorns*; *the Years expire*; *C. the Grantee enters and leases at Will to D. to whom A.* the Grantor *levies a Fine Come ceo. B. in the Remainder enters.* Resolved that when C. enters

enters by Colour of this void Grant he is a Disseisor; and a Diversity was taken between a Grant made by Agreement of the Parties, which stands not with the Rules of Law, and which never can by any subsequent Act (as by Livery or Attornment) be made good, and a Grant good at the Commencement, but to have its Perfection by Ceremony subsequent, as in the Case of a Charter of Feoffment if the Feoffee enters before Livery he is no Disseisor; for the Charter is good, and the Agreement of the Parties accords with the Law, and it may be made good by Livery subsequent. 2 Rep. 55. a. b. Mich. 39 & 40 Eliz. C. B. *Buckler's* Case.

this Point.—Mo. 423. pl. 591. S. C. adjudged but no on this Point.——2 And. 29. pl. 19. Buckley v. Hardy, S. C. adjudged, but not on S. P.

18. *Copyholder* or *Lessee for Years* or *at Will levies a Fine* of his Lands so holden among other Lands, and yet pays his Rent, this Fine shall not bind; for it is no Disseisin but at Election. 3 Rep. 77. b. Hill. 44 Eliz. in Canc. Farmer's Case.

2 And 176. pl. 98 S C. resolv'd by all the Justices at Serjeants Inn (except two.) —— Jenk. 253. pl. 45. S. C. resolv'd by all the Judges of England.——S. C. cited per Cur. Jo. 317.

19. Tenant at Will made a Lease *from Year to Year.* Per Dyer and Manwood it is no Disseisin, and denied the Book of 12 E. 4. 12. but Harper J. e contra. 4 Le. 35 pl. 95. 15 Eliz. C. B. Anon.

If *Lessee at Will leases for Years* and the Lessee enters, it is a Disseisin at the Election of him who has the Franktenement and not otherwise. Per Jones J. Lat. 53. 1 Car. Gerrard v. Norris.

20. If *A. lease Land to B.* reserving a Rent &c. *B. pays* his Rent *to C.* this is no Disseisin to A. unless he will. 2 Sid. 75. Pasch. 1658. Crouch v. Wills.

Cro C. 303. pl. 6. Pasch. 9 Car. B. R. per Cur. S P in Case of Blunden v. Baugh.

21. *Tenant in Tail of a Rent grants the same in Fee* and dies. The Issue has his Election; If he will *distrain* he is in Possession; But if he brings *Formedon* he is out of Possession. Co. Lit. 57. b. cited per Archer J. Cart. 58.

22 *Executor de son tort of a Term* is a Disseisor only at the Election of the Lord or the Reversioner. 2 Show. 458. Hill. 1 & 2 Jac. 2. B. R. Norwich (Mayor) v. Johnson.

(I) *Who* shall be said a *Disseisor* or not.

A Man *cannot qualify his own Wrong.*

1. If a Disseisor makes a Lease for Years or at Will, and the Disseisee enters upon him, and after the Lessee re-enters, claiming his first Estate, yet he is a Disseisor, because he cannot qualify his own Tort. D. 3. 4 Ma. 134. 11.

D. 134. b. pl. 11. Mich. 3 & 4 P. & M. Kirton v. Birling. S. C.

2. If a Man enters into my Land, claiming a Lease for Years, he is a Disseisor. 9 H. 6. 21. 31. b.

3. So if a Man enters claiming as Guardian where he is not Guardian, he is a Disseisor. 9 H. 6. 31. b. 28 Ass. 11. adjudged.

Br. Disseisor, pl 85 (84) cites S. C.—Br Assise, pl. 280. (279) cites S. C.

Fitzh. Ass. pl. 130. cites S. C.

4. So if a Man enters into Land, claiming as Tenant by Statute-Merchant when he has no Right &c. he is a Disseisor. 24 E. 3. 31. adjudged.

5. If Guardian in Chivalry assigns Dower to one, as the Wife of the Father of the Ward, where she was not his Wife, she is a Disseisoress to the Heir, though she enters as Tenant in Dower. 21 E. 3. 5.

6. If a Man leases for Years to another and his Heirs, and after the Lessee dies, and his next Heir claiming the Land, enters into the Land, though this is but a Chattel, so that the Heir hath no Right thereto, yet because he claims but the Term, he is no Disseisor. 11 E. 3. 88. adjudged.

7. If a Copyholder leases for Years by Licence of the Lord, and after enters upon the Lessee, and ousts him, this is a Disseisin to the Lord of the Freehold. M. 11 Ja. B. R. per Coke.

8. If the King Guardian continues the Possession after the full Age of the Heir, he does not gain the Fee thereby, because he hath Right to continue it till Livery sued. 7 H. 4. 43.

Fol. 663.

* Tit. Estate. (D. c) pl. 5.

9. If the Guardian holds himself in after the full Age of the Heir without Cause, he is a Disseisor. 7 H. 4. 43. but a Tenant at Sufferance, for which, vid. the Divisions under Title * Estate, 1 Rol. Abr. 861. D.

10. But if Lessee for Years holds over his Term, he is no Disseisor. 7 H. 4. 43.

11. If *Tenant for Years*, *or a Guardian makes a Lease for Life*, *the Remainder in Fee*, and Tenant for Life enters, he is a Disseisor, because he takes the first Livery; and so it is of him in the Remainder for Life or in Fee, if he enter. 2 Inst. 413. Marg. cites 50 E. 3. 22.

12. A *Man and a Woman Executors sued Execution of a Statute*, and the *Man granted his Estate to the Baron of the Feme*, *Co-executrix*, *and died*. The *Baron granted his Estate to another*, *who entered and was seised*; and also the *Baron and Feme sealed an Indenture of Grant of their Estates to another*, *and delivered to him the Obligation of the Statute*, *but not Seisin*, by which *entered claiming such Estate only*, yet he is a Disseisor, by reason that the Grant is void, and a Disseisor by his Claim nor otherwise cannot qualify his Estate. Br. Disseisin, pl. 78. cites 24 E. 3. 31. and 63.

13. *Mayor and Commonalty* cannot *disseise another unless to the Use of themselves*; Per Cand. Contra it seems if one enters for them by Authority in Writing under their common Seal, where their Entry is not lawful. Br. Corporations, pl. 24. cites 8 H. 6. 1. 4.

14. If there be two Jointenants, and the Grantee of a Rent-charge distrains for the Rent, and one of them makes Rescous, *they are both Disseisors*; for a Distress for the Rent is a Demand in Law, and then the Nonpayment is a Denial and Disseisin, but he that made the Rescous is the only *Disseisor with Force*. Co. Litt. 161. b.

15. If a Man *enters into Land* of his own Wrong, *and takes the Profits*, he cannot qualify his own Wrong by saying he holds it at the Will of the Owner. Co. Litt. 271. a.

(K) Who

(K) Who shall be said a Disseisor.

By Command.

1. If a Man commands J. S. to enter into certain Land in his Name, if he hath Right thereto, or in the Name of his Cousin, if he hath Right, if J. S. enters accordingly, yet if the Commander or his Cousin have no Right, he shall not be a Disseisor, but J. S. only; for his Command was conditional. 34 Ass. 12. adjudged.

Br. Disseisin, pl. 57. cites S. C. for he made J. S a Judge of his Right, and therefore it was his Folly to enter where the Commander had no Right; Quod Nota. ——— Br Entry Congeable, pl. 72. cites S. C. ——— Fitzh. Assise, pl. 315. cites S. C. and J S. who entered was awarded the Disseisor.

2. So if a Man says to J. S. that where his Ancestor died seised of certain Land, he commands him to enter into it in his Name if his Ancestor died seised of a Fee, otherwise not; if J. S. enters in his Name, yet if the Anceitor of the Commander did not die seised of a Fee, J. S. only is the Disseisor, and not he that commanded him, for his Command was conditional. 34 Ass. 12.

See supra, pl. 1. and the Notes there.

3. If a Man commands J. S. to disseise J. D. and he does it accordingly, the Commander is a Disseisor as well as J. S. * 22 Ass. 99.

* This is misprinted, no such Point being there.

4. [So] If a Man commands his Bailiff to make a Disseisin, and he does it accordingly, the Commander is a Disseisor. 27 Ass. 30. adjudged.

Fitzh. Assise, pl. 254. cites S. C.

5. If a Man counsels another to make a Disseisin, and does it accordingly, the Counsellor is a Disseisor. 27 Ass. 30. adjudged.

Fitzh. Assise, pl. 254. cites S. C. ——— Co. Litt. 180. b. S. P. and that Assise lies against him.

6. If a Man makes a Lease for Years of the Land of another out of the Land, and the Lessee enters, the Lessee only is the Disseisor, and not the Lessor. P. 10 Ja. B. Contra 23 H. 8. S. 27.

7. If Lessee at Will makes a Lease for Years, and the Lessee for Years enters, the Lessee at Will is the Disseisor, and not the Lessee for Years, for that otherwise the Lease for Years would be void. P. 9 Car. B. R. between *Blunden and Baugh*, in a Writ of Error upon a Judgment in Banco, resolved per Curiam, præter Richardson, and the Judgment given in Banco by Richardson, then being Chief Justice there, and by the Court, præter Harvey, reversed accordingly. Intratur, Hill. 7 Car. B. R. Rot. 1106. This was for the Manor of Blechingly, which belonged to the Earl of Nottingham.

8. If Tenant at Will or Sufferance makes a Lease for Years, the Lessee at Will and Tenant at Sufferance are the Disseisors, and not the Lessee for Years. 12 E. 4. 12. b. by all the Justices.

Br Disseisin, pl. 68. (67.) cites S. C. —— Fitzh. Disseisin, pl 4. cites S. C.

9. Assise against an Infant and others; The Disseisin was found by *Command of the Infant to his own Use*, but he *was not present*, and the Infant was acquitted of the Disseisin by Judgment, for he *cannot consent*, and because one came Vi & Armis to make the Disseisin, all the others

F. N B. 179. (G) S. P ——— But a Man of full Age

may be a Disseisor if he commands another to enter into Land Ibid.

others were adjudged to Prison; and so see of Trespass. Br. Disseisin, pl. 35. cites 12 Ass. 33.

10. Lord and Tenant by *Rent-Service.* The *Lord distrained.* The *Tenant commanded N. to make Rescous, who did so.* The Assise is well brought against the Tenant only; for he is Tenant, and is Disseisor by the Command, and so Disseisor and Tenant named &c. Br. Disseisin, pl. 54. cites 29 Ass. 59

Litt Rep 372. Arg. cites S. C and says, that a material Implication will not serve, as saying, *Do if you will*; and says it was agreed there that this is no Disseisin to his Use.

11 If *a Man says that he will disseise J. N. to my Use*, and *I say that I am content*, he is sole Disseisor, and this is no Command but a Sufferance. Br. Disseisin, pl. 15. cites 21 H. 7. 35.

12. If a Man *disseises a Stranger to the Use of W. N. by my Command* it is a Tort in me. Per Pollard. Br. Disseisin, pl. 15. cites 21 H. 7. 35.

13. If *A. leases the Land of J. N.* to me for Years *rendring Rent*, and the *Lessee enters and pays the Rent to the Lessor*, the Lessor is a Disseisor. Br. Disseisin, pl. 77. cites it as said for Law T. 25 H. 8. For *this countervails a Command to enter*, and he who commands is a Disseisor, quod nota by his void Lease.

(K. 2) Who is Disseisor by Failer of Record pleaded.

1. 13 *E.* 1. *cap.* 25. IF *the Defendants fails to make good the Exception which he pleads, he shall be adjudg'd a Disseisor without taking the Assise, and shall give to the Plaintiff double Damages, and shall suffer a Years Imprisonment.*

Br. Assise, pl. 186. cites S. C.

2. In Assise the Baron and Feme pleaded Record in Bar and fail'd at the Day, and the *Feme was received*, and *was no Disseisor by the Failer of the Record*, notwithstanding the Statute of Westminster 2. cap. 25. Br. Disseisin, pl. 36. cites 13 Ass. 1.

3. In *Assise* if the *Tenant vouches Record and fails at the Day, he is a Disseisor without confessing the Assise by the Statute of Westminster* 2. *cap.* 25. Br. Failer de Record, pl. 5. cites 15 Ass. 16.

4. *And* where a Man fails of his Record at the Day &c. he *is not excus'd to say that the Justices before whom the Record remains was in Wales, and cannot be found. But* by some he is excus'd to say *that the Record remains in C. B. which Court was always after clos'd so that he could not have the Record*; Quære. Br. Failer de Record, pl. 5. cites 15 Ass. 16

5. In Mortdancester the *Tenant vouch'd*, and the *Demandant granted the Voucher*, and the *Vouchee vouch'd Record and fail'd* at the Day, and yet the Assise was not awarded of the Damages as in Assise of Novel Disseisin, but the Assise was at large upon the Points &c. For the Statute says, That by Failer in Assise habeantur pro Disseisitoribus &c. and *no Disseisor is in Assise of Mortdancestor.* Br. Failer de Record, pl. 10. cites 29 Ass. 11.

6. If

6. If an Infant *pleads Record in Assise and fails at the Day*, he shall not be Disseisor by the Statute. Br. Coverture, pl. 76. cites 36 E. 3.

Br. Disseisin, pl. 98. cites S. C. and Fitzh. Assise. 443.

and concordat, 33 E. 3. ibi N. 67. quod nota.——Br. Failer de Record, pl. 13. cites S. C. and 33 E. 3. S. P. accordingly; For Corporal Punishment shall not be against an Infant.

7. An *Infant* shall not be a Disseisor by Failer of Record, for *corporal Punishment* shall not be against an Infant. Br. Failer de Record, pl. 13. cites 36 E. 3. and 33 E. 3.

8. Attaint in Assise the *Baron and Feme pleaded Record* in Bank *and fail'd* at the Day, and the *Baron made Default*, and the *Feme was received*, and therefore the Baron was adjudg'd a Disseisor by the Statute by the Failer of his Record; For Judgment cannot be given upon the Failer of the Record by reason of the Receipt.. Br. Disseisin, pl. 72. cites 11 H. 4. 51.

(L) Disseisin *by Officers*.

1. If a Man recovers several Houses in an Assise, and after the Tenant reverses it in a Writ of Error, and a Writ of Execution issues to the Sheriff to put them in Possession of the Houses which he lost by the Judgment, though the Tertenants are Strangers to the Recovery, and therefore ought to be ousted without a Scire Facias against them, yet if he does Execution putting them out of Possession by Force of this Writ, he shall not be any Disseisor, because he hath the direct Authority of the Court to do it. P. 15 Ja. B. R. per Curiam, resolved between *Floyd and Bethel.*

Fol. 664.

2. The same Law is in all Cases where the Execution is of a Judgment in which the Demand was of a Thing certain, if the Sheriff make Execution of this Thing, he is no Disseisor. P. 15 Ja. B. R. between *Floyd and Bethel*, resolved per Curiam.

3. But where the Execution is in the Generalty without mentioning any Thing in particular, there the Sheriff ought to make Execution of the right Thing at his own Peril, otherwise he will be a Disseisor, for he is bound to take Notice thereof, and he hath no Warrant from the Court to make Execution but of the right Thing. P. 15 Ja. B. R. between *Floyd and Bethel*, resolved per Curiam. 6 R. 2. Ass. 71.

(M) In what Cases a Disseisin *of what Part shall be* a Disseisin *of the Whole*.

1. If a Man be disseised of Part of a Corody, this is not any Disseisin of the Whole. 22 H. 6. 10.

Br. Assise, pl. 76. cites S. C.——Br. Disseisin, pl. 10. cites 15 E. 4. 5. S. P.——If the Corody be to take four Loaves and four Flagons of Drink every Week he is disseised of the Loaves; this is no Disseisin of the Drink, but if disseised of two Loaves only; this is a Disseisin of all four. 8 Rep. 50. a. cites 22 H. 6. 9. b. and 12 Ass. 23.

Br. Assise, pl. 70. cites S. C —— Br. Disseisin, pl. 10. cites 15 E. 4. S. P.

2. If a Man be disseised of Part of the Profits of an Office, this is not any Disseisin of the whole Office. 22 H. 6. 10.

3. If a Man holds of me 20 s. Rent, and disseises me of 10 s. thereof, this is a Disseisin of the Whole. 22 H. 6. 10. b.

Br. Assise, pl. 76. cites S. C. For Entry or Livery of Seisin in one County in Name of Things in two Counties shall not serve but for the one County. Per Paston.——Br. Disseisin, pl. 10. cites S. C.

4. If a Man seised of a Manor which extends into several Counties, and one disseises me of an Acre in one County, this is not any Disseisin of the Residue of the Manor. 22 H. 6. 10. b.

Br. Assise, pl. 121. cites S. C.

5. If *five Coparceners* are, and the *one takes more Profits than he ought* to take, this is a Disseisin to the others, though he relinquishes Part to the others; but if the others *take this little Part it shall abate the Writ.* Br. Disseisin, pl. 18 cites 7 Ass. 10.

6. Disseisin of one *Parcel of an Office*, or of the *Profits of an Office*, is no Disseisin of the whole. Br. Disseisin, pl. 10. cites 22 H. 10. per Paston.

7. If one *disseises me of Part of a House, and I am in Possession of the rest* of it, it is at my Election whether I will admit myself out of Possession of the House or not. Sty. 341. Mich. 1652. Cydall v. Spencer & al'.

(N) Where it is purged.

1. IF *the Issue* in Tail *enters* after the Death of his Anceftor *upon the Discontinuee within Age, and aliens in Fee*, he shall not have Formedon, but *Dum fuit infra ætatem*, because the *Disseisin is not purged by the Discontinuance.* Br. Formedon, pl. 47. cites 7 E. 4. 19.

2. If a Man *leases for Life*, the *Remainder* over *to another for Life*, if he in *Remainder disseises Tenant for Life*, and after the *Tenant for Life dies*, he in Remainder is not now any Disseisor; for by the Death of the Tenant of Life, he in Remainder is now seised by his Remainder, and the Fee revested to him in Reversion; for there he in Remainder cannot enter after the Disseisin, inasmuch as there is a Mesne Remainder between them. Br. Disseisin, pl. 74. cites 19 H. 6. 22.

3. If *a Man disseises my Father*, and *I enter upon the Desseisor*, and after *my Father dies*, now *I shall retain* against the Disseisor, and yet the Disseisor may have Action of Trespass against me for my first Entry; for *Assise lies against me in the Life of my Father*; Per Brian and his Companions. Brooke says Quære inde; for Disseisor cannot make Title. And so see that the Descent of the Right after shall change his Matter. Br. Disseisin, pl. 90. cites 21 E. 4. 78.

2 Rep. 55. a. 56. a. Buckler's Case, S. C. and the sixth Point there it was said accordingly. —— Gouldsb. 162. pl. 96. Hill. 43 Eliz. S. P. put by Coke Attorney-General to the Court; but Popham and Gawdy thought that Disseisor should not take Advantage of it. —— Mar. 105. pl. 180 Reeve and Crawley Justices held that this Fine shall enure only by way of Estoppel, and Estoppels bind only Privies to them, and not Strangers, and therefore the Disseisor here shall not take

4. If the *Disseisee levies a Fine to a Stranger*, the Disseisor shall retain the Lands for ever; because the Disseisee against his own Fine cannot claim; but by the Fine *the Right is extinct, of which the Disseisor shall take Advantage.* Mo. 423. pl. 591. Pasch. 37 Eliz. adjudged both in C. B. and in B. R. Buckler v. Harvey.

take Benefit of it, and therefore did conceive 2 Rep 56. a to be no Law. —— Diſſeiſee levied a Fine, and declared the Uſe of it by Deed to the Conuſee. Bridgman held that this ſhall not enure to the Diſſeiſor ; but if no Uſe had been declared, then it ſhould enure to the Uſe of the Diſſeiſor, and extinguiſh the Right of the Diſſeiſee. Lev. 128. Hill. 15 & 16 Car. 2. at Lent Aſſizes at Southwark. Peterborough (Counteſs) v. Bludworth.

5. If a *Leaſe for Life* be made, the *Remainder for Life*, the *Remainder in Fee*, and he in *Remainder for Life diſſeiſes the Tenant for Life*, and then *Tenant for Life dies*, the *Diſſeiſin* is purged, and he in the Remainder for Life has but an Eſtate for Life ; And ſo note a Diverſity, where the particular Eſtate for Life is precedent, and when ſubſequent. Co. Litt. 276. a.

By the Death of the Diſſeiſee that wrongful Fee is turned into a rightful Eſtate by Operation of Law. 8 Mod. 53. Arg.

6. Rights, and the *purging of wrongful Acts are always favoured in Law*, and therefore where a Diſſeiſin or Abatement is made, and the Diſſeiſee brings his Ejectment, and has a Verdict and Judgment for him, (but no Execution) yet an Entry being found as being in the Declaration of Ejectment, that *Entry will purge the Diſſeiſin, and the continuing in Poſſeſſion afterwards is only as a Treſpaſſor.* See Hill. 12 Ann. B. R. Goodtitle v. Riſden. The Caſe was as follows, viz.

MS. Rep. Hill. 12 Ann. C. B. Goodtitle v. Riſden & al'.

In Eject' Firmæ the Plaintiff declared, that Brown Forteſcue, 13 April Anno Reginæ nunc 9. did demiſe to the Plaintiff two Meſſuages, two Gardens &c. with Appurtenances in Clauton in Com' Devon' habend' a 25 Die ejuſd' Menſis Aprilis for ten Years then next following, and that James Forteſcue poſtea ſcilicet eodem 13 April' Anno ſupradict' did demiſe the ſame Tenements (as above) &c. and alſo that Brown Forteſcue poſtea ſcilicet eodem 13 Die Aprilis Anno nono ſupradict' did demiſe the ſaid Tenements (as above) ; that by Virtue thereof the Plaintiff entered, and was poſſeſs'd until the Defendants ejected him &c. On Not Guilty pleaded, and upon a Trial at Devon Aſſiſes, the Jury find a ſpecial Verdict, viz. they find that Leonard Pote was ſeiſed of, and in the Premiſſes with the Appurtenances in his Demeſne, as of Fee, and being ſo ſeiſed 3 Martii, 16 Jac. 1. by a certain Indenture made between him of the one Part, and Richard Gedge, and John Mayne, of the other Part, did infeoff the ſaid Richard and John, habend' to them and their Heirs, to the Uſe of Leonard for his Life, and after his Deceaſe, then to the Uſe of * M. the Wife of John Pote, Son and Heir apparent of the ſaid Leonard for the Term of her Life, and after the Deceaſe of Leonard and M. to the Uſe of the ſaid John Pote, and the Heirs Male of his Body lawfully begotten, or to be begotten, upon the Body of the ſaid M. and for Default of ſuch Iſſue, to the Uſe of the Heirs Males of the Body of the ſaid Leonard Pote, lawfully begotten upon the Body of Willmot his late Wife, deceaſed, and for Default of ſuch Iſſue to the Uſe of the right Heirs of the ſaid Leonard Pote. That M. died in the Life-time of Leonard, and Leonard died ſeiſed of ſuch Eſtate in the Premiſſes as aforeſaid, after whoſe Death the ſaid John Pote entered, and was ſeiſed in his Demeſne as of Fee Tail, and had Iſſue by M. Leonard his eldeſt Son, John his ſecond Son, and Thomas his third Son ; that John Pote the Father died ſeiſed &c. and that the Premiſſes deſcended to the ſaid Leonard as the Son and Heir of the Body of the ſaid John Pote the Father, begotten on the Body of M. whereupon Leonard the Son entered, and was ſeiſed in Fee Tail, Remainder as aforeſaid ; and being ſo ſeiſed the ſaid Leonard the Son, 22 Die Martii 1688. died thereof ſeiſed without Iſſue ; that John the ſecond Son died in the Life-time of the ſaid Leonard alſo without Iſſue. They find that Leonard the Son in his Life-time married one Eliz. Pine, who ſurvived him, and immediately after his Death entered &c. into the Premiſſes, and during her Life continued the Poſſeſſion thereof ; that one John Truebody in her

* The true Name was (Richawrd) which being an odd Chriſtian Name for a Woman is changed into (M.)

her Life-time, viz. Trin. 2 W. & M. in C. B. impleaded the ſaid Eliz. (after the Death of her ſaid Husband) & al' in a Plea of Treſpaſs and Ejectment (inter al') of the Premiſſes upon the Demiſe of the ſaid Thomas Pote, Narrando verſus eos inde (inter al') Modo & Forma ſequen' videlicet Devon' ſſ. Johannes Raw, Eliz. Pote, & al' attach' fuerunt ad reſpond' Johanni Truebody Gent' de placito quare Vi & Armis quinq' Meſuag' &c. quæ prædict' Tho. Pote dimiſiſſet ad terminum &c. intraverunt & ipſum Johannem Truebody a firma ſua prædict' ejecerunt &c. et unde idem Johannes Truebody &c. ad tunc querebatur quod cum prædict' Tho. Pote 1 Aprilis 2 W. & M. &c. dimiſiſſet eidem Johanni Truebody Tenementa prædict' &c. habend' eidem Johanni Truebody a 25 Die Martii tunc ult' præterit' uſque finem Termini quinq' Annorum ex tunc prox' ſequen' plenar' complend' & finiend' virtute cujus quidem dimiſſionis prædict' Truebody in Tenement' prædict' &c. intravit & fuit inde Poſſeſſionat' & ſic inde Poſſeſſionat' exiſten' prædict' Johannes Rawe & al' poſtea ſcilicet eodem 1 Die Aprilis Anno ſecundo ſupradict' apud Clauton &c. Vi & Armis &c. in Tenementa &c. cum Pertinentiis quæ præfat' Thomas Pote eidem Johanni Pote in Forma prædict' dimiſit ad Terminum qui nondum præteriit intraverunt & ipſum Johannem Truebody a firma ſua prædict' ejecerunt &c. Upon Not Guilty pleaded and Iſſue thereupon, In quo quidem placito talit' proceſs' fuit in eadem Cur. &c. quod poſtea ſcil' Term' Sancti Mich. Anno ſecundo ſupradict' prædict' Johannes Truebody per Cons' ejuſdem Cur. recuperavit verſus præfat' Johannem Raw Eliz. Pote & al' Terminum ſuum prædict' (inter al') de & in Tenement' prædict' cum Pertin' &c. ad tunc ventur' & ſuper inde Johannes Truebody petiit breve dictorum nuper Regis & Reginæ de Habere fac' eidem Johanni Truebody poſſeſſion' Termini ſui prædict' ad tunc ventur' de & in Tenement' prædict' &c. per ipſum ſic ut præfertur recuperat' prout per Record' & Proceſs' &c. They further find, that after the ſaid Judgment, and before any Entry by the ſaid Thomas Pote, or by the ſaid John Truebody, a Fine was levied a Die Sancti Mich. in Tr' Septiman' Anno Regni W. & M. ſecundo between John Forteſcue jun. Gen' Quer', and the ſaid Tho. Pote Deforc' of the ſaid Premiſſes &c. unde Placitum convention' fact' inter eos &c. ſcil' quod the ſaid Tho. Pote did acknowledge the ſaid Premiſſes to be the Right of the ſaid John, ut illa quæ idem Johannes habuit de Dono ipſius Thomæ &c. prout &c. They further find, that the ſaid Fine levied of the Premiſſes was, and by a certain Indenture dated 1 Die Maii, Anno tertio W. & M. and made between the ſaid Tho. Pote of the one Part, and the ſaid John Forteſcue of the other Part was, at the Time of the levying thereof, to have been had and levied to the Uſe of the ſaid Thomas Pote and his Heirs for ever; that the ſaid Thomas Pote afterwards, ſcil' 2 Die Junii, Anno 5 W. & M. entered upon the ſaid Premiſſes, and was thereof ſeiſed &c. and being ſo ſeiſed, he the ſame Day by an Indenture made between him of the one Part, and the ſaid Brown Forteſcue of the other Part, and then ſealed and delivered by the ſaid Thomas upon the ſaid Premiſſes &c. in Conſideration of 500 l. paid to him by the ſaid Brown Forteſcue, did demiſe to the ſaid Brown Forteſcue the ſame Premiſſes &c. habend' for the Term of 1000 Years, by Virtue whereof the ſaid Brown Forteſcue entered, and was poſſeſſed &c. They further find, that the ſaid Eliz. Pote poſtea ſcil' 26 Die Martii Anno Domini 1710 died, and that after her Death the ſaid Anthony Rildon, and others, entered into the ſaid Premiſſes, and were thereof ſeiſed &c. and that afterwards the ſaid Brown Forteſcue, by Virtue of the ſaid Demiſe, entered into the Premiſſes &c. and was thereof ſeiſed &c. and being ſo poſſeſs'd, poſtea ſcil' Die & Anno in Narr' inde mentionat', did demiſe to the ſaid

said George Goodtitle the Premisses &c. That the said George Goodtitle by Virtue of the said Demise entered &c. and was possess'd &c. upon whose Possession the said Anthony & al' re-entered & ipsum Georgium a firma sua prædict' &c. inde ejecerunt prout idem Georgius interius versus eos inde queritur sed utrum &c.

This special Verdict was argued Pasch. 12 Ann. by Serjeant Prat for the Plaintiff, and Serjeant Hooper for the Defendant; and in Mich. Term following it was argued by Serjeant Pengelly for the Plaintiff, and by Serjeant Cheshire for the Defendant; and in Hill. Term following the Court of C. B. scil' Lord Trevor Ch. J. Blencowe, Tracy, and Dormer, gave Judgment for the Plaintiff.

The Ch. J. delivered the Opinion of the Court as follows, viz. that upon this special Verdict three Questions had been made and argued at the Bar; 1st. Whether, as this special Verdict was found, Elizabeth Pote, who was the Wife of Leonard Pote, must be taken to have entered by Disseisin or Abatement, and to have gained an Inheritance by Wrong? Whether this Entry must imply a Disseisin or Entry by Abatement, or must be supposed to be a wrongful Entry to him who had the Right?

In the next Place, whether the Recovery in the Ejectment that was prosecuted by Thomas Pote against Elizabeth, (supposing there had been a Disseisin) has not purged that Disseisin, and re-vested the Estate in Thomas? And

3dly, Admitting there was a Disseisin to him, and that that Disseisin was not purged, then whether the Fine levied by him, who was disseised, to John Fortescue, who was a Stranger, and had nothing in the Estate did not work by way of Extinguishment, and for the Benefit of the Defendant, the Right of the Lessor of the Plaintiff being extinguished by the Fine?

These were the Questions argued at the Bar; now if either of them be with the Plaintiff, he has a good Title; for if there were no Disseisin, or if the Disseisin was purged, or if there was no Extinguishment by the Fine, it is plain he had a good Title unless it had been destroyed by these wrongful Acts.

That as to the first Question, whether it was a Disseisin or not, and as to the third Question, whether the Fine levied by a Disseisee to a Stranger, to the Use of him and his Heirs, did work by way of Extinguishment or not, the Court, as to either of them, would not deliver any Opinion at all; But upon the second Question the Court were of an Opinion, that the Recovery in Ejectment had purged the Disseisin. When an Ejectment is brought the Plaintiff declares upon an Entry; 1st. He declares of a Demise or Lease made to him by his Lessor, and then of an Entry by the Plaintiff, and then that afterwards the Defendant entered upon him, and ejected him; now all this is confessed by the Rule of the Court, and this Confession is in Nature of an Estoppel, that the Entry will purge the Disseisin, therefore after a Recovery in Ejectment the Plaintiff, or his Lessor, may bring an Action for the mesne Profits from the Time of that Entry. This is the constant Practice, the Defendant has confessed the Entry; As to himself he is concluded from denying it afterwards, he is accounted a Trespassor, and the mesne Profits shall be recovered against him.

There is nothing plainer in the Law, than that Rights, and the purging of wrongful Acts, are always favoured; therefore where the Plaintiff has recovered his Estate, and an Entry is found by the Jury that Entry purges the Disseisin, and the Continuer in Possession afterwards is but as a Trespassor, though there was a Disseisin it is now purged; But whether there was a Disseisor or not, or whether Fine levied by a

Disseisee will extinguish the Right, it is not necessary in this Case for the Court to give any Opinion upon at all; so the Plaintiff must have his Judgment. Judgment pro Quer' per tot. Cur.

(O) What Actions &c. Disseisee may have against Strangers.

1. IF the *Tenant* of the Land *with Warranty be disseised* by a Stranger, he shall not have this Writ during this Disseisin, because he is not Tenant of the Land during the Disseisin, and the Writ supposes him Tenant. 11 H 3. Rot. 3. between Simon of Abendun and Reginald de Meffebury agreed aud adjudged. 2 Roll Warrantia Chartæ (D) pl. 6.

2. *So* if a *Stranger takes unjustly redditum Terræ*, (that is, as it seems, takes the Profit of the Land, by which is intended a Disseisin) from the Tenant, or of the Tenant, he shall not have this Writ; for he *may have his Assise* if he will. 11 H. 3. adjudged. 2 Roll Warrantia Chartæ (D) pl. 7.

(P) What Charge of Disseisor shall bind Disseisee.

1. YOungest Son disseises the Elder. In Assise or other Action it is found by false Oath against Plaintiff. Then the youngest grants a Rent-charge and dies without Issue. Before Attaint brought he must hold the Land charged; for he *comes in now as Heir to his Brother*. The Attaint is gone by his Death, and no Remitter contrary to the Recovery. D. 5. b. pl. 1. Trin. 24 H. 8.

2. Disseisor leases for Life, and *grants Reversion to Disseisee*. Disseisee *accepts the Rent* of Lessee. Quære, if Disseisee shall oust Lessee? D. 30. b. pl. 207. Hill. 28 H. 8. in Canc. Compton v. Brent.

(Q) Power of Disseisee or Disseisor as to Strangers.

1. IF a Man is disseised, and the *Disseisor makes Feoffment*, and the *Disseisee re-enters*, he shall have Action of *Trespass* as well against the Disseisor as against the Feoffee, and recover all his Damages, so that by divers Writs every one shall be charged for his Time of the Damages. Br. Trespass, pl. 31. cites 33 H. 6. 46.

2. If *Disseisor takes the Beasts* of a Stranger *Damage-feasant* upon the Land, *and after Disseisee re-enters*, yet Disseisor may justify the keeping the Beasts taken before the Re-entry till Agreement be made with him. Kelw. 40. pl. 3. Mich. 17 H. 7.

3. A Disseisor *makes a Lease* for Life or Years, the Disseisee shall not have Action of *Trespass Vi & Armis* against him, because he comes in by Title. For this *Fiction of Law* that the Franktenement hath always been in the Disseisee, shall not have *Relation* to make him that comes in by Title to be a Trespassor Vi & Armis. Arg. Godb. 318. cites 11 Rep. 51. [Mich. 12 Jac.]

4. If a Man enters on another, and makes a Lease for Life, he gains a Reversion, and shall *maintain* an Action of *Waste*. Arg. Godb. 318. pl. 417. Pasch. 21 Jac. in Scacc.

(R) Writ and Pleadings.

1. IF *five Coparceners* are, and the one *takes more of the Profits than he ought* to take, this is a Disseisin to the others, though he relinquishes Part to the others, but if the others *take this little Part it shall abate the Writ*. Br. Disseisin, pl. 18. cites 7 Ass. 10.

2. In Assise if *Disseisor named* in the Writ comes *in proper Person he may plead in Abatement of the Writ*. Br. Disseisin, pl. 20. cites 8 Ass. 2.

3. In Mortdancester of Rent, the *Pernor of the Rent* was not suffered to plead *Hors de son Fee*, and therefore it seems that this is only for the Tertenant. Br. Disseisin, pl. 80. cites 12 Ass. 38.——But it seems 2 H. 6. 1. That *Stranger to the Avowry* shall plead this Plea well, but there he *had Interest* in the Land, contra of Pernor. Br. Disseisin, pl. 80.

4. A *Disseisor shall not plead Recovery in Abatement* of the Writ, *neither by Conclusion nor Misnosmer*, nor otherwise, without *shewing the Record immediately*; for he cannot lose the Land by Failure of Record, as the Tenant may, therefore the Assise was awarded immediately; Quod Nota. Br. Assise, pl. 413. cites P. 20 E. 3.

5. The Disseisor *shall not plead Record in Abatement of the Writ*; *nor by Conclusion*; Per Skipwith. But per Grene, Disseisor shall plead *Misnosmer of the Plaintiff*, or *that the Feme Plaintiff is Covert Baron*. But Shard e contra of the Coverture nor *Record*, *unless he shews it immediately*; for if the Record be deny'd he cannot lose the Land by Failer of the Record; Per Thorpe, Disseisor may plead that he was *Anterfoits acquit of the Disseisin*. Br. Disseisin, pl. 93. cites 20 E. 3. Fitzh. 120.

6. Præcipe quod reddat against *Pernor of the Rent*, who *said* that he *is Tenant of one House out of which &c. and W. N. not named, is Tenant of the other House out of which &c. Absque hoc that he is Pernor of any Rent of this House*, and a good Plea, and the Demandant was compelled to maintain his Writ; for if there is not all the Tenants nor Pernors named, this is not well. Br. Disseisin, pl. 73. cites 21 E. 3. 24.

7. Entry, supposing *that the Tenant entered by W. and K. his Feme*, and the Tenant *said that the Feme's Name was J.* Prist; and the Demandant was compelled to maintain his Writ that her Name was K. For *known by the one Name, and the other is no Plea*. Br. Enter en le per. pl. 16. cites 21 E. 3. 47. 48.

8. In Assise Disseisor shall not plead *Ancient Demesne*, nor any but the Tertenant, and he who takes upon him the Tenancy, Quod Nota. Br. Disseisin. pl. 83. cites 21 Ass. 2.

9. In

9. In Assise Disseisor shall not plead *that the Plaintiff was seised the Day of the Writ purchased*; for this is for him to plead who takes upon him the Tenancy, Quod Nota, by Award. Br. Disseisin, pl. 44. cites 26 Ass. 49.

10. *Assise against B. and A.* and B. *pleaded to the Assise as Tenant* of the Franktenement; and *A. pleaded that the Plaintiff was seised* of the Franktenement *the Day of the Writ purchased, and yet is*, where the Plaintiff *had elected B. for Tenant before*, and from hence it seems that the Disseisor may plead this Plea to the Writ, Quod Nota. Br. Disseisin, pl. 51. cites 28 Ass. 41.

11. In Assise it was said by Ascue J. That among the Assises Anno 28 is, that Bailiff nor Disseisor cannot plead that there are *two Vills of the same Name in the same County, and none without Addition*. Br. Disseisin, pl. 9.

12. In Assise the Bailiff of the Disseisor pleaded, *That the Plaintiff never had any Thing, and if* &c. Nul tort. Fish. said his Master had nothing in the Franktenement, therefore he shall not have the Plea, and the Opinion of the Court waa with him, and therefore it seems that the Disseisor shall not have the Plea. Br. Disseisin, pl. 49. cites 28 Ass. 24.

13 It was the Opinion of the Court, that the Disseisor shall not plead *that there are two S.'s in the same County* scil. *Great S. and little S.* and none without Addition, Judgment of the Writ, *nor other Plea, but Misnosmer of his proper Name*, and so was the Opinion of the Court, and it seems that these Words (no other Plea) are *intended no other Plea of Misnosmer, but Misnosmer of his proper Name.* Br. Disseisin, pl. 50. cites 28 Ass. 38.

14. In Assise the *Tenant pleaded in Bar by Statute made by himself to the Plaintiff, who had the Land after in Execution by Extent*, which *Plaintiff was after condemned at the Suit of C. in 40 l. and this Land delivered in Execution by Elegit*, as a Chattel, *which Estate C. the Defendant has.* The *Plaintiff said that he had the Land in Execution by the Statute* ut supra, and was seised till by the Defendant disseised, *absque hoc that C. had ever any Thing* in this Land, Prist, and the other e contra; and so see that in Pleading by Tenant by Statute-Merchant *he said that he was seised, and yet it is only a Chattel.* Br. Assise. pl. 348. cites 38 Ass. 4.

15. *Disseisor made Feoffment to a Feme Sole*, who *took Baron*, and Writ of *Entry was brought against both, supposing that the Feme entered by the Disseisor, and not that the Baron and Feme entered by the Disseisor*, and the Writ awarded, Quod Nota, and it seems that the Writ had been good also if the Entry of both had been supposed by the Disseisor of this Part, contra of the Part of the Demandant, as in 5 H. 7. Br. Enter eu le per. pl. 34. cites 39 E. 3. 25.

16. Assise *by Baron and Feme*, quod Disseisivit eos, the *Defendant said that he himself was seised in Fee, and leased to B. C. for Life, who aliened to the Feme and her first Baron*; the *Plaintiff made other Title*, upon which they were *at Issue out of the Point of Assise*, viz. That the Lessee had Fee, and *found for the Plaintiff*, and *that the Feme was seised and disseised before the Espousals, and that the Baron never had Seisin*, Hache demanded Judgment of the Writ, which is, Quod *Disseisivit eos, where the Baron was not seised*, & non allocatur, but Seisin awarded to the Plaintiff, for an *Ouster was confessed* by the Defendant in his Plea before, and therefore ought not to have inquired of the Seisin and Disseisin, and so the Verdict void. Br. Assise, pl. 369. cites 44 Ass. 6.

17. Entry in the Post of *Disseisin to the Brother of the Demandant*, the Tenant *pleaded Feoffment of this same Brother to J. N. Que Estate he has, Judgment si Actio*, and held a good Bar; quod Mirum! for it seems Argumentative. Br. Enter en le per. pl. 10. cites 2 H. 4. 19.

18. Writ

18. Writ of Entry *sur Disseisin* made to J. N. the *Tenant pleaded Feoffment of this same J. N. made to another, Que Estate he has*, and held a good Bar; quod mirum! for it seems only Argumentative. Br. Bar, pl. 14. cites 2 H. 4. 19.

19. *Feme Covert is infeoffed, Writ* of Entry is brought, *supposing the Entry to be by Baron and Feme*, as Land cannot revert to the Feme Covert but to the Baron also; but otherwise it shall be where *the Feme enters and after takes Baron* so that he finds the Feme seised; for there the Writ of Entry shall suppose the Entry of the Feme only. Br. Enter en le per. pl. 12. cites 7 H. 4 17.

20. Pernor of the Profits shall not plead *Ancient Demesne*, nor *Release of Right, Fine, Recovery*, nor such like by Que Estate, as it seems, unless in special Cases; but he may plead *all Actions, or traverse the * Disseisin, or the Pernancy of the Profits* &c. Br. Disseisin, pl. 91. cites 1 H. 5. Fitzh. 381.

* Orig. is (Difference)

21. In Writ of Entry sur Disseisin made to the Ancestor, the Writ was, *Quæ clamat esse jus et Hæreditatem suam*, by which the Writ was abated. Thel. Dig. 105. Lib. 10. cap. 14. S. 1. cites Mich. 20 E. 2. Brief 851. but cites 10 H. 6. contra.

But Ibid. S. 8 says, that in Writ of Intrusion upon the Possession of his Ancestor, and in every Writ where a Man demands a Fee Simple upon the Possession of his Ancestor, he ought to have these Words, Quæ clamat esse jus et Hered' suam, cites the Register 228, 229. but contra in Nat' Brev. 191. but in no Writ of his own Possession, unless in Cui in Vita Mich. 10 H 6. 9.

22. In Trespass Issue was tendered *that J. N. Defendant did not disseise the Plaintiff to the Use of W. P.* and the other e contra, and by Danby and Davers, it is Negative Pregnant; but if he says that *non Disseisivit Modo & forma*, it is good to all Intents. Br. Negativa &c. pl. 5. cites 33 H. 6. 37.

23. In *Assise* they were *adjourn'd for Variance between the Writ and the Patent*, to Westminster, and there to H. such a Day, at which Day the Parties appeared, and the one *Defendant took the Tenancy* upon him, *and pleaded in Bar*, and the *other said that the Plaintiff after the last Continuance had entered into Parcel* of the Land put in View and now in Plaint, and demanded *Judgment of the Writ*, and there it is agreed that the Disseisor shall have this Plea to the Writ. Br. Disseisin, pl. 1. cites 35. H. 6. 11. 12.

Br. Assise, pl 14. cites S. C.

24. *And* it is said that *he shall have every Plea which goes in Excuse of Damages* as this Plea does, *and every Plea which goes in Bar and does not meddle with the Right of the Land*, as *Release of all Actions personal*; Quod Nota, it is agreed that this is a good Bar in Assise, *but* he shall *not* plead Release *of all the Right*, for this goes to the Right of the Land. Br. Disseisin, pl. 1. cites 35 H. 6.

Br. Assise, pl. 14. cites S. C.

25. *But* per Prisot and Fincham, he may plead to the Writ, *that at another Time the Plaintiff brought Writ of a higher Nature against him*, and he may plead that *no Tenant of the Franktenement named in the Writ*, and *that the Plaintiff has nothing unless jointly with one J. N. not named* in the Writ who is in full Life; for *those Pleas do not go in Extinguishment but in Excuse of Damages*, and therefore by the Entry into Part the Assise is gone, and he cannot recover any Damages. And so see that *Entry into Part goes to all the Writ*; for the Damages are entire, Quod Nota, by which the Plaintiff said, that he did not enter, and the others e contra. Br. Disseisin, pl. 1. cites 35 H. 6. 11. 12. and says see 14 H. 6. fol. in Fine, and 28 Ass. 41.

Br. Assise, pl. 14 cites S C.

26. In Præcipe quod reddat the Tenant *said that J. S. was seised till by him disseised before the Writ purchased, which J. S. has entered upon him pending the Writ*; Judgment of the Writ and a good Plea. Br. Disseisin,

seisin, pl. 101. cites 5 E. 4. 5. 6. and such a Plea was awarded good Anno 15 E. 4. and so see that for his Advantage *to abate the Writ* &c. the *Tenant may confess a Disseisin to a Stranger.* Br. Disseisin, pl. 101.

27. A Man may *confess, that he himself did a Disseisin* for his Benefit. Br. Disseisin, pl. 11. cites 15 E. 4. 5.

As in Dower the *Tenant said that before the Writ purchased A. B. was seised in Fee till by this Tenant disseised, and that the 10th Day of October A. re-entered,* Judgment of the Writ, and a good Plea per tot. Cur. And it is *no Replication that A. entered by Covin*; for his Entry was lawful, and a Man cannot do Right by Covin. Br. Brief, pl. 192. (bis) cites 15 E. 4. 4.

28. In *Assise against Disseisor and Tenant,* the *Disseisor may plead to the Disseisin, and in Bar, and in Excuse* of the Tort, *but he cannot meddle with the Land*; for the Tenant only shall plead to the Right of the Tenancy. Br. Disseisin, pl. 75. cites 13 H. 8. 14. Per Brudnel.

29. *And* in Assise *against Pernor and Tenant* the Tenant shall plead a Discharge of the Tenancy only; But the *Pernor may plead to the Tort, and shall intitle himself to the Rent* out of it if he can. Br. Disseisin, pl. 75. cites 13 H. 8. 14. Per Brudnel.

(S) Pleadings. What Plea is a Confession of a Disseisin.

1. IN Assise, they are at Issue upon *Hors de son Fee*; the Seisin and Disseisin shall not be inquired; For it is confessed *implicative* by the Plea, quod nota bene. Br. Assise, pl. 429. cites 10 E. 3. 41.

2. In Assise, the *Tenant pleaded a Deed in Bar, and waved it,* there the Assise shall not inquire of the Disseisin, but only of the Seisin; For he is Disseisor by his Plea; Per Parninge. Br. Assise, pl. 416. cites M. 13 E. 3.

3. *Release pleaded by the Defendant* is a Confession of the Disseisin, so that the Seisin and Disseisin shall not be inquir'd. Br. Assise, pl. 417. cites 22 E. 3. 4.

(T) Entry in the Per &c. Pleadings.

1. ENTRY brought *by a Feme, in that the Tenant had not Entry unless by the same Feme,* and the Tenant *said that she and her Baron demised to him,* Judgment of the Writ and a good Plea, and she put to her Cui in Vita; For it was in Writ of Entry ad terminum qui præteriit. It seems that she may enter if there be no Descent after the Discoverture. Br. Entry en le Per, pl. 43. cites 6 E. 2. Itinere Cant.

2. If Writ of Entry be *brought in the Post which may be within the Degrees it shall abate.* So if it be brought in the Per, or in other Degree within the Degrees where it should be in the Post, this shall abate. Br. Enter en le per, pl. 39. cites Vet. N. B. Tit. Brief de Non compos mentis, and Brief de Entry dum fuit infra ætatem, and Fitzh. Tit. Brief 286. 438. and 440. and 17 E. 3.

3. Entry sur Disseisin *against a Man and his Feme in the Quibus, the Feme not having Entry unless by R. who wrongfully &c. disseised his Father,*

Father, and *not supposing the Entry of the Baron*, and yet the Writ awarded good, and if the *Baron aliens and retakes to him and his Feme*, yet this shall not change the Degrees; For the Feme is remitted. Br. Entre en le Per, pl. 25. cites 39 E. 3. 25.

4. Entry sur Disseisin *of Rent*, the *Tenant made bar of Rent-Charge*, and the *Demandant made Title to the Rent-Service*, and good per Cur. For it may be that he has both there, and brings the Action of the one, and there the Tenant shall have new Answer, and this to the Writ if he will in this Case, and so he had there; For the Bar was not pleaded to this Rent-Service. Br. Entre en le Per, pl. 35. cites 12 E. 4. 10. 11.

5. Writ of Entry *against the Baron and Feme*, the *Writ shall be that the Feme had not Entry unless by N.* &c. and *not that the Baron and Feme had not Entry unless by N.* &c. Br. Enter en le Per, pl. 36. cites 7 H. 7. 2.

6. Entry in the Post, *supposing that the Tenant had not Entry unless after the Disseisin which J. S. made to his Ancestor* &c. And the Tenant *said, That before that the Ancestor any Thing had, T. was seised in Fee and leas'd to B. for Term of Life, and B. infeoffed N. by which the Lessor enter'd for Alienation to his Disinheritance and died seised, and the Land descended to the Tenant as Heir* &c. and per tot. Cur. this is no Plea, because he does not traverse the Disseisin alleg'd by J. S nor he does not confess nor avoid it; And per Vavisor *in Writ of Entry the Disseisin ought to be confess'd and avoided or travers'd.* But *otherwise* it is *in Assise*; For there it is sufficient to plead Feoffment of a Stranger, and give Colour to the Plaintiff; Contra in Writ of Entry sur Disseisin. Br. Enter en le Post, pl. 22. cites 15 H. 7. 16, 17.

7. In Writ of Entry *in the Post*, the Tenant *said that he was seised till by the Plaintiff disseised, upon which he entered*, and a good Plea. And the same Law in Trespass. Br. Enter en le Per, pl. 46. cites 16 H. 7. 4.

(U) Pleadings. Traverse in what Cases.

1. ENTRY in the Per by which the *Tenant had not Entry but by J. who disseised the Demandant*, the Tenant *said that the Demandant infeoffed J.* and no Plea without saying *absque hoc that J. disseised the Demandant*; For Plea contrary to the Supposal of the Writ is no Plea without traversing the Point of the Writ. Br. Enter en le Per, pl. 15. cites 38 E. 3. 2.

2. If a Man is disseised he may have *Assise or Writ of Entry* in Nature of Assise at his Pleasure. Br. Enter en le Post, pl. 14. cites 9 H. 5. 9.

3. In Entry sur Disseisin *it is no Plea that the Plaintiff infeoffed him unless he traverses the Disseisin.* Br. Traverse per &c. pl. 299. cites 4 H. 6. 29.

4. In Trespass the *Defendant pleaded his Franktenement at the Time* &c. per quod &c. the *Plaintiff said that before that the Defendant any Thing had, P. was seised in Fee and infeoffed him, by which he was seised till the Defendant enter'd and did the Trespass, and he freshly re-enter'd*, and because the Defendant acknowledg'd the Trespass, Judgment &c. the *Defendant said that J. N. was seised in Fee, and died seised and W. his Heir enter'd and died, and he as Heir to him, and shew'd how &c. enter'd and*

and of such Estate was seised at the Time of the Trespass &c. and held no Plea; For he has not travers'd the Disseisin in the Replication, nor confess'd and avoided it. Br. Traverse per &c. pl. 61. cites 7 H. 6. 33.

5. In *Trespass* the *Defendant said that he was seised* &c. *till by A. disseised, who infeoffed the Plaintiff upon whom the Defendant enter'd,* of which Entry the Plaintiff has brought this Action, and the *Plaintiff said that before the Defendant or the said A. any Thing had, W. was seised,* and *so convey'd the Descent to the said A. and that the Defendant abated after the Death of the Ancestor of the said A. upon whom A. enter'd and infeoffed the Plaintiff, and after the Defendant did the Trespass,* of which he has brought his Action, and pray'd his Damages, and by the Opinion of the Court the *Title is not good without traversing the Disseisin alleg'd in the Bar.* Br. Traverse per &c. pl. 13. cites 9 H. 6. 32.

6. *For* it is said there and the same Year, fol. 19. and 30. that *where Disseisin is alleg'd by Supposal,* as *in Writ or Declaration,* as in Assise or Writ of Entry sur Disseisin, there it is sufficient to plead Matter of Bar as above, without traversing the Disseisin; *But* where it is alleg'd *in Bar, Title, or other Pleading,* there it ought to be confess'd and avoided or travers'd, quod nota, and in the Case above the Plaintiff has not done the one nor the other. Br. Ibid.

7. Trespass *against R. who pleaded* that *his Franktenement* &c. the *Plaintiff said that before R. any Thing had, W. was seised and infeoffed the Plaintiff, who was seised till by N. disseised, who infeoffed the said R. upon whom the Plaintiff freshly re-enter'd, and the Trespass mesne between the Disseisin and the re-entry,* to which the *Defendant said, that E. was seised in Fee, and infeoffed the said R.* and no Plea without traversing the Disseisin to the Plaintiff. Br. Traverse per &c. pl. 292. cites 21 H. 6. 5. 6.

8. Where the Disseisin is *alleg'd by Way Conveyance to the Title or Possession of the Plaintiff,* it is not traversable, and especially where the *Plaintiff and Defendant convey from one and the same Person.* Arg. D. 365. b. 366. a. pl. 34. Mich. 21 & 22 Eliz. in Ld. Crumwell's Case. cites 21 and 30 H. 6. 2. and 5 E. 4. and 4 & 5 H. 7.

9. In Assise, the Tenant may say *that his Father was seised, and died seised,* without traversing the Disseisin supposed in the Writ or Plaint. Br. Traverse per &c. pl. 279. cites 22 E. 4. 39.

10. Formedon *against Pernour of the Profits of the Day of the Title accrued;* Per Littleton the Statute does not give Action but where the Defendant is Tenant of the Franktenement the Day of the Action accrued, and where the Defendant takes the Profits the Day of the Writ purchased, and so the Defendant may traverse any of the Points; Contra in Assise or Action founded upon Disseisin, there he shall traverse the Disseisin or the Prender of the Profits. Br. Traverse per &c. pl. 216. cites 4 E. 4. 38.

For more of Disseisin in General, See **Assise, Discent, Entry** and other proper Titles.

Diſtreſs.

(A) *Damage-Feaſant.* What Things may be taken Damage-Feaſant.

1. A Grayhound may be taken Damage-Feaſant running after Coneys in a Warren. 2 E. 2. Fitzh. Diſtreſs, 20.

2. So a Man may take a Ferret that another hath brought into his Warren and taken Coneys with. 2 E. 2. Fitzh. Avowry 182.

3. If a Man brings Nets and Gins through my Warren I cannot take them out of his Hands. 7 E. 3. Avowry. 199.

4. If a Man rides upon my Corn I cannot take his Horſe Damage-Feaſant. 7 E. 3. Avowry. 199.

Sid 440. in a Nota at the End of pl. 9 Hill. 21 Car. 2. B. R. the Chief Juſtice ſaid, that a Horſe on which a Man is riding may be diſtrained Damage-Feaſant, and it ſeems he ſhall be led to the Pound with the Rider on his Back.

5. Shocks of Corn may be taken Damage-Feaſant. 21 H. 7. 39. b. by all the Juſtices.

Br. Diſtreſs, pl. 30 cites S. C.——Fitzh. Avowry, pl. 263. cites S. C. and Trin. 14 H. 7.———S. P. accordingly, per Cur. Obiter. Lat. S. Hill. 1 Car. B. R. in Caſe of Stilman v. Chance.

6. Treſpaſs for taking a Grayhound with a Collar, the Defendant pleaded that the *Dog* was *courſing a Hare in his Land*, and thereupon he took him and led him away; upon Demurrer this was adjudged an ill Plea. Cro. J. 463. pl. 10. Hill. 15 Jac. B. R. Athill v. Corbett.

7. Treſpaſs for cutting the Plaintiff's Nets and Oars; the Defendant juſtified, for that he was ſeiſed in Fee of a ſeveral Fiſhery, and that the Plaintiff with others *endeavoured* to row on the Water, and *with their Nets to catch his Fiſh*; and thereupon to preſerve his Fiſhing, he cut the Nets, and Oars &c. adjudged no good Plea, for he might have taken the Nets and Oars, and detained them as Damage-Feaſant. Cro. Car. 228. pl. 5. Mich. 7 Car. B. R. Reynell v. Champernoon.

8. If *ten Head* of Cattle *are doing Damage* one cannot *take one* of them and keep it till he be ſatisfied for the whole Damage, but may bring Treſpaſs for the Reſt. Per Holt Ch. J. 12 Mod. 660. Hill. 13 W. 3. in Caſe of Vaſpor v. Edwards.

(B) The *Goods of whom* may be taken Damage-Feaſant.

Fol. 665.

1. If the Lord agiſts the Cattle of a Stranger in the Common of the Tenants where he himſelf hath Right to feed the Common, though he hath the Freehold, yet a Tenant may take the Cattle Damage-Feaſant. 30 E. 3. 27.

2. In

2. In Avowry it was held that where J. is amerced in a Leet for receiving of W. by a Year and a Day, who was not put in Decennary, the Lord cannot diſtrain J. but by his proper Beaſts, and not by the Beaſts of another in his Cuſtody, by reaſon that *the Offence aroſe upon the Perſon*, contra where it ariſes by the Soil, as for Rent-Service or Damage-Feaſant; note the Diverſity, for it is good as it ſeems, but the Plaintiff paſſed over Gratis. Br. Diſtreſs, pl. 3. cites 41 E. 3. 26.

3. Note, It was ſaid that if *the King grants a Rent out of his Manor*, the Manor is not charged, but the Perſon by Petition, the Reaſon ſeems to be inaſmuch as a Man cannot diſtrain upon the King, nor have Aſſiſe or other Action againſt him. Br. Charge, pl. 37. cites 13 E. 4. 5. 6.

4. *Leſſor cuts Wood*, and puts it into his Cart, and *leaves it on the Land for a Month*, and then will carry it away; Leſſee may diſturb him, for he may diſtrain this Damage-Feaſant for the Wrong to him; Per Doderidge; (N. B In the Caſe in Judgment the Leſſee had covenanted not to diſturb the Leſſor in felling or carrying away &c.) Palm. 504. Hill. 3 Car. B. R. Hayward v. Fulcher.

5. The *Cattle of a Stranger* cannot be diſtrained unleſs they were *Levant and Couchant*, but it muſt come on the other Side to ſhew that they were not ſo; Per Keeling. Mod. 63. in pl. 6. Trin. 22 Car. 2. B. R.

(C) *Who, in reſpect of his Eſtate*, may take Cattle Damage-Feaſant.

1. A Commoner may juſtify the taking of the Cattle of a Stranger upon the Land Damage-Feaſant. 30 E. 3. 27.

2. If there be a Shack Common in a Town where every one knows his Part, but it lies in Common, yet no Commoner may avow the taking of Cattle Damage-Feaſant in any Part of the Common but in that which is his own Part. Mich. 8 Jac. B. *Boderidge's Caſe*, per Curiam.

3. If a Man hath Common for ten Cattle, and he puts in more, the Surpluſage above the ten may be taken Damage-Feaſant. 46 E. 3. 12. b.

Br. Avowry. pl. 29. cites S. C. —— The Land-holders had Common for all Beaſts levant and couchant upon their Eſtates; the Plaintiffs were both intitled to this Common, and the Plaintiff putting in more Cattle than were levant and couchant upon his Eſtate, the Defendant diſtrained them; and the Queſtion was, Whether one Commoner might diſtrain another in this Caſe? It was agreed in this Caſe, that one Commoner might have an Action upon the Caſe againſt another that put in more than were levant and couchant, and that the Lord might in ſuch Caſe diſtrain; and that where a Commoner was intitled to a Common for a certain Number of Cattle, as for ten or any other certain Number, there if he ſurcharged, another Commoner might diſtrain. It was likewiſe agreed, that if a Stranger, who has no Right of Common, put in Cattle, any Commoner might diſtrain; but this was ſaid to be a Caſe not yet reſolved, Whether one Commoner could diſtrain another for a Surcharge in the Caſe of Levancy and Couchancy; And ſo the Court took Time to conſider till the next Term. Freem. Rep. 273. pl. 300 Paſch. 1698. C B. Dixon v. James.

If a Man hath a Freehold in a Market-Place, and Corn is brought thither on the Market Day, and ſet down, he cannot juſtify the taking it there Damage-Feaſant. Cro. Eliz. 75. pl. 34. Mich. 29 & 30 Eliz. B. R. The Mayor of Launceſton's Caſe.

(D) Diſtreſs

(D) Diſtreſs Damage-Feaſant. *In what Caſes* it may be.

1. If a Man takes my Cattle and puts them into the Land of another Man, the Tenant of the Land may take the Cattle Damage-Feaſant, though I. who was the Owner was not privy to the Cattle being Damage-Feaſant, and he may keep them againſt me till Satisfaction of the Damages. Trin. 15 Jac. B. R. between *Robinſon and Waller*, Per totam Curiam.

2. If a *Man comes to diſtrain* Damage-Feaſant, *and ſees the Beaſts there, but the Owner drives them out*, he cannot diſtrain them Damage-Feaſant, but is put to his Action of Treſpaſs; For in ſuch Caſe though otherwiſe in the Caſe of Rent Arrear the Beaſts ought to be Damage-Feaſant at the Time of the Diſtreſs; Per the Reporter in a Nota. 9 Rep. 22. a. cites 16 E. 4. 10. b. and 2 E. 2. Avowry 180.

Co. Litt. 161. a. S. P. —— Pl. C. 38. a. S. P. —— But Ibid. Marg. cites that in a Writ of Reſcous brought by one named Rich, Hill. 6 R. 2. and abridged by Fitzh. tit. Reſcous, pl. 11 it is held that for Damage-Feaſant the Party who had the View may purſue and take the Beaſts in other Land &c.

Diſtreſs Damage-Feaſant *is the ſtricteſt Diſtreſs* that is; for the Thing diſtrained *muſt be taken in the very Act*; For if they are once off, though on *freſh Purſuits*, you cannot take them; Per Holt Ch. J. 12 Mod. 661 Hill. 13 W. 3. in Caſe of Vaſper v. Edwards.

3. Treſpaſs againſt A. who *juſtified for Diſtreſs for his Lord*; the *Plaintiff ſaid that he had a Cloſe adjoining in which Beaſts were put, and they eſcaped and went into the other's Lands where Treſpaſs &c. and the Plaintiff freſhly purſued them, and before that he could take them out the Defendant took them*, and yet the Diſtreſs is well taken, per Cur. notwithſtanding the freſh Suit, and that they were not levant and couchant; for they *were there without Authority*. Br. Treſpaſs, pl. 281. cites 7 H. 7. 1.

4. S. brought an *Ox-hide to Leadenhall in London to ſell it*, and W. diſtrains it Damage-Feaſant, and juſtifies as Servant to the Mayor to whom that Place appertained for the Incorporation; adjudged that the Diſtreſs is not lawful, for it was brought there to be ſold pro bono publico; for *Goods brought to a Market* and expoſed to Sale ſhall not be diſtrained. Noy 19. Mich. 15 Jac. cites the Caſe of Sawyer v. Wilkinſon.

5. A. ſuffer'd his *Cattle* to *eſcape into B. his Neighbour's Ground, the Fences being out of Repair, which B. ought to make*, and the Cattle being there levant and couchant, without any freſh Purſuit made *were diſtrained for Rent due from B.* and per Cur. the Diſtreſs is not lawful; for though the Fault was in B. for not repairing the Fences, yet it was A.'s Fault to ſuffer them to be levant and couchant there without making any freſh Purſuit after them; and Rent is due of common Right, and the Land is the Debtor, where the Landlord muſt reſort for his Rent, and is not to enquire whoſe Cattle they are, or how they came there. 2 Roll Rep. 124. Mich. 17 Jac. B. R. Gill v. Gawen.

6. The *Cattle of a Stranger* cannot be diſtrained, unleſs they were *levant and couchant*; but it muſt come on the other Side to ſhew that they were not ſo; Per Kelynge. Mod. 63. pl. 6. Trin. 22 Car. B. R. Jordan v. Martin.

S. C. cited by Powell J. 2 Lutw. Appendix 1580. in Caſe of a Diſtreſs for Rent. —— 2 Keb. 669 pl. 34 S. C. and per Curiam præter Twiſden, it muſt be averr'd Levant and Couchant, but it not being poſitively averred that the Plaintiff was a Stranger, the Court will never intend it ſo.

7. If

7. If *Turves* are *lying on a Common Damage-Feasant* a Commoner may distrain them, but he cannot justify the burning them. 2 Jo. 193. Pasch. 34 Car. 2. B. R. Bromhall v. Norton.

(D. 2) For Rent. By whom. In respect of his Estate.

1. IN Assise it was said for Law, that where *Rent-Charge descends to a Daughter*, and after *the Land descends to the same Daughter and to her two Sisters*, nothing is extinct but the third Part of the Rent, and yet the Daughter, who has the Rent, *cannot distrain* for the other two Parts of the Rent *till Partition* be made; For she is seised of the Land per my et per tout with the other two Sisters till Partition be made. Br. Distress, pl. 37. cites 34. Ass. 15.

2. In Scire Facias upon a Fine, it was agreed, where *upon a Fine it it reserv'd*, That for not performing of Masses by the Prior of B. (the Conusor) *That the Justices of C. B. or Barons of the Exchequer might distrain*, and in this Case the *Conusee and his Heirs might distrain*. Br. Distress, pl. 20.

3. Where it is *reserv'd*, *That* for Non-Feasance *the Bailiff of the King shall distrain*, yet the *Bailiff of the Party may distrain*. Br. Distress, pl. 20.

Br Grants, pl 21. cites 46 E. 3. 18.

4. *Rent reserv'd upon a Lease for Term of Life may* be put in Execution by Elegit, and the Plaintiff who recovers may distrain for the Rent, and yet he has not the Reversion. Br. Distress, pl. 71. cites 13 H. 4.

Br Execution, pl. 143. cites S. C. and Fitzh. tit. Avowry. 237.

5. Where a Man *leases for 20 Years*, and the *Lessee leases over for 10 Years* rendring Rent, there if he grants the Rent to another Man he cannot distrain; because he has not the Reversion of the Term; Contra if he had granted to him the Reversion and the Rent; Note the Diversity. Br. Distress, pl. 45. cites 2 E. 4. 11.

6. It was said, that if *the King grants a Rent out of his Manor* the Manor is not charged, but the Person by Petition; The Reason seems to be inasmuch as a Man cannot distrain upon the King, nor have Assise nor other Action against the King. Br. Charge, pl 37. cites 13 E. 4. 5. 6.

7. *Cestuy que Use of a Rent-Charge* for Life *executed by the Statute*, may distrain as incident to the Estate, the Power of Distress is transferred to him by the Statute. Mod. 223. pl. 12. Mich. 28 Car. 2. C. B Boscawen and Herle v. Cook.

2 Mod. 138 Cook v. Herle S. C.

8. If a *Lease for Years* be made reserving Rent, *and then Lessor acknowledges a Statute* which is extended. The Conusee after the extent shall have a Debt or Distrain and avow for the Rent. Per Ventris J. 2 Vent. 328. cites Bro. tit. Statute Merchant 44. [cites Fitzh. Avowry. 137. 13 E. 4.] and Noy 74. *But* he that *enters by a Power to hold for an Arrear* of Rent shall not. Per Ventris J. 2 Vent. 328. Trin. 1 W. & M.

9. In Replevin the Defendant avowed, for that W. R. was seised of the Place where &c. in Fee, and being so seised he *granted a Rent-Charge out thereof to W. W. for Life*, that *W. W. is dead*, and that he (the Defendant) was his Executor, and distrained in the Place where, for so much Rent in Arrear, and due to his Testator in his Life; but did not aver, that the Place where &c. was then in the Seisin of the Grantor of this Rent, or any other Person who claimed by, from or

under him; And upon a Demurrer to this Avowry Holt Ch. J. held, that the Executor might diſtrain either on the Grantor or any other Perſon, who comes in by or through him, and if the Plaintiff is not liable to the Diſtreſs, it is more natural for him to ſhew it in his Replication for his own Defence. Beſides, the Statute which impowers Men to diſtrain, is a Remedial Law, and therefore ought to be expounded according to Equity, and extended accordingly, and the Words therein being (Executors of Tenants for Life) may ex vi Termini include all Tenants for Life. 2 Salk. 136. pl. 2. Mich. & Hill. 8 W. 3. C. B. Howell v. Bell.

(D. 3) Who may diſtrain for Rent, in Reſpect of the Eſtate or the Perſon in Poſſeſſion. Of the King &c.

1. THE *one Tenant in common* may hold of the other, and the *other may diſtrain* and make Avowry, quod nota. *Contra* it ſeems *between Coparceners* and Jointenants *before Partition*, for Privity. Br. Diſtreſs, pl. 64. cites 31 E. 1. and Fitzh. Avowry. 241.

2. Where a Man *has a Seigniory*, and *this Land is ſeiſed into the Hands of the King by falſe Office*, yet the *Lord cannot diſtrain upon the Poſſeſſion of the King*, *though the Office be Falſe*, this Office *being in Force*, quod nota; For it appears, tit. Treſpaſs, that a Man may traverſe for his Seignory. Br. Diſtreſs, pl. 76. cites 44 E. 3. 13.

3. A Man cannot diſtrain during the Poſſeſſion of the *King*, be he *intitled by Office* or not, and if he be intitled by Office or Record, and grants the Land over, then he cannot diſtrain upon the Grantee. Contra where the King enters *without Office or Record*, and grants it over, there he may diſtrain the *Patentee*, but not upon the Poſſeſſion of the King. Br. Diſtreſs, pl. 46. cites 4 E. 4. 22.

4. If the *King is intitled to the Ward of* the Heir of the Tenant, and the *Land is charg'd with Rent-Charge*, and the *King commits it over durante minore Ætate*, a Man cannot diſtrain upon the Poſſeſſion of the King, nor upon the Poſſeſſion of the Committee. Per Keble, quod non negatur. Br. Diſtreſs, pl. 38. cites 1 H. 7. 17.

5. If the *King is intitled by Office to the Land out of which I have a Rent-Charge iſſuing*, there I cannot diſtrain upon the Poſſeſſion of the King; But if the King *grants the Land by Patent*, there I may diſtrain; For I am not out of Poſſeſſion of the Rent by the Office. But he who pretends Title to the Land is out of Poſſeſſion thereof by the Office, nota Diverſity. Br. Diſtreſs, pl. 27. cites 21 H. 7. 1.

6. The Land ſubject to a Rent-Charge is privileg'd, and diſcharg'd from Diſtreſs while it is in the Hands of the King, yet *when* it is *transferr'd from his Poſſeſſion*, then *the Diſtreſs there is reviv'd*; For Rent is not extinct by the Poſſeſſion of the King of the Land out of which it iſſues, but the Diſtreſs is ſuſpended for the Time; but when the King has intirely diſmiſſed himſelf of all the Intereſt in the Land, then the Land is ſubject to ſuch Charges and Incumbrances as it was before; and this ſeemed by the better Opinion. Sav. 125. pl. 194. Mich. 32 & 33 Eliz. Boſden's Caſe.

(E) Distress. In what Cases a Distress may be *of common Right* by a common Person. *For what* Thing.

Litt. S. 213. S. P. and Co. Litt 142. a. says that Littleton's Meaning is, that the Lord may distrain for his Rent of Common Right, that is, by the Common Law, without any particular Reservation or Provision of the Party.

1. FOR Rent-Services a Distress may be taken of Common Right. 45 E. 3. 15 b. 1 H. 4. 1. b. 3 H. 6. 21.

Br. Distress, pl. 15. cites S. C. —— Fitzh. Distress, pl. 11. cites S C.

2. If my Tenant holds Land to do Suit to my Hundred, I may distrain for this Suit if it be arrear. 8 H. 4. 15.

3. For Aid to marry his Daughter, or make his Son a Knight, a Distress may be taken of Common Right. 39 E. 3. 34. though it was objected he ought to have a Writ to the Sheriff to levy it.

The Lord may distrain, but cannot have Action of Debt, but his Executors or Administrators may have Action of Debt, but cannot distrain. Co. Litt. 83. a. b. —— Ibid. 162. b. S. P.

4. The Lord may distrain for Relief, but if he dies his Executors cannot, but shall have an Action of Debt for it. D. 3. 4 Ma. 140. [pl.] 37. Co. 4. *Ognell* 49. b.

Br. Hariot, pl. 6. cites S. C. but not for Hariot-Custom. —— Fitzh. Avowry, pl. 177. cites S. C. —— S. P. admitted, Cro. E. 32. pl. 8. Trin. 26 Eliz. B. R. in Case of Peter v. Knoll. —— Cro. C. 260. pl. 4. Trin. 8 Car. B. R. Major and Brandwood, S. P. —— Jones 300. pl. 2. S. C. & S. P.

5. For an Heriot-Service due after the Death of every Tenant, the Lord may distrain. 27 Ass. 24. admitted.

6. It was held, that for *Suit-Service* a Man may distrain, but *not for Amercement for such Rent*, but for *Amercement for Suit-Real*; As at the Leet a Man may distrain; Note the Diversity, and it was for 2d. Br. Distress, pl. 15. cites 8 H. 4. 16.

7. For *Rent reserved upon Equality of Partition* the Parcener may distrain of Common Right. Br. Distress, pl 92. cites 11 H. 4. 3.

Ibid. 126. a. pl 87. S. P.

8. If one *holds of another by Homage, Fealty, and* 10 *s. Rent*, who takes Wife and dies, his *Wife* shall have the third Part of the Rent as a Rent-Seck, and yet *in Favorem Dotis* she *shall distrain for it.* Kelw. 104. a. pl. 11. Casus incerti temporis.

And *yet he shall distrain for it*; for seeing the Fealty is extinct, the Law reserves the Distress to the Rent; for, as it has been said in the like Case, seeing the Fealty is extinct, the Distress by Act in Law may be preserved, Quia quando Lex aliquid alicui concedit, concedere videtur & id sine quo res ipsa esse non potest. Co. Litt. 153. a. —— S. P for the Rent was Rent-Service before, and the Nature of the Rent is not changed by the Act of the Mesne. Keilw. 104. a. pl. 11. —— And therefore if a Man make a *Lease for Life, reserving a Rent*, and binds himself in a Statute, and has the Rent *extended and delivered* to him, he shall distrain for the Rent, because he comes to it by Course of Law Co. Litt. 153. a —— But if a *Rent-Service is made a Rent-Seck* by the Grant of the Lord, the Grantee shall not distrain for it, for that the Distress remains with the Fealty. Co Litt. 153 a.

9. If the *Tenant holds of the Mesne by* 5 *s.* and the *Mesne holds but by* 12 *d.* so as he has more in Advantage by 4 s. than he pays to his Lord, *he shall have the said* 4 *s. as a Rent-Seck* yearly *of the Lord which purchased the Tenancy.* Litt. S. 232.

10. It

10. It is a Maxim in Law, that no Diſtreſs can be taken for any *Services* that are *not put into Certainty*, *nor can be reduced* to any Certainty. For id certum eſt quod certum reddi poteſt, for oportet quod certa res deducatur in Judicium, and upon the Avowry Damages cannot be recovered for that which neither has, nor can be reduced to a Certainty, and yet in ſome Caſes there may be a *Certainty in Uncertainty*; As a Man may hold of his Lord to ſhear all the Sheep depaſturing within the Lord's Manor, and this is certain enough, albeit the Lord has ſometimes a greater, and ſometimes a leſſer Number there, and yet this Uncertainty being referred to the Manor which is certain, the Lord may diſtrain for this Uncertainty; Et ſic de ſimilibus. Co. Litt. 96. a.

12. The Lord by Eſcheat ſhall diſtrain for the *Rent after the Death of the Tenant*, though the Reſervation be to the Leſſor and his Heirs, and both Aſſignees in Deed and in Law ſhall have the Rent, becauſe the Rent being reſerved of Inheritance to him and his Heirs is incident to the Reverſion, and goes with the ſame. Co. Litt. 215. b.

13. If a *Gift in Tail*, *Leaſe for Life of Leſſee*, *or of another*, *or for Years* be made rendring Rent, ſuch Rent is Rent-Service, and the Leſſor may diſtrain for it of Common Right. Litt. S. 214.

And if a Man makes a *Leaſe at Will*, rendering a Rent, though the Leſſee ſhall not do Fealty, yet the Leſſor ſhall diſtrain for the Rent of Common Right, Co. Litt. 142. b

14. If *upon a Partition between Coparceners a Rent is granted* out of Part of the Lands deſcended for Equality of Partition, the Grantee of Common Right may diſtrain for this. Co. Litt. 169. b.

3 Rep. 22. b. in Walker's Caſe, S. P.

15. So if a Rent be *aſſigned* out of the Lands *to a Woman for her Dower*. Co. Litt. 169. b.

(E. 2) Taken. How. And where.

1. WHERE *the Lord comes to diſtrain and ſees the Beaſts*, and the *Tenant perceiving it chaſes the Diſtreſs* &c. the Lord may purſue them, and diſtrain well enough; Quod Nota; and this is where the Lord ſees the Beaſts as above, and not otherwiſe; for *if they are chaſed out before that he ſees them, he cannot purſue and diſtrain*; nota inde. Br. Reſcous, pl. 13. cites 21 H. 7. 40.

S. P. by all the Juſtices and Serjeants, but he cannot have Reſcue, becauſe he had not Poſſeſſion. Br. Diſtreſs, pl. 30. (bis) cites S. C.

2. One cannot *fling open Gates*, or break down an *Incloſure* to take a Diſtreſs. Co. Litt. 161. a.

3. *Horſes yoked to a Plow* may be ſevered *for Damage-Feaſant*; but per Manwood J. there is a Difference in the Books when the Diſtreſs is for *Rent-Service* they cannot be ſevered, for they are an intire Diſtreſs, and he claims no Intereſt in the Land, but only a Rent or Service with which the Land is charged; but in a Diſtreſs for Damage-Feaſant the Party claims the Land itſelf, and he may have ſeveral Actions for Treſpaſs for every Horſe; for every one of them does Treſpaſs. Cro. E. 7. pl. 6. Trin 24 Eliz. B. R. Tunbridge's Caſe.

4. By 2 *W. & M.* 5. It is thought convenient that a Conſtable ſhould be preſent, though the Act does not require it. Sir B. Shower's Obſervations on Stat 2 W. & M. cap. 5

5. If a Landlord comes into a Houſe, and *ſeiſes* upon *ſome Goods* as a Diſtreſs *in the Name of all* the Goods of the Houſe, that will be a good

Seizure

Seifure of all; but he muft *remove them* in convenient Time by common Law, and now *fince the Stat of 2 W. & M. immediately, except it be Hay or Corn*; Per Holt Ch. J. 6 Mod. 215. Trin. 3 Ann. B. R. in Cafe of Dod v. Monger.

6. Upon a Queftion about taking a Diftrefs, it was held, that a *Padlock* put *on a Barn's Door could not be opened by Force* to take the Corn by Way of Diftrefs; Per Ld. Ch. Juftice Hardwick. Summer Affifes at Exeter, 1735.

(E. 3) Sold. In what Cafes it may be.

1. THE *Lord of a Manor* having a *Leet may fell Diftrefs taken for Offence prefented in Leet* as the King may, becaufe it is the Court of the King, though it be in the Hands of a common Perfon, and he fhall caufe a ftrange Man to be fworn as the King may; for this is for the Advantage of the King. Br. Diftrefs, pl. 39. cites 3 H. 7. 4. Per Fairfax J.

2. *For Debt of the King* Diftrefs fhall be fold within 40 Days. Br. Diftrefs, pl. 71.

3. *And* per Fairfax, *Lord of a Leet* of the King may do the like; for this Pre-eminence goes with the Leet. Br. Diftrefs, pl. 71. cites 3 H. 7. 4.

4. A Diftrefs taken for an *Amerciament in a Court Leet* may be impounded or fold at the Pleafure of the Lord. 8 Rep. 41. a. Trin. 30 Eliz. C. B. in Griefley's Cafe.

Roll Rep. 76, 77. Mich 12 Jac. S. P. —— The Lord may fell a Diftrefs taken for a Fine. Noy 17. Hill. 3 Jac.

5. Diftrefs taken by a Bailiff of a *Court Baron* for not *doing Suit* and Service there, being warned, cannot be *fold*. Bulft. 52. Mich. 8 Jac. Hewet v. Norborough.

6. A Diftrefs for an *Amerciament in a Court Baron of the King's Manor* cannot be fold, but a Diftrefs infinite fhall go. Bulft. 53. Mich. 8 Jac. Hewett v. Norborough.

Yelv. 194. Gomerfall v. Medgate. —— Cro. J. 255. Gomerfall v. Wayts.

7. A Farm leafed *lay in two Hundreds*, and the *Conftable of one Hundred only, in the Prefence of the Conftable of the other* Hundred, *fwore the Appraifers and caufed the Goods* diftrained in both Hundreds *to be fold*; And per Cur. this is good; For the Diftrefs is entire being made at one Time, and the Land contiguous; and then where fuch Lands are in two Counties, and the Goods are diftrained for one *Intire Rent* out of thofe Lands, this *is one Diftrefs*, and by the 1 & 2 Ph. & M. 12. ought to be put into one Pound; and whereas it was urged, that the *Appraifement* muft be made by the Officers of the Parifh or Hundred where the Diftrefs is taken, it was faid that the *Continuing and Driving them to the Pound is a taking*. 12 Mod. 76. Walker v. Rumbold. cites Lat. 60. [Pafch. 1 Car.]

8. 2 *W. & M. Seff.* 1. *cap.* 5. *S.* 2. *Diftreffes for Rent may be fold in five Days after the taking and Notice given if not replevied; The Diftrainor with the Sheriff, Under-Sheriff, or Conftable of the Hundred, Parifh, or Place, (who are required to affift therein) fhall caufe the Diftrefs to be* appraifed

The Perfon *diftraining* muft give Notice, but it need not be immedi-

praifed *by two Appraifors to be fworn, and then may fell for the* * *beft Price towards fatisfying the Rent Arrear, Charge of Diftrefs, Appraifement, and Sale, leaving the Overplus (if any be) for the Owner's Ufe, in the Hands of the Sheriff or Conftable.*

ately, but at any Time after the *Diftrefs*; but then the five Days are to be computed from the Notice, not from the *Diftrefs*. If the Party *replevy*, all this is to no Purpofe; therefore before you venture to make any Sale, fearch the Sheriff's Office within the five Days

The Rent may be tendered after the five Days if no Appraifement, and a Tender after Appraifement prevents the Sale, for all is but to have the Rent, and no Property is in the Diftrainer, but only in the Vendee by Sale.

Any Perfons may be Appraifors that are of Age and capable of being Witneffes; *but* they *muft be fworn* by the Sheriff or Conftable for that Purpofe. The *Appraifement* fhould be *in Writing*.

Suppofe the Appraifement is higher than they can be fold for, may they fell them notwithftanding?

I think they may; for the Words are *for the beft Price can be gotten for the fame*; and it is not faid, for what they were appraifed at or above that Rate. But are they bound to carry them to Market or wait for a good Chapman? For the Words of the Act are (*beft Price that can be gotten*) and no Time is limited for the Sale, and Charges are allowed for it. I do think it moft advifeable, if it can be, to get the Value fettled by the Appraifers, and to fell immediately to the firft Chapman; if not, to wait fome fmall, reafonable and convenient Time, as a Week or the like. If you cannot get that Price, to fell to the higheft Bidder. And the next convenient Way feems to be by giving Notice at the next Market or Parifh Church, of the Day and Place, when and where the Goods fhall be expofed to Sale; yet I conceive, that after the Expiration of the five Days, and no Replevy, and an Appraifement, the Party may carry any portable marketable Goods and Commodities to the next Market, as Corn or the like, and there fell them, and he fhall have his Charges allowed for fuch Carriage, if he could not have a Chapman at Home; I think it always adviseable for the Buyers to have a Bill of Sale of all fuch Goods fo diftrained, appraifed and fold, and the Sheriff or Conftable Witnefs thereto. As to the Charges, I think the Expence in Removal of the Goods, Charges of Food for living Creatures, and moderate neceffary Expences for Tenants and Officers, will be allowed within the Meaning of this Claufe.

For the *Overplus* (if any) to be *left in the Sheriff or Conftable's Hands*, it is adviseable for the *Landlord to have a Receipt* or other Writing teftifying the fame

For the *Corn or Grain*, the Law is the fame as to Sale, only there it is not to be removed, if to the Damage of the Owner, otherwife it may. Sir Barth. Shower's Obfervations on this Statute, faid to be printed from a MS. of his in the Hands of the Author of The compleat Englifh Copyholder. fol. 160. &c.

* A Diftrefs fold at an appraifed Price, fhall be intended to have been fold at the beft Price, fince the Appraifers were fworn. Ld. Raym. Rep. 55. Trin 7 W 3. Walter v. Rumbal.

9. *Lands* lying *in two Hundreds and two Counties contiguous*, *were demifed by one Leafe* rendering Rent; The Leffor for Rent-Arrear *diftrained in both Hundreds*, and the Diftrefs not being replevied in five Days, the Conftable of the Hundred in which the Diftrefs was taken, Notice having been given to the Owner, adminiftered the Oath upon *Sale of the Goods in the other Hundred*; and this was held good, it being an intire Diftrefs and not feverable, and the Hundreds contiguous, fo that the Driving was lawful, and a Continuance of the firft Taking. 1 Salk. 247. pl. 1. Trin. 7 W. 3. B. R. Walter v. Rumbal.

12 Mod 76 Walker v. Rumbald, S. C. adjudg'd. —— Comb. 336. S. C. —— 4 Mod. 390. S. C. adjudged. —— 12 Mod. 53 S. C. adjudged. —— Ld. Raym. 55. S C. held accordingly.

10. Diftrefs *in a Leet* of Common Right may be fold becaufe it is a *Court of Record*, otherwife of Diftreffes in Courts that are not of Record; Per Holt. 12 Mod. 330. Mich. 11 W. 3.

11. As to *Commiffioners of Sewers* that is a fpecial Power given them, and of Confequence of that they may fell; And Callis takes great Pains to prove them a Court of Record, and though fome Acts that order Things to be levied by Diftrefs have alfo the Words (and Sale) yet no neceffary Inference can be made from that, for Statutes very often exprefs Matters more plainly than they need for greater Caution; Per Holt. 12 Mod. 330. Mich. 11 W. 3.

12. Upon a Diftringas in a Court-Leet *Pro Certo Letæ* the Officer cannot fell the Diftrefs of Common Right without a Cuftom; Per Cur. 1 Salk. 379. Mich. 1 Ann. B. R. in Cafe of The King v. Speed.

13. 11 *Geo. 2. cap. 19. S. 1. Goods or Chattles conveyed away from the Premisses to prevent the distraining them for Rent arrear, may be seized any where within 30 Days after, and sold, or otherwise disposed of, as if seized upon the Premisses for such Arrears.*

Provided they are not sold bona fide, and for a valuable Consideration, before such Seizure, to any Person not privy to the Fraud.

See the Statutes and several Pleas at (H).

(E. 4) Impounded. Where.

1. 52 *H. 3. cap.* 4. NONE *shall cause any Distress to be driven out of the County, and if any Neighbour do so to his Neighbour of his own Authority, and without Judgment, he shall be punished by Redemption. Nevertheless, if the Lord do so against his Tenant, he shall be but grievously punished by Amercement.*

2. Trespass for *distraining in one County and carrying into another*; the Defendant was condemned upon Insufficiency of his Plea, and was condemned in Damages 10 l. taxed by the Court, and that the Defendant should be ransomed, and Capias awarded against him. Br. Trespass, pl. 255. cites 30 Ass. 38.

Br. Action sur le Statute, pl. 41. cites S. C and notwithstanding the Statute of Westminster 1. cap. 16.

3. If a Man *holds Land in Essex of a Manor in the County of Hereford*, the Lord may distrain for his Services upon the Land, and bring the Distress into the other County to the Manor, notwithstanding the Statute of *Marlebridge, cap.* 3. Quod nullus duci faciat districtiones &c. Br. Distress, pl. 32. cites 1 H. 6. 3.

4. Trespass for distraining in the County of Wilts, and carrying into the County of Southampton contrary to the Statute of Marlebridge, cap. 4. The Defendant said, that the Place where is a Carve of Land which the Defendant holds of him in the County of Warwick, by which he distrained for the Rent arrear, and was going towards the County where the Manor is, and the Place where the Writ is brought was in the County of B. which is the Way to his Manor of B. in the County of Warwick &c. And per Hussey he cannot justify, because the Statute is in the Negative. But per Jenney and Fairfax Justices he may justify; because the Statute speaks, Quod si vicin' supra vicin' hoc fecerit puniatur per Redemptionem, & si Dominus super tenen' suum hoc fecerit tunc puniatur per gravem misericordiam, and therefore per Fairfax the Statute is *intended of Distress for Damage feasant or Rent-charge*, and *not between Lord and Tenant*. But quære inde; for the Statute is *in the Negative* as Hussey rehearsed; for the Parties demurred in Law, and no Replevin can be made in this Case; for a Replevin shall be where the taking was. Br. Distress, pl. 53. cites 22 E. 4. 11.

5. It was agreed, that if a Man puts the Distress in his *several Pasture, this is sufficient Pound-Overt*; and by others, præter Fairfax, if he puts them in the several Pasture *of another*, this is a good Pound-Overt. Quære, for per Fairfax it shall be where the Plaintiff may give them Food without Damage to others, and after Issue was taken if they died in Default of the Plaintiff, or in Default of the Defendant. Br. Distress, pl. 41. cites 5 H. 7. 9.

6. If Lord or Lessor distrains, he cannot make a Pound *in the same Land* for this Distress; Per all the Justices. But per Justiciarios, if he distrains *for Damage feasant* in his proper Land, he may impound them

them there; Quod Nota. And per Keble, when a Man diſtrains his Tenant at Will for Rent, and makes a Pound in the ſame Land, this making of a Pound there is a Diſcharge of the Leſſee, Quod non negatur. Br. Diſtreſs, pl. 30. (bis) cites 21 H. 7. 39.

7. 1 & 2 *P. & M. cap.* 12. *S.* 1. *Diſtreſſes ſhall not be driven out of the Hundred &c. unleſs to a Pound-Overt in the ſame Shire, and within three Miles of the Place where taken, and ſhall not be impounded in ſeveral Places, whereby the Owner ſhall be conſtrained to ſue ſeveral Replevins, in Pain that every Perſon offending ſhall forfeit to the Party aggrieved 5 l. and treble Damages; and 5 l. for taking more than 4 d. for impounding one Diſtreſs.*

The Plaintiff declared of a Diſtreſs taken in a Hundred in ſuch a County, and that he drove it ſix Miles out of the County; and becauſe a Hundred may be in divers Counties, and the Statute is, That the driving ought not to be more than three Miles out of the Hundred; and that it might be that the Driving was ſix Miles from the Place where the Diſtreſs was taken in another County, and yet not three Miles from the Hundred where the taking was, for that Cauſe it was not adjudged againſt the Party; and that was after Verdict in arreſt of Judgment. Godb. 11. pl. 15. Mich. 24 Eliz. C. B. Anon.

Diſtreſs was taken in the Hundred of Offlay in Staffordſhire, and the City of Litchfield was ſometime within this Hundred, and by Letters Patents of 1 Marie, the City was made a County of itſelf, and he which took the Diſtreſs impounded them within a Pound in the County of the City of Litchfield; now whether he has incurred the Penalty of the Statute, or not, was the Queſtion? And becauſe the Court had not a Statute-book there to ſee the Preamble, therefore they would give no Reſolution. Anderſon ſaid the Meaning of the Statute was, becauſe the Bailiff of the Hundred might make Deliverance; Alſo I think it is within the Compaſs of the Statute, becauſe the City was a County ſevered before this Statute made. Goldsb. 100. pl. 5. Mich. 30 & 31 Eliz. Beardſley v Pilkington.

It was ſaid by the Serjeants at Bar, that the Party may drive the Diſtreſs as far as he will within the ſame Hundred, but not above three Miles out of the Hundred. Gouldsb 101. pl. 5 Mich 30 & 31 Eliz. Beardſley v. Pilkington.

If a Diſtreſs be of three Cattle, and they are drove about three Miles from the Place where taken, and each Beaſt has a diſtinct Owner, the Diſtrainer ſhall forfeit three times 5 l. Per Holt Ch. J. 1 Salk. 52. in pl. 2. Paſch. 5 W. & M. in B. R. obiter.

8. P. brought an Action of Debt againſt N. upon the Statute of 1 & 2 P. & M. cap. 12. for taking of a Diſtreſs in one County, and driving it into another; and the Caſe was, that *three Men diſtrained a Flock of Sheep, and them impounded in ſeveral Places*, and if every of them ſhall forfeit 100 s. ſeverally, or but all together 100 s. The Court was divided, for the Words of the Statute is, that every Perſon ſo offending ſhall forfeit to the Party grieved for every ſuch Offence 100 s. and treble Damages; but Walmſley thought that every one ſhould forfeit 100 s. and he put a Difference between Perſon and Party, for many Perſons may make but one Party. Gouldsb. 145. pl 62. Hill. 43 Eliz. Partridge v. Naylor.

Noy 52. S. C. and the Court gave 5 l. againſt every Offender; but after upon Error brought it was held to be erroneous, but the Court gave a Day for Precedents.

—— Cro E 480. pl. 12 S. C adjudged accordingly in C B and Judgment reverſed in B. R —— Mo. 453 pl. 620. S C. and Judgment reverſed. —— D. 177 b Marg pl. 34. cites S. C accordingly. —— But by Fenner, if the Plaintiff had brought his Action againſt them ſeverally, every one ſhould have paid 5 l. Noy 62. in Caſe of Patridge v. Emſon, and ſeems to be S. C. But the Reporter ſays Quære.

9. At Common Law a Man might have driven the Diſtreſs into what County he would, which was miſchievous for two Cauſes; 1ſt. Becauſe the Tenant was bound to give the Beaſts (being impounded in an open Pound) Suſtenance, and being carried into another County, by common Intendment he could have no Knowledge where they were. Another Cauſe was, he could not know where to have a Replevin, but the Party was, before this Statute, driven to his Action upon his Caſe; and albeit this Statute be in the Negative, yet if the *Tenancy is in one County, and the Manor in another* County, the Lord may drive the Diſtreſs which he takes in the Tenancy to his Manor in the other County, for that the Tenant is out of both the ſaid Miſchiefs; for the Tenant by doing

doing of Suit and Service to the Manor, by common Intendment may know what is done there, and therefore may give his Beaſts Suſtenance; and to know where to have his Replevy, the Bailiff of the Manor uſually drives the Cattle diſtrained to the Pound of the Manor. And this * Act extends as well to Goods as to Beaſts. 2 Inſt. 106.

* Stat of Marlb 52. H. 3. cap. 4.

10. *By Preſcription*, if a Manor is one County, and is held of a Manor in another County, the Lord may drive a Diſtreſs out of the County where it is taken; Arg. Palm. 544. Trin. 4 Car.

S P cited per Walmſley J 2 Brownl. 260. ——Pl C. 9 b. cites it as held accordingly 30 E. 3. in the Abbeſs of Wilton's Caſe. ——— Ibid. in the Marg. is a Nota, viz Vide the Caſe in Termino H 30 E 3 fol 5. in Treſpaſs upon the Statute abridged by Fitzh in Tit. Diſtreſs, 16 but nota that it is adjudged contrary to what is vouched here. Diſtreſs was *in* the County of *Wiltſhire in a Place which is within the Honour of Wallingford*, which Caſtle and Court is *within the County of Berks*, and drove them to the Caſtle, and there Deliverance was made, and at the Suit of the Defendant the Plaint was removed by Accedas ad Curiam directed to the Sheriff of Oxford into Bank, and there counted of the taking in Wiltſhire, and this was held well by the Court. D. 168. b. 169. a. pl. 20. Trin. 1 Eliz. Anon.

11. If *Lands in Middleſex and Hampſhire* are *demiſed by one Demiſe, reſerving one intire Rent*, the *Diſtreſs taken in Middleſex cannot be chaſed into Hampſhire*, becauſe the Counties are not adjoining; Per Holt Ch. J. Ld. Raym. Rep. 55. Trin. 7 W. 3. in Caſe of Walter v. Rumbal.

12. Where *Land lies in ſeveral Counties*, and *one Diſtreſs is taken for an intire Rent of ſome Cattle in one County, and ſome in the other*, the *Landlord may* drive them all together, and *impound them in either County*, (notwithſtanding the Statute of Marlbridge, that a Diſtreſs ſhall not be driven out of the County) and the Officer of either County is within the Meaning of the late Act of Parliament of 2 W. & M. Reſolved. Comb. 336. Trin. 7 W. 3. B. R. Walter v. Rumbal.

4 Mod. 395. S. C. per Cur though the Diſtreſs was *taken in two Hundreds*, they being *contiguous*, *it is but one intire Diſtreſs*, eſpecially being taken at one and the ſame Time, and for one intire Rent, and it ought to be put into one Pound. ——— Ld. Raym. Rep. 55 S. C. held accordingly, and that the chaſing of the Diſtreſs over is a Continuance of the taking the Diſtreſs, and the Party, ſince it was for one intire Cauſe, cannot ſever the Diſtreſs, but muſt chaſe them all together, and impound them in one Pound, by the Stat. 1 & 2 P. & M. cap. 12. ——— 12 Mod. 77. S C. & S. P. held accordingly.

(F) For an *Amercement*.

[*In what Caſes.*]

1. **FOR Amercements** in a Court-Leet **for** Offences done out of Court **a Diſtreſs is incident of Common Right. Co.** 8. *Grieſly* 41. **Doctor and Student** 74. **M.** 12 **Ja. B. per Curiam.**

S. C. cited 11 Rep 45. a — Diſtreſs is *incident* to an Amercement in a Law-Day, by all the Juſtices in C B. Quod nota bene. Br. Diſtreſs, pl. 44. cites 9 H 7. 22.

2. So **for Amercements in a Court-Leet for Offences** done in Court **a Diſtreſs lies of Common Right.** 10 **H.** 6. 7. 7 **E.** 2. **and** 8 **E.** 2. **Avowry** 211. 212. **upon Default of Appearance.**

8 Rep 41. a. b. in Grieſley's Caſe, S. P. a fortiori, Quod licitum eſt pro minore, licitum eſt pro majore.

3. So for Fines in a Court a Diftrefs is incident of Common Right. 39 E. 3. 35. admitted.

4. But the Lord cannot diftrain for an Amercement in a Court Baron without a Prefcription. Doctor and Student 47. Co. 11. Godfrey 45. Kelloway 20 H. 7. 66.

Brownl. 36. S. P.

5. If the Lord of a Fair hath ufed to have certain Toll for every Sale of Cattle, and upon a Sale the Toll is not paid, the Lord may feife any of the Cattle fo fold, and retain them till Satisfaction. Mich. 13 Jac. B. between Agard and Lifle.

6. And in fuch Fair, if a Man buys one Beaft of one Man and another of another Man, and fo many of feveral Men, and refufes to pay Toll for any of them, the Lord may feife any of the Cattle fo bought by him for all his Toll. M. 13 Jac. B. per Hobert.

7. Replevin. Where the *Lord of a Leet diftrains for Amercement affeer'd in a Leet* for Non-appearance at the Leet, the *Tenant is bound to take Notice for what Matter he diftrains*; per Finch, but Wich contra, and that it is fufficient for the Tenant to fay, that in Cafe the Defendant would have notified to him what was amerc'd, that he would have paid it. And per Finch, if the *Tenant offers the Amercement*, and the *Lord refufes it*, and after the *Lord diftrains*, and he *Tenant offers it again*, and the *Lord carries away the Diftrefs* he does tort, and yet once it was offer'd; For he *ought to offer it at the Time of the Taking* &c. and then the Lord fhall not have Return. And per Wich, if the Tenant comes after the Lord has diftrain'd, and offers the Rent and the Lord refufes, he fhall not have Return. And fo fee that *the Diftrefs is only a Pledge for the Duty, which* Duty *when it is offer'd the Lord ought to deliver the Pledge*, and after Iffue was taken upon the Notice gratis. Br. Diftrefs, pl. 8. cites 45 E. 3. 9.

Br. Retorn de Avers, pl. 11. cites S. C.

8. In *Trefpafs* the *Defendant juftified for* Diftrefs for Amercement, *in which A. the Owner was amerced*, and the *Iffue* was taken *if the Property at the Time of the Taking was in the Plaintiff or in A. who was amerc'd* Br. Iffues joines, pl. 46. cites 47 E. 3. 13.

Br. Trefpafs, pl. 59. cites S. C. and fays, Quære of this Pleading at this Day.

9. It was held that a Man *cannot diftrain for Amercement for Rent-Service*, but for *Amercement for Suit real* as at the Leet, a Man may diftrain; Note the Diverfity, and it was for 2 d. Br. Diftrefs, pl. 15. cites 8 H. 4. 16.

Br. Amercement, pl. 15 cites S C.—For Suit Real no Diftrefs can be taken but for Amerciaments for Default of Suit. 2 Inft. 120.

10 For Amercement in a Leet *no Beafts* fhall be diftrain'd *but the proper Beafts of the Offender*. Br. Diftrefs, pl. 89. cites 12 H. 7. 15.

11. *But if a Man holds of a Leet to be Cryer tempore Curiæ* &c. there *he may diftrain any Beafts* which are *upon the Land, held* per Fineux, quod nota, and by the beft Opinion of the Court; et concord' of the Diftrefs in Leet. 47 E. 3. 13. Br. Diftrefs, pl. 89. cites 12 H. 7. 15.

12. It was agreed that a Man *may prefcribe for Amercement in a Leet*, to diftrain and fell the Diftrefs, becaufe it is Curia Regis, and the Party derives his Intereft from the King, quod nota. Br. Diftrefs, pl. 31. cites 21 H. 7. 40.

Br. Diftrefs, pl. 91. cites S C. that Lord may diftrain *for breaking of a By-Law* in a Leet by Cuftom Br. Diftrefs, pl. 91. cites 21 H. 7. 40 ——See 6 Rep. 25. a Ruddock's Cafe. ——Cro E. 648. Rafing v. Ruddock. S. C.——11 Rep 44. Godfrey's Cafe

13. A Man may diftrain and avow &c. *for Rent due from a Copyholder* to a Lord of a Manor; For this is a Duty to the Lord at the Common Law; and therefore an Avowry may well be for it. Cro. Eliz. 524. pl. 51. Mich. 38 & 39 Eliz. B. R. Laughter v. Humfries.

15. So he may for an *Amercement of an Inhabitant* impofed *in a Court-Leet* for *refufing to take upon him the Office of a Conftable.* 8 Rep. 38. and 41. Trin. 30 Eliz. C. B. Greifley's Cafe.

Sav. 93, 94. pl 173. S. C adjudg'd.

16. A common Perfon Lord of a Manor cannot diftrain for Amerciaments in a *Court Baron*, as for Surcharge of Common &c. *without Prefcription.* But the Queen by her Prerogative may. Cro. E. 748. pl. 1. Pafch 42 Eliz. B. R. Rowlfton v. Alman.

17. *Diftrefs* taken *for not doing Suit* at the Leet *may be fold*, and taken in any Land within the Leet of the Beafts of him that made Default. Jenk. 219. pl. 67.

18. Upon an Avowry for an Amerciament in a Court *no Damages* are to be recovered, though found for the Avowant. Jenk. 272. pl. 89.

7 *H.* 8. nor 21 *H.* 3. 19 gives any *Cofts or Damages* in this Cafe. Cro E. 258. but adjornatur. Hafelip v. Chaplin ——— S. P. adjudged. Cro. E * 300. Porter v. Grey. ——— Upon producing divers Precedents of Damages and Cofts given fince the Statute, the Court inclined to allow them. Cro. E. 330. Hafelop v. Chaplin.
* S. C. cited Cro. J. 28.

19. A *reputed Manor* will maintain an Avowry for an Amercement in a Court-Leet, though indeed he had no Manor in Truth. Brownl. 170. Reynolds v. Oakley.

20. A *Diftrefs* is incident of Right to a Court-*Leet*, but in a Court Baron Prefcription muft be laid to diftrain. Brownl. 36.

21. Upon a Prefentment of a *Nufance* in a Court-Leet and a Pain affeffed to remove it by fuch a Time it was refolved by All that the Lord may *diftrain* or have Action of * *Debt* for fuch Pain or Amerciament. Cro. J. 382. pl. 10. Mich. 13 Jac. B. R. Pratt v. Stearn.

* Action of Debt was brought by a Lord againft his Copyhold Tenant for a Pain affeffed by the Homage *for an Incroachment on the Wafte.* The Court feem'd to ncline againft the Action. See Carth. 183. Cudmore v. Honywood.

22. A *Cuftom was laid for fuch a Townfhip to fend one to be fworn Conftable at fuch a Leet*, which not being done a Fine was fet, and Diftrefs taken for it. Exception was taken, becaufe *no Cuftom was alleged to warrant the Diftrefs*; For though of Common Right a Diftrefs may be taken for a Fine in a Court-Leet, that is, where it is impofed for fuch Things as are of Common Right incident to its Jurifdiction, as for Contempts or the like; yet where Cuftom only enables them to fet a Fine, it cannot be diftrained, for without Cuftom alfo, and cites 11 Co. **Godfrey's Cafe.** And to this Opinion did the Court incline; Sed Adjornatur. Vent. 105. Mich. 22 Car. 2. B. R. Pierfon v. Ridge.

Raym. 204. Pierfon v. Riddley S. C. Twifden J. faid that when a Duty is raifed by Cuftom, a Diftrefs for that Duty muft be maintained by the like Cuftom Sed adjornatur. ——— 2 Keb. 701. 739. 745 S. C adjornatur.

23. If the Bailiff *diftrains* for an Amercement for a Nufance upon Prefentment in a Leet, he muft *juftify by Warrant of the Steward.* Show. 61. Mich. 1 W. & M. Matthews v. Cary.

S. P. or he muft *fet out fome Eftreate* of the Court. 1 Salk 108. S. C. —— A Diftrefs *per Mandatum* of the Lord of the Manor is not good; For a Bailiff cannot diftrain by that Means, nor otherwife than by Virtue of a *Precept* directed to him *by the Steward of the Court.* Carth 75. Mich 1 W. & M. in B. R. Mathews v Carew. —— Show 61. S. C. & S. P accordingly ——— But in an Avowry he need not fhew any Authority or Precept, but then he muft aver the Offence to have been committed Carth. 74 S. C. ——— Show 61, 62. S C & S P accordingly. ——— 3 Mod. 137. S C. refolv'd that he ought to fet forth the Warrant of the Steward, without which he cannot juftify to diftrain for an Amercement. But in a Replevin where the Defendant made Cognizance in the Right of the Lord, it might be well enough. —— S. P. per Popham accordingly; But per Gawdy contra. ——Cro E. 698. in Cafe of Steverton v. Scroggs. —— S P per Popham, but the other Juftices conceived otherwife, but afterwards Judgment was according to the Opinion of Popham. Cro. E. 748. pl 1. Pafch 42 Eliz. B. R. Rowlefton v. Alman

24. In *Replevin* the Defendant made *Conufance as Bailiff* to R. F. and faid that the Place where is within S. and that S. is within the Manor of &c. and *fhews a Cuftom for the Jury to elect* one of the Refiants to ferve the Office of *Conftable* for a Year, and faid that they elected fuch a One to be Conftable for the Year infuing, and to take his Oath under a Penalty of 40 s. and at the next Court it was prefented that he did not take the Oath, and for this 40 s. a Diftrefs was taken &c. And the Plaintiff demurred to this Avowry, that here is a Duty laid to be by Cuftom, and it is not like to a Fine or Amercement, and therefore the Party ought likewife *to enable himfelf by Cuftom to diftrain* for it, otherwife no Diftrefs is incident of Common Right; For the Defect of a Cuftom to diftrain, and for want of alledging of Notice, the Court held the Avowry to be ill; for this is a Duty by the Cuftom, and therefore the Remedy in fuch a Special Matter ought to be by Cuftom likewife. Skin. 635. pl. 4. Hill. 7 W. 3. B. R. Fletcher v. Ingram.

1 Salk 175. pl. 1. S C. adjudg'd for the Plaintiff ——If abfent the Party ought to be fummoned, and a Time and Place appointed under a Penalty when and where he fhall come, and before whom to take the Oath. 5 Mod. 127 S. C. and the Pleadings ——Comb. 350. S. C. adjudg'd, Nifi &c ——12 Mod. 87. S C. the alleging that Notitiam habuit is too general. Judgment for the Plaintiff ——Ld. Raym. Rep 69. 71. S. C. & S. P and for that Reafon, and becaufe the Defendant did not allege a Cuftom for taking the Diftrefs, it was adjudg'd for the Plaintiff.

(F. 2) Pleadings in Replevins, and Avowries for Amerciaments.

1. CUSTOM cannot be that a Man abiding within the Leet fhall be *excus'd* of the Leet, *by their coming before the Conftable and Port-reeve.* Br. Cuftoms, pl. 11. cites 2 H. 4. 16.

Br. Leet, pl. 10. cites 2 H. 4. 15. ——Br. Prefcription, pl. 13. cites S. C.

2. The Lord intitled himfelf to a Leet and a certain Sum Pro Certo Letæ by Means of his Hundred; it is a *good Plea* by him *that he is feifed of the Hundred without fhewing the Deed*; Per Periam and Rhodes J. But if the Hundred itfelf had been in Queft on, then he ought to fhew a Deed; but here the Defendant intitling himfelf to a Leet, and a Leet-Fee by reafon of the Hundred, it is fufficient for him to fay that he is feifed of the Hundred &c. although it be by Diffeifin; For if he has Poffeffion, be it Jure vel Injuria he fhall have all Things incident thereunto; For the Poffeffion of the Hundred draws to him the Leet, and the Leet the Leet-Fee. 2 Le. 74. pl. 98. Trin. 28 Eliz C B. Lawfon v. Hare.

3 Le. 178. pl. 231. S. C in totidem Verbis.

3. In Avowry on a Diftrefs for an Amercement in a Leet on a Vill as *for not making Tumbrel and Stocks*, it *muft be alledged that the Pain is not paid* to the Lord, or *elfe it might be paid by another of the Vill before.* Mo. 573, 574 pl. 789. Trin. 40 Eliz. Scroggs v. Stevenfon.

Cro. E. 698. pl. 11. Steveron v. Scroggs. S. C.

4 In Replevin, the Defendant *avowed, for that he had a Leet for all the Inhabitants and Refiants within his Manor, and that the Plaintiff being an Inhabitant, was fummoned to appear* at the Leet *on a certain Day, and for making Default he was amerced, for which he diftrained*; The Plaintiff *replied, that the Place where he dwelt was Parcel of a Monaftery, and Land held in Frankalmoigne difcharg'd of all Secular Services*; *then* he *pleads the Statute* 31 *H.* 8. *and the King's Grant to his Anceftors adeo plene, libere & integre, as the Abbot held it* before the Diffolution, and conveyed the Land to himfelf by Defcent &c. The

Avowant

Avowant demurred; and adjudged for the Plaintiff; for the Abbot was diſcharged ratione ordinis ſui as all Churchmen, Women and Noblemen &c. were; and this Immunity Churchmen had at Common Law before the Statute of Marlbridge, in reſpect of their Perſons, and therefore it ſhall not go to the Patentee of the King; but all other Perſons above 12 Years old muſt do Suit, and it is called Suit Real, alias Regal, for though the Lord has the Benefit of the Court, yet it is the King's Court, and the Service there done is Service to the King. 2 Roll. Rep. 56. Mich. 16 Jac. B. R. Dacre v. Nixon.

5. In *Treſpaſs* the Defendant pleads a Special Juſtification for an Amercement upon a *Preſentment* by the Jury *for a Nuſance* at the Court Leet of the Archbiſhop of Canterbury; adjudged for the Plaintiff, for the Defendant ought to *ſhew the Bounds and Limits* of the Leet, *and over what Perſons* the Leet has Juriſdiction, as to ſay de Reſidentibus, and Inhabitantibus infra Manerium de Lambeth &c. for the Leet may extend into one Manor or within four or five Manors; or there may be ſeveral Leets within one Manor, and therefore he ought to plead the Bounds of his Leet certainly. Skin. 392, 393. pl. 29. Mich. 5 W. & M. in B. R. George v. Lawley.

4 Mod. 377. S. C. adjudg'd for the Plaintiff. —S. P. held accordingly, and alſo becauſe he did not plead an Extract of the Court, which the Bailiff ought to have for his Warrant. Mo. 573, 574 pl. 789 Trin 40 Eliz. Scroggs v. Stevenſon——All the Juſtices held, that the Bailiff cannot without Special Authority from the Steward diſtrain for an Amercement in a Leet. Mo 607. pl. 839. Stevenſon v. Scroggs. S. C.

6. The Avowry of the Bailiff of a Manor *for taking the Beaſts as a Diſtreſs for Breach of a Bye-Law by the Plaintiff was held ill, becauſe he did not plead a Precept of the Steward* for taking the Diſtreſs, or levying the Pain; For he can no more do it ex officio than a Sheriff could execute a Judgment of B. R. without a Writ. Skinn. 587. Mich 7 W. 3. B. R. Lamb v. Mills.

Skinn. 635. pl. 4. S. C. & S. P accordingly Comb 350. S. C. & S. P. by Holt Ch. J. and Judgment accordingly. ——5 Mod. 127. 130. S C ——Ld. Raym. Rep. 69. 71. S. C. & S. P. accordingly, by the Opinion of the whole Court.

7. There can be *no Diſtreſs for a Penalty* by Cuſtom in a Leet, as to forfeit 40 s by the Cuſtom if one refuſes to be ſworn Conſtable if elected, *without alleging a Cuſtom for it.* 1 Salk. 175. Hill. 8 W. 3. B. R. Fletcher v. Ingram.

(G) *For what* Thing *againſt common Right* a Diſtreſs may be taken.

S. C. cited by Hale Ch. J. Freem. Rep. 103. in the Caſe of Brumfield v. Tra, that though they did not allege a Cuſtom to diſtrain, yet it was held good enough.

1. IF there be a Cuſtom in the Town of Tewksbury that the Bailiffs and principal Burgeſſes of the Town have uſed Time &c. to rate and tax every Inhabitant within the Town for the Reparation of any Bridge within the Town; if a Tax be made according to the Cuſtom, a Diſtreſs may be taken for this Rate of the Goods of any Inhabitant ſo tax'd, though upon the making of the Tax it is not ordain'd that a Diſtreſs ſhall be taken for it, inaſmuch as here no Perſon can have an Action of Debt for this Tax, inaſmuch as the Corporation is not to have it, and then if a Diſtreſs ſhould not be for it, there ſhould be no Remedy for it. Paſch. 11 Car. B. R. *Smethesden and Aſhton*, reſolv'd per totam Curiam, after a Verdict for the Avowant, in which the Diſtreſs was made by Warrant

Warrant under the Seal of the Bailiffs, Burgeſſes and Commonalty which was the Name of the Corporation, and yet reſolv'd good, becauſe the Bailiffs could not have made a Warrant by other Seal.

because the Party had no other Remedy.

2. If a Rent-Charge be granted, and that if it be Arrear that the Grantee ſhall have a penal Sum; if the Penalty be forfeited the Grantee may diſtrain for it. 11 H. 4. 65. Quære of this.

3. The *Uſage* of the Town of Dale was, *That when the Church was ruinous* the *Inhabitants aſſembled* themſelves *and taxed every one to a certain Sum, and if any taxed &c. did not pay they uſed to diſtrain ſuch Perſon*; This by the Cuſtom is allowable, and the Diſtreſs taken lawful, notwithſtanding there is a Statute which ſays, that nulli liceat ex quacunque Cauſa facere Diſtrictiones extra feodum ſuum niſi a Domino Rege & Miniſtris ſuis Aucthoritatem habent; For the Statute does not take away ſuch Cuſtom. Arg. And. 71. in pl. 144. cites 44 E. 3.

4. If by Cuſtom Time out of Mind there has been paid at a Leet certain Money, called *Certum Letæ*, the Lord without a ſpecial Cuſtom enabling him, cannot diſtrain for it, becauſe being againſt common Right, and for the private Benefit of the Lord, as he muſt preſcribe in the Principal, ſo he muſt preſcribe in the Diſtreſs. 11 Rep. 44. b. Mich. 12 Jac. Godfrey's Caſe.

1 Roll Rep. 33. 35 75, 76, 77 S. C. adjudged.

5. A *Rent-Charge* was granted *for Years with a Nomine Pœnæ, and Clauſe of Diſtreſs* if not paid at the Day, and the Rent is behind, and the Years incur, he cannot diſtrain for the Nomine Pœnæ, for that depends upon the Rent, and the Diſtreſs is gone as to both of them; Per Cur. Win. 7. Paſch. 19 Jac. Tutter v. Fryer.

6. If there be a *Cuſtom* within a Manor, *that every free Tenant of the Manor, upon every Alienation* of their Tenancy, *ſhall pay ſo much by Way of Relief as their yearly Rents amount to*, this is not properly a Relief, but a Fine for the Alienation due by Cuſtom, and therefore cannot be diſtrained for unleſs by Cuſtom; otherwiſe if due by Tenure; And it being alleged that the Tenant held by 5 s. Rent, & per Relevium quando acciderit ſecundum conſuetudinem Manerii, it was held by three Judges againſt Doderidge, that it ſhould be *intended a Relief due by Tenure*; for though it was firſt averred, that ſuch Relief was due by Cuſtom of the Manor, yet it is after expreſly alleged, that the Tenant held by Relief quando acciderit; Agreed per totam Curiam. Jo. 132. Trin. 2 Car. Hungerford v. Havyland.

Lat. 37, 95. 130. S. C.—3 Bulſt 323. S. C.———

7. Certum Letæ cannot be *diſtrained for* unleſs there is a Cuſtom to warrant it. Jo. 133. Trin. 2 Car. B. R. per Cur. cites 11 Rep. 44. b. Mich. 12 Jac. Bulloyne and Godfrey's Caſe.

Roll Rep. 35. S. C. Coke Ch. J. ſaid that Certum Letæ is againſt Common Right, therefore he doubted if it might be diſtrained for without a Preſcription; and the Court ſeemed to incline to the ſame Intent. ——— Ibid. 76. 77. S. P. accordingly.

8. Grantee of a Rent-Charge *levies a Fine* to the Uſe of himſelf and Wife in Tail, yet he may diſtrain for Rent Arrear before the Time levied. 2 Jo. 2. Witherhead v. Harriſon.

(H) *What Thing* may be diftrained.

1. A Diftrefs for Rent or &c. ought to be of a Thing of which there is a valuable Property in fome Perfon, and for Dogs, Deer, Coneys, and fuch like which are Feræ Naturæ, they cannot be diftrain'd. Co. Litt. 47.

2. Furnaces or Cauldrons fixed to the Freehold, or the Doors or Windows of an Houfe or fuch like cannot be diftrained. Co. Litt. 47. b.

3. A Man cannot cut the Corn growing and take it as a Diftrefs. 18 E. 3. 4.

Freem. Rep. 202. pl. 204. Mich. 1675. S. P. Obiter. —— 2 Mod 61. S. P. obiter in S. C.

4. Such Things of which no Replevin lies becaufe they cannot again be known from other Things cannot be diftrain'd for Services, as Money out of a Bag. 22 E. 4. 50. b.

2 Inft. 82. S. P. —— Freem Rep. 202. pl. 204. S. P. per tot. Cur. Mich, 1675. Wilfon v. Ducket. —— 2 Mod. 61. S. C. adjudged.

5. Or Sheafs out of a Cart. Contra, 22 E. 4. 50. b.

* Fitzh. Avowry, pl 263. cites S. C. and Trin. 14 H. 7 —— Br. Diftrefs, pl. 30. cites S. C. —— Jo 197. Mich. 4 Car. B R. S. P admitted in the Cafe of Cowper v. Pollard —— 2 Mod 61. Mich. 27 Car. 2. C B Wilfon v. Ducket, S. P. per tot. Cur. —— Freem. Rep, 202. pl. 204 S. C. and S. P. per Cur.

6. Or Shocks of Corn. 11 H. 7. 14. * 21 H. 7. 39. b. Curia.

Fol 667.

2 Mod 61. S. P. in Cafe of Wilfon v. Ducket.

7. Another Reafon is given that Shocks cannot be diftrained, for that by the Carriage there would be Damage by fhedding. 22 E. 4. 150. 2 H. 4. 15. Co. Litt. 47.

8. Grain or Barley cannot be diftrain'd. 18 E. 3. 4. 20 H. 7. 8. b.

9. Nor after it is ground. 18 E. 3. 4.

10. But fuch Things of which a Replevin lies, and which can be known again, may be diftrained. 22 E. 4. 50. b.

2 Inft. 82. S. P. —— Jo. 197. Mich. 4 Car. B. R. the S. P. per Cur. in Cafe of Cooper v. Pollard. —— 2 Mod. 61. S P. per Cur Mich. 1675. in Cafe of Wilfon v. Ducket. —— Freem. Rep. 202. pl. 204. S. C. & S. P. per Cur.

11. As a Cart of Grain. 22 E. 4. 50. b.

* Br. Diftrefs, pl. 11. cites S. C. —— Fitzh. Diftrefs, pl. 9. —— See pl. 37.

12. Curia, Co. Litt. 47. a Cart of Corn. * 2 H. 4. 15.

13. Or a Horfe laden with a Load of Sheafs. 21 E. 4. 50. b.

14. Or Money in a fealed Bag. 22 E. 4. 50. b.

15. A Man cannot diftrain Corn in the Ear, or Hay for Services. 3 E. 2. Avowry, 189.

16. A Man may diftrain other Goods befides Cattle. 18 E. 3. 4.

17. A

17. A Man cannot distrain Hay in a Barn for Services, because this cannot be known again to have Deliverance in a Replevin. Mich. 4 Car. B. R. between *Cooper and Pollard* adjudged upon a Demurrer; which Intratur Trin. 4 Car. Rot. 457.

Jo. 197. S. C. adjudged.— And so of Hay in Cocks, but if it be in a Cart it may. Adjudged by four Justices. Ibid.

18. If a Man leases rendring Rent, when the Tithes are severed from the nine Parts, he cannot distrain the Tithes for the Rent. 11 H. 4. 40. quære. But Brooke Distress 81. it is said he shall not, because it is the Thing leased.

19. No Man can be distrained by the Utensils of his Trade. Co. Litt. 47.

Though this is generally true, yet it must be intended where there are Goods or other Beasts enough to be distrained; Arg. 5 Mod 361. ——— If a Miller has two *Mill-stones*, the one in the Mill, and the other near it, the spare Stone may be distrained. Mo. 214, 215. Arg. cites 18 H. 8.

20. As the Axe of a Carpenter cannot be distrained for Rent. Co. Litt. 47.

21. Nor the Books of a Scholar. Co. Litt. 47.

22. If a Horse be laden with a Burden of Sheafs, the Horse only, or the Sheafs only, may be distrained for Services, (R. admitting the Sheafs only may be distrained.) 22 E. 4. 50. b.

23. The Materials for making Cloth in a Weaver's Shop cannot be distrained. Co. Litt. 47.

24. Equitatura hoc est Equus Palfridus or an Horse that a Man keeps for Journeys cannot be distrained. Registrum Originale, 100 b. but it does not appear for what the Distress was.

If a Man rides upon a Horse, this shall not be distrained, but if he has another Horse upon which he sometimes rides also, the spare Horse may be distrained Arg. Mo. 214.——— S. P. per Cur obiter Cro. E. 550. ——— A Saddle Horse is not distrainable if there are other Goods sufficient or coveniable. 2 Inst. 133.

25 An Horse upon which another rides cannot be distrained. Co. Litt 47.

26. An Horse in a Smith's Shop cannot be distrained for the Rent issuing out of the Shop; because this is for the Maintenance of Trade or of the Common-wealth. Co. Litt. 47. For he is there by Authority of Law.

3 Bulst. 270. S. P. Arg.— S. P by Holt Ch. J. but he said that there is no such Restriction where it is for a personal Duty. Ld. Raym. Rep. 386. Mich 10 W. 3.

27. So an Horse cannot be distrained in an Inn. Co. Litt. 47.

Br. Distress, pl. 97. (99) cites 10 H. 7. 21. S. P. ——— Ibid pl. 42 cites 7 H. 10. [1] S. P. ——— Br. Trespass, pl. 281 cites 2 H. 7. 1. S. P. ——— 3 Bulst. 270. Arg S. P.

28. So Sacks of Corn or Meal cannot be distrained in a Mill. Co. Litt. 47.

Br. Trespass, pl. 281. cites 7 H. 7. 1. S. P. ——— Ibid. pl. 42. cites S. C. [but misprinted for 7 H. 7. S. 10.] S. P.

29. So Sacks of Corn or Meal cannot be distrained in a Market. Co. Litt. 47.

30. So Cloth or Garments cannot be distrained in a Taylor's Shop. Co. Litt. 47. * 10 H. 7. 21.

* Br. Distress pl 97 (99) cites S. C. — Ibid. pl. 42. cites 7 H. 7. 10. [1] S. P. — — Br. Trespass, pl. 281. cites 7 H. 7. 1. S. P.

31. Averia

They are not privileged where there is no other Diſtreſs. Arg. 1 Salk. 249. cites 2 Inſt. 133 ——— By the Common Law the Plough or any Thing belonging to it was not diſtrainable ſo long as any other Diſtreſs might be taken. 2 Inſt. 133. ——— Co. Litt 47 a. b. S. P. ——— 5 Mod. 361. Arg. S. P.

31. Averia Carucæ **cannot be diſtrained.** **Co. Litt.** 47.

Things which are in Cuſtodia Legis cannot be taken; As a Diſtreſs in a Pound overt cannot be taken out of the Pound upon another Diſtreſs. Godb. 316 Arg. cites D. 67. Stringfellow's Caſe.

32. Things diſtrained Damage-Feaſant **cannot be diſtrained for Rent; becauſe they are** in Cuſtody of Law. **Co. Litt.** 47.

In Treſpaſs on the Statute for diſtraining per Averia Carucæ 'ue contra Formam Statuti he ought to ſurmiſe in his Count that he had other Beaſts; for if there are no other Beaſts he may diſtrain the Beaſts of the Plow. Br. Action ſur le Eſtatute. pl. 45. cites 4 H. 7. 8.

In Treſpaſs on the Statute the Plaintiff declared of taking Contra Formam Statuti Generally without alleging that he had otherwiſe reaſonable Diſtreſs, for which Cauſe Exception was taken, Sed non allocatur; for this muſt come on the Part of the Defendant, viz. That no other reaſonable Diſtreſs could be found, and this is iſſuable; and Judgment with Coſts was given for the Plaintiff. D. 312. a. pl. 86. Trin. 12 Eliz.

Ibid cites Mich. 18 E. 2. where it was held that this Action lies for the Tenant againſt the Lord, though the Tenant had come to Agreement with the Lord for the Rent for which the Diſtreſs de Averiis Carucæ was taken; and cites Paſch. 17 H. 6. Rot. 93.

33. 51 *H.* 3. *Stat.* 4 *Neither Draught-Cattle nor Sheep ſhall be diſtrained (except for Damage-Feaſant) ſo long as other Goods may be found to ſatisfy the Debt; Diſtreſſes ſhall be reaſonable; The Sheriff ſhall anſwer all Debts received; and where the Sheriff charged himſelf, the Debtor ſhall be acquitted.*

34. A Man may diſtrain *Sheep* if he cannot find other Diſtreſs, tho' he might have found other Diſtreſs before. Br. Diſtreſs, pl. 63. cites 29 E. 3. 16 and Fitzh. tit. Treſpaſs 250

35. A Man *ſeiſed of four Acres* of Land *has Iſſue a Son and a Daughter by one Venter, and two Daughters by another Venter, and granted* 100 s. *out of his Land to his Son in Fee*; the *Son dies without Iſſue in the Life of his Father*; the *Father dies*, the *Land deſcends to the three Daughters*; the *eldeſt Daughter* cannot diſtrain for the two Parts of the Rent till Partition be made. Br. Extinguiſhment, pl. 31. cites 34 Aſſ. 15.

S. C. cited Cro E. 550

36. A Man cannot diſtrain the *Horſe upon which a Man rides*, quod nota bene. Br. Diſtreſs, pl. 60. cites 6 R. 2. and Fitzh. tit. Reſcous 11.

37. Note, That a *Waggon full of Corn* may be diſtrained, contra of *Grain in Truſſes*; per Hank and Thirn, quod nemo negavit. And note, that a General Receiver has no Authority to re-deliver Diſtreſs without Command of his Maſter. Br. Diſtreſs, pl. 11. cites 2 H. 4. 15.

Br. Diſtreſs, pl. 80. cites S. C.

38. In Debt upon *a Leaſe of Tithes levied by Diſtreſs* is no Plea, per Skrene, becauſe there is no Land in which he can diſtrain, and he cannot diſtrain by the Tithes ſevered; for this is the Thing leaſed, contra Till. Br. Dette, pl. 234. cites 11 H. 4. 40.

39. A Man may diſtrain *the Beaſts of his Tertenant* for Rent-Service, or for Rent reſerved upon a Leaſe &c. *immediately* when they are put into the Land, *but not* the Beaſts *of a Stranger before they are levant and couchant*. Br. Diſtreſs, pl 65. cites Lib. Fundamentum Legum.

40. *A Garment at a Taylor's, or a Horſe baiting in an Inn or Hoſtery*, ſhall not be diſtrained; for they are there by Authority. And the ſame Law elſewhere of *Sacks of Grain at a Mill to grind*, or *Cloth at a Dyers*. And per Bryan, the ſame Law of a *Horſe with a Farrier to be ſhod*; But if he *takes off the Saddle and lays it upon the Ground*, the Lord may diſtrain the Saddle, and yet not the Horſe. Br. Diſtreſs, pl. 56. cites 22 E. 4. 49.

41. Treſpaſs

41. Trespass of taking of *two Waggons of Corn*; The Defendant justified as Distress for Rent arrear upon the Seigniory, and shewed certainly, there *he ought as well to justify the taking the Waggons as the Corn*, and otherwise it is ill; For per Suliard clearly, a Man cannot distrain Sheafs, nor Grain in Snocks, for the Damage of shedding in Carriage, and a Man cannot distrain *Money unless it were in a Bag sealed*, for one Penny cannot be known from another, and then Replevin cannot be thereof made. Per Catesby, our Books are so of Sheafs unless they were in Waggons; but I think that a Man * may distrain by Sheafs; and Brian to the same Intent; for Writ of Rescous lies thereof; tamen *Quære*. Br. Distress, pl. 58. cites 22 E. 4. 50.

Br. Distress, pl 88. cites S. C.

* S P. per Brian and Catesby, but Suliard contra, no more than Money. Br Distress, pl. 88. cites S. C.

42. *As* where a Man *Lases his Sheep*, or *bails his Goods in Pledge*, there they shall not be taken and put in Execution, nor taken for Outlawry, nor for Distress, nor such like, *till the Lease be determined, or the Money paid* for the Pledge. Br. Distress, pl. 74. cites 22 E. 4. 11.

43. A Man cannot distrain *Grain in Shock* for Rent arrear, because he cannot have Replevin nor Return thereof, for it is not certain to have thereof Conusance; but otherwise it is for Damage feasant; Per all the Justices. Br. Distress, pl. 100. cites 11 H. 7. 14.

44. A *Furnace fixed to the Land*, and *not to the Walls*, nor *Fatts fixed in the Land, Pale, Estanks, Windows, Doors, Gates, Evidence of Land, Post fixed in the Land, Table Dormant* &c. shall not be distrained, for they are not Chattles which go to the Executors, but the Heir shall have them, per. Cur. Quære if *Glass*; for it is said per Pollard, and not denied but that the Executor shall have it, and not the Heir. Br. Distress, pl. 29. cites 21 H. 7. 26.

Br. Chattels, pl. 7 cites S. C.

45. In Trespass of taking a *Mill-Stone*; The Defendant justified for distraining it for Suit &c. The *Plaintiff said, that it was fixed to a great Piece of Timber, cum clavibus & asseribus.* Per Brudnell this is no Plea, but he *shall say that he had a Horse-Mill in the House, and annexed to the House where* &c. and *that the Mill-Stone was Parcel of the Mill*; by which he said so; by which the *Defendant said, that it was severed, and was in Picking*; and yet it was held that it shall not be distrained, For yet it is Parcel of the Mill; For a Mill is for the Commonwealth; but if another Mill-Stone, which is none of them which are for grinding, be in the House, this may be distrained. Quære of the *Anvil of a Smith*, it seems that this shall not be distrained, if it be that upon which the Smith used to work, notwithstanding that it be taken out of the Stock. Br. Distress, pl. 23. cites 14 H. 8. 25.

46. *So of Doors and Windows.* Br. Distress, pl. 23. cites 14 H. 8. 25.

47 It is a moot Case, if *a Man distrains for a just Cause, and impounds the Beasts*, and after the *Lord of the Soil comes and distrains them for Rent again*, if his Distress be lawful, and it seems that it is not, inasmuch as they were distrained before, and were *in Custodia Legis.* Br. Distress, pl. 74. cites 4 E. 6.

48. *Stuff sent to a Taylor, Fuller, Sheerman, Weaver, Miller* &c. shall not be distrained; for those Artificers are for the Commonweal. And the same Law elsewhere of *a Horse in a common Inn.* But such Artificers may retain the Stuff for their Wages for their Labour. And the Hostler of the Inn may retain the Horse for his Victuals, viz. for the Horse-Meat not paid. And *Victuals* nor *Corn in Sheafs* cannot be distrained; Contra *of Corn in a Waggon.* Br. Distress, pl. 70. cites Lib. Rastel.

49. If a *Knight of the Order of the Garter has several Garters*, all but one may be distrained; Arg. Mo. 214. Mich. 27 & 28 Eliz.

50. An

50. An Horse which carries Corn to Market, and is put into a Friend's House for the Time, he is not distrainable; Per Beamond and Owen, which Walmsley denied. And where an *Horse carries Corn to a Mill, and is tied at the Mill-Door during the Grinding* of the Corn, he shall not be distrained; which Walmesley agreed; because it is a common Place, and for the Publick-weal; but he said that they be not alike. Cro E. 550. pl. 25. Hill. 39 Eliz. C. B. in Case of Read v. Burley.

51. A covenable Distress is not of *Armour*, or *Vessel*, or *Apparel*, or *Jewels*, so long as there are other sufficient or covenable, nor of *Sheep, Saddle-Horses, Beasts of the Plough, Poultry or Fish*. 2 Inst. 133. cites Mirror, cap. 2 S. 16.

52. *Goods under an Attachment* cannot be distrained. Vent. 221. Trin. 24 Car. 2. B. R. Monk's Case.

Upon this Act, if Corn be distrained in the Field the Party may carry it away, or else by its lying on the Ground it may spoil, and every taking and removing of the Corn out of the Place where it was, is a taking and carrying away in Law; Per Holt and Powell. For per Holt, the Act of Parliament is only that it be not removed to the Damage of the Owner, and as long as it is not at the Damage of the Owner it may be carried out of the Field; But by Holt, if Corn be distrained in a Rick, I doubt whether it can be carried away. Mich. 8 Ann. B R. Le Grice v. Manning.

53. 2 *W. & M. Stat.* 1. *cap.* 5. *S.* 3. *It shall be lawful to distrain for Rent arrear, as aforesaid, any Sheaves or Cocks of Corn, or Corn loose in the Straw, or Hay in any Barn, or upon any Hovel, Stack or Rick, or otherwise; and to lock up and detain the same where it shall be found, till it be replevied; and in Default thereof, within the Time aforesaid, to sell the same after Appraisement as aforesaid; so as it be not removed to the Damage of the Owner, but kept where it shall be found till it be replevied or sold.*

54. 11 *Geo.* 2. *cap.* 19. *S.* 8. *Enables Landlords, their Stewards, Bailiffs, Receivers, or other Persons impowered, to distrain any* Cattle or Stock *of their Tenants* feeding or depasturing upon any Common *appendant or appurtenant, or any Ways belonging to all or any Part of the Premisses demised or holden; and also to take and seize all Sorts of Corn and Grass, Hops, Roots, Fruits, Pulse, or other Product whatsoever, which shall be growing on any Part of the Estates so demised or holden, as a Distress for the Arrears of Rent; and the same to cut, gather, make, cure, carry, and lay up, when ripe, in the Barns or other proper Place on the Premisses so demised or holden; and in Case there shall be no Barn or proper Place on the Premisses so demised or holden, then in any other Barn or proper Place which such Lessor or Landlord, Lessors or Landlords shall hire, or otherwise procure for that Purpose, and as near as may be to the Premisses, and in convenient Time to appraise, sell, or otherwise dispose of the same, towards Satisfaction of the Rent for which such Distress shall have been taken, and of the Charges of such Distress, Appraisement, and Sale, in the same Manner as other Goods and Chattel, may be seised, distrained, and disposed of, and the Appraisement thereof to be taken when cut, gathered, cured, and made, and not before.*

S. 9. *Tenants to have Notice of the Place where the Distress is lodged. And Distress of Corn &c. to cease if Rent be paid before it be cut.*

(H. 2) The Goods of whom may be diſtrained.

1. LESSEE is ouſted by a Stranger, the Goods of *the Diſſeiſor* may be diſtrained for the Rent. Cro. J. 300. pl. 5. Paſch. 10 Jac. B. R. Humphry v. Damion.

2. A. *driving Cattle to London to ſell*, by Agreement with the Maſter of an Inn puts them into a Ground at ſo much a Score for a Night; The *Landlord* ſeeing them asked whoſe they were, but *conſented* to their ſtaying there, and afterwards the ſame Evening diſtrained them for Rent due to him by the Maſter of the Inn; and adjudged for the Landlord in the Caſe of Fowkes v. Joice. 3 Lev. 260. Trin. 1 W. & M. in C. B.

2 Vent 5[illegible] S. C. —— 2 Vern. R. 129. S. C. Relief decreed upon the Fraud, and the Landlord to anſwer the Value of the Sheep, and to pay Coſts both in Equity and at Law; Per Commiſſioners, and they ſeemed to think that the Grounds lying to the Inn and uſed therewith, ought to have the ſame Privilege as the Inn, and Paſſengers Cattle not to be diſtrainable there. ——— On the Landlord's coming and ſeeing the Sheep he pretended to be angry, upon which the Owner offered to take out the Sheep, at which Time they were not diſtrainable for the Rent, having not bee *levant and couchant* upon the Lands; ſo that the Court looked on the Conſent as a Fraud to get them to be left all Night, by which they became liable to the Diſtreſs; and the Plaintiff had his Coſts both at Law and in Equity. Ch. Prec. 7. S.C.

3. A *Rent-Charge* was Arrear for 20 Years, and *Cattle eſcaped out of the next Ground* and were diſtrained. Ld. Nottingham relieved againſt it; cited 2 Vern. 131. Hill. 1690. as the Caſe of Brodon v. Pierce.

S. C. cited Ch. Prec. 8

4. Where a *Stranger's Beaſts eſcape* into the Land they may be diſtrained for Rent, though they have *not* been *levant or couchant*, provided that they are *Treſpaſſors*. *But* if the Tenant of the Land is in Default in *not repairing his Fences* whereby the Beaſts came into the Land, the Leſſor cannot diſtrain ſuch Beaſts, though they have been levant and couchant, unleſs he have given *Notice to the Owner*, and he ſuffer them to remain there afterwards. But *the Lord of the Fee*, or *Grantee of a Rent-Charge*, in this Caſe may diſtrain ſuch Beaſts after they have been levant and couchant, without giving Notice. 2 Lutw. 1573. 1577. Hill. 7 W. 3. Kimp v. Cruwes.

5. The Goods of an *Ambaſſador* are *privileged by 7 Ann. 12.* and 10 Mod. 4. Trin. 8 Ann. B. R. Arg. and cites Grotius to the ſame Purpoſe.

(I) The *Goods of whom* may be diſtrained.

[*And in what Place.*]

Fol. 668.

1. IF the Cattle of a Stranger eſcape into the Lands holden, **and the** Owner **knows** it and ſuffers them to continue **there after** for a Day or more, **the Lord may diſtrain them for his Services.** 27 E. 3. 80.

But if in this Caſe the Cattle eſcape and the Owner freſhly follows to take them, it is otherife. 2 Inſt. 296 ——— S. P. admitted per Cur. Palm. 43 Mich. 17 Jac. B R. Lacy's Caſe, and held that there was no Difference between Leſſor and Leſſee, and the Caſe of Lord and Tenant. ——— S. C. cited by Powell J. 2 Lutw. 15[illegible]0. Hill [illegible] W. 3

And ſo he may though they are not levant and Couchant. See (O) pl. 1.

2. [So] if the Cattle of a Stranger eſcape into the Lands held, though the Owner does not know them to be there, yet if they are levant and couchant there, the Lord may diſtrain them for his Services. Contra 27 E. 3. 80.

In Caſe of an ancient Seignory the Lord may diſtrain Cattle Services, which came in by Eſcape, though they were not levant and couchant, although it be in Default of the Fences, which the Tenant of the Land ought to maintain, becauſe the Lord has nothing to do with the Repairing of the Fences. But in Caſe of Rent reſerved upon a Leaſe for Years the Leſſor cannot diſtrain ſuch Cattle until they be levant and couchant; for if the Leſſor had had the Land in his own Hands he ought to have repaired the Fences; and when he puts in a Leſſee he ought by Covenant &c. to oblige him to repair. And therefore in that Caſe if the Law would allow the Leſſor to diſtrain the Cattle of a Stranger which come in by Eſcape, before that they be levant and couchant, it would be in Effect to allow a Man to take Advantage of his own Wrong; therefore the Opinion of Coke cannot be maintained ſo generally, no Book warranting it unleſs 10 H. 7. 21. b. Therefore it muſt be intended if the Cattle come in by Default of the Owner of the Cattle, then they may be diſtrained before they be levant and couchant 7 H. 7. 1. 15 H. 7. 17. but if in Default of the Tenant of the Land, there they cannot be diſtrained until they have been levant and couchant; that is to ſay, for Rent upon Leaſes for Years. 15 H. 7. 17. And in ſuch Caſe the Leſſor ſhall not take the Cattle before that he has given Notice to the Owner that they are upon the Land liable to his Diſtreſs. And if the Diſtrainor chaſe Chattle in a Place liable to his Diſtreſs, and gives Notice to the Ownor of the Cattle, and he does not come to take them away, they are now become diſtrainable. But in Caſe of Diſtreſs by the ancient Seignory aforeſaid the Owner may prevent the Diſtreſs by making freſh Purſuit, cites 15 H. 7. 2 Roll Rep. 124. Gill v. Gawen; per Powell J. But by Treby Ch. J. where the Cattle eſcape accidentally, there they are not diſtrainable, until they have been levant and couchant; but if they eſcape by Default of their Owner, they are diſtrainable the firſt Minute. Ld. Raym 168, 169. Hill. 8 & 9 W. 3. C. B. Kemp v. Crewes.

3. The Cattle of a Stranger that eſcapes into the Land may be diſtrained for Services.

4. But the Cattle of a Stranger that comes into the Land by Eſcape cannot be diſtrained for a Rent-Charge. 18 E. 2. Avowry 219.

5. But the Cattle of a Stranger may be diſtrained for Rents and Services, though they eſcape into the Land of the Tenant if they do a Treſpaſs to the Tenant. 22 E. 4. 49. b. Contra 27. E. 3. 80.

6. But the Cattle of a Stranger cannot be diſtrained by the Lord if they eſcape into the Land of the Tenant if they do no Treſpaſs to the Tenant. 22 E. 4. 49 b.

7. As if the Tenant ought to incloſe againſt the Highway by Preſcription, and in driving my Cattle by the Way by Default of the Incloſure they eſcape into the Land of the Tenant, the Lord cannot diſtrain them. 20 E. 4. 49 b.

8. So if he ought to incloſe by Preſcription againſt my Land, and my Cattle eſcape &c. 22 E. 4. 49 b.

9. In theſe Caſes after the Eſcape if my Cattle continue in the Land levant and couchant for four, or ſix, or more Days, or for half a Year, yet if I have no Notice thereof the Lord cannot diſtrain them. 22 E. 4. 49. b.

10. But otherwiſe it is if I have Notice and ſuffer them to continue there after. 22 E. 4. 49. b. 50.

Fitzh. Diſtreſs, pl. 8. cites S. C. — Goods brought to Market and expoſed to Sale ſhall not be diſtrain'd, becauſe it is Pro Bono Publico. Noy. 19. 15 Jac. Traſſel v. Morris

11. My Goods cannot be diſtrain'd in a Market or Fair for the Prejudice to the Publick. 7 H. 7. 2.

Br. Diſtreſs, pl. 42. cites 7 H. 7. 10. S. P.

† Br. Treſpaſs, pl. 281. cites 7 H. 7. 1. S. C. —— Br. Diſtreſs, pl. 42. cites 7 H. 7. 10. [1] S. P. —— Fitzh. Diſtreſs, pl. 8. cites S. C.

12. So my Gown in a Taylors Shop cannot be diſtrain'd by the Lord of the Shop for Services, nor my Horſe in an Inn. 10 H. 7. 21. b. † 7 H. 7. 2. Nor my Horſe in the Shop of a Smith who is to ſhoe him; For the Laws give me a Liberty to put him there. 22 E. 4. 39. b.

13. But

13. And in thefe Cafes the Lord cannot diftrain thefe Goods, though they continue there as long as I pleafe; For they may retain them till Satisfaction. 22 E. 4. 39. b.

14. If I put my Horfe to a Smith's to be fhod, although he be there three or four Days before he is fhod, yet the Lord cannot diftrain him. 22 E. 4. 50.

15. But if I come with my Horfe to be fhod, and there put the Saddle under the Right Side of the Horfe, the Lord may diftrain the Saddle. 22 E. 4. 50.

16. If a Man rides to any Place, and there he is took Sick, upon which he remains there two or three Days, yet his Horfe cannot be diftrain'd for Rent. 15 E. 2. Avowry 216.

17. [So] if a Man put his Horfe into a Common Herbage per 8 Jours & * in beverie fon Chival & luy remove yet this Horfe cannot be diftrain'd for Rent there. 15 E. 2 Avowry 216. adjudg'd.

* Quære the Meaning of the French Words, unlefs it be (and waters his Horfe, and puts him in again.)

Fol. 669.

18. If the Diftrefs is to be taken for any Caufe touching the Soil, the Cattle of a Stranger may be diftrain'd, being upon the Land for Rent &c. 41 E. 3. 26. b.

Br. Diftrefs, pl. 3. cites S. C. & S. P. as where it is for Damage-Feafant, or for Rent-Service.

19. If an Heriot Service due after the Death of a Tenant be efloign'd, the Lord may diftrain the Cattle of any Stranger manuring upon the Land. 27 Aff. 24. adjudg'd.

Br. Hariots, pl. 6 cites S. C.——Fitzh. Avowry, pl. 177. cites S C.———Ow. 146. Anderfon faid, that he agreed the Cafe of Dyer, that the Cattle of a Stanger cannot be taken for a Heriot.

20. The fame Law if a Diftrefs be to be taken for a Caufe touching the Perfon, as for an Amercement in Frank-pledge the Cattle of a Stranger may be diftrain'd being upon the Land. 41 E. 3. 26. b. Vide Contra, 47 E. 3. 23.

21. The Cattle of a Stranger cannot be fold for Debt of the King. 41 E. 3. 26. b.

22. But they may be diftrain'd if they are depaftured in the Place where &c. 11 H. 4. 2.

Fitzh. Avowry, 52. cites S. C.

23. Cattle which are in certain Land by way of Agiftment may be diftrain'd for Rent. 18 E. 2. Avowry 219. admitted by the Iffue.

24. If a Town be affefs'd to 40 s. for the Expences of the Knights of the Shire in Parliament this may be levied upon the Goods of one Man in the Town only. 11 H. 4. 2.

Fitzh. Avowry, pl. 52 cites S. C.——Br. Diftrefs, pl. 94. (95) cites S. C.———Br. Avowry, pl. 42. cites S. C.

25. If there are feveral Jointenants and one grants a Rent-Charge out of the Land, the Grantee may diftrain the Cattle of the Grantor. 11 H. 6. 23. b. 28. 33.

Br. Diftrefs, pl. 68. cites S C.——Br. Charge, pl. 39. cites S. C.

26. But he cannot diftrain the Cattle of the other Jointenants. 11 H. 6. 23. b. 28, 33.

Br. Diftrefs, pl. 68. (69.) cites S. C. ——— Br. Charge, pl. 39. cites S. C.

Br Distress, pl 68 (69.) cites S. C. and that there is a Quære; but Brooke says it seems that they may be distrained. ——— Br. Charge, pl. 39. cites S. C. and Quære, and same Opinion by Brooke.

27. But he may distrain the Cattle of a Stranger that come upon the Land. 11 H. 6. Brook Distress, 69. Quære.

Cro J. 611. pl. 6. Hill. 18. Jac B R. Snelgar v Henston, S. C. adjudged, that one Tenant in Common may distrain upon the other, where he comes in under the Lessee ——— 2 Roll Rep. 212 Hudson v Snelgar, S. C. Two were Tenants in Common in Fee, and one made a Lease for 40 Years, rendering Rent, and the Lessee assigned his Term to the other Tenant in Common; and the Court held clearly that for Rent arrear the Lessor may distrain the Beasts of his Companion; and cited 11 H. 6. 28. accordingly.

28. If there be two Jointenants, and one leases his Part to the other for Years, rendring Rent, and they occupy it accordingly, now the Lessor may distrain his Cattle; for now he shall occupy the whole without the Disturbance of the Lessor, and he cannot oust him. 11 H. 6. 34. M. 18 Ja. B. R. between *Sir Henry Snelgrave and Daiston* adjudged upon a Demurrer where the Lease was made to a Stranger, who leased it to the other Jointenant.

Br. Distress, pl. 68 (69.) cites S. C and cites 11 H 6. 33. where it is in a Manner agreed, that where five Jointenants are, and two charge the Land with Rent, and lease their Part to one of the other three, and the Grantee distrains him, that this is good; for by the taking of the Lease of the Part of the Grantors, he shall be in the same Plight as the Grantors themselves should be; and e contra if he had occupied his first Part only.

29. If there be several Jointenants, and one grants a Rent-charge, and after leases his Part to the other Jointenants at Will, and they occupy the whole, yet their Cattle cannot be distrained for the Rent; because the Lease at Will is void, inasmuch as a Jointenant ought to occupy per my et per tout by the Law. 11 H. 6. 28. 34.

30. But admitting the Lease at Will to them to be good, then their Cattle may be distrained for the Rent; because they come to the third Part under the Charge, and they shall be in the same Plight that the Grantor himself was. 11 H. 6. 28. a. b.

31. If a leases at Will and after grants a Rent, (admitting this does not determine the Will, quod quære) the Grantee cannot distrain the Cattle of the Tenant at Will, because he was in before the Charge, and therefore the Tenant of the Freehold cannot charge him before the Will determined. 11 H. 6. 28. b.

32. If a Man be seised of a Rent-charge by Prescription issuing out of the Manor of D. yet it seems he cannot distrain the Cattle o the Copyholders of the Manor, if they have not been used to be distrained, because they are in by Prescription also, and so as high as the Owner of the Rent. M. 12 Ja. B. between *Cannon and Turner*, dubitatur.

* Fo 670.

33. But in the said Case it is clear if the Owner of the Rent has it by Grant, or otherwise, and not by Prescription; yet the Cattle of the Copyholders * cannot be distrained for it. M. 12 Ja. B. between *Cannon and Turner* adjudged.

34. If a Rent be granted out of two Parts of certain Land, and after a Lease is made of the two Parts to A. and the other third Part also comes to A by another Lease of him that has the third Part, the Cattle of the Lessee may be taken for this Rent. Hobart's Reports 110 between *Newman and Moor*, where but one 3d Part came to the Lessee of the two Parts.

35. If a Man *puts his Beasts to J. N. to Pasture* for 4 d. the Week, and after *gives Notice that he will not Pasture them any longer*, and the Owner will not retake them, J. N. may distrain them for Damage feasant. Br. Distress, pl. 93. cites 43 E. 3. 21.

36. In

36. In Writ of *Meſne*, if the *Defendant confeſſes the Acquittal*, the Defendant ſhall be diſtrained if he does not acquit him; Per Belknap. Br. Diſtreſs, pl. 20.

Br. Fines, pl. 45. cites 38 E. 3. 33 S. C.

37. Where a Man *agiſt Beaſts* in his Land *for a certain Sum*, he cannot diſtrain the Beaſts for the Agiſtment arrear; But if the Owner chaſes them away before Payment of the Agiſtment, the other may have Action of Treſpaſs; Quære inde; For it ſeems that Debt lies. Br. Diſtreſs, pl. 67. cites the Regiſter.

38. *So* it ſeems of *Leaſe of Tithes*, the *Leſſor cannot diſtrain the Sheafs of the Tithes.* Br. Diſtreſs, pl. 67. cites the Regiſter.

39. For *Fees of Knights of the County for the Parliament*, a Man may diſtrain the Beaſts of the Vill, or of any of the Vill. Br. Diſtreſs, pl. 94. (bis) cites 11 H. 4. 2.

40. A Man *put his Beaſts into his own Cloſe*, and they *eſcaped into the Cloſe of another adjoining*, *and* the *Owner freſhly retook them*, this is good Matter to ouſt the Lord of the Diſtreſs of them, but the other ſhall have Treſpaſs thereof; Quod Nota; per Cur. Br. Diſtreſs, pl. 21. cites 21 H. 6. 37.

41. Whether the *Sheriff* may *diſtrain the Beaſts of a Stranger upon the Land of one that has loſt Iſſues* in Curia Regis for Non-appearance was the Queſtion on a Demurrer; Brook ſays it ſeems to him that he may; becauſe the Land is thereof charged. Br. Diſtreſs, pl. 40. cites 5 H. 7. 1.

42. In Replevin the Defendant *avowed for Rent-Charge*; *The Plaintiff ſaid that the Land where* &c. *was open to the Highway for Default of Incloſure, and he drove his Beaſts in the Way, and they eſcaped and he freſhly purſued them, and the Defendant took and diſtrained them*; and by all the Juſtices, if *a Man de ſon tort puts his Beaſts into certain Lands*, the Lord may diſtrain them though they were * [not] levant and couchant upon the Land. Quære of the Diverſity between this Caſe and the Caſe of Eſcape. And the Defendant ſaid by Replication, that the Beaſts were in the Land by two Nights after the Eſcape; and per Catesby, he *ought to traverſe the Eſcape*; But Brian e contra, and that upon freſh Purſuit the Party cannot diſtrain, contra where he ſuffers the Beaſts to remain after the Eſcape, by which (by him) the Defendant *ought to traverſe the freſh Suit or the Eſcape*, quod Choke conceſſit. Br. Diſtreſs, pl. 24. cites 15 H. 7. 17.

* The Editions of Brook omit the Word (not) but it is in the Year-Book.

43. By Manwood J. there is a *Difference when the Cattle come upon the Lands of another in the Default of the Owner of the Cattle*, as by Eſcape or Stray, *and where in the Default of another*; For in the firſt Caſe the Lord may diſtrain them before they be levant and couchant; but in the latter Caſe not; alſo a *Rent reſerved upon a Leaſe for Years, is a new Rent, and not like unto an ancient Rent due upon an ancient Tenure betwixt the Lord and the Tenant*; For, for a Rent reſerved upon a Leaſe for Years, or for a Rent-Charge a Man cannot diſtrain the Cattle before they be levant and couchant upon the Lands although they come upon the Land by Eſcape, Eſtray &c. Dyer ſaid the Lord cannot diſtrain the Cattle which eſcape into the Land of his Tenant, for want of Encloſure of his Tenant, before they be levant and couchant, and yet the Seignory is favoured for the Antiquity of it. 2 Le. 7. 8. pl 8. 7 Eliz. C. B. Anon.

44. If a *Clothier* having *put his Wool to ſpin comes with an Horſe to carry it back*, but becauſe there is no Beam or Weights at the Spinner's Houſe to weigh it, *the Clothier and Spinner with the Leave of a Neighbour who had a Beam and Weights* in his Houſe, *bring the Horſe thither, and enter the Houſe to weigh the Yarn*; the Lord of the Houſe whilſt they are

Noy 68 S. C. accordingly, for they were brought there for another Intent.

and were in the Possession of the very Owner. are there cannot distrain the Horse for Services; Adjudged. Cro. E. 549. 596. Hill. 39 Eliz. Read v. Burley. —— S. C. cited 3 Lev 161. by Lutwich J.

45. There is a *Difference between a Distress for Services, and* a Distress *for Amercements for not doing the Services*; For the first is by Common Right maintainable, the second against Common Right by Prescription. And then for such Amercements you must distrain the Tenants own Beasts, and not the Beasts of a Stranger found upon the Land; As for Services you may, and the reason of that, as I conceive, is, for that it is for a *Personal Crime*; Per Walmsley J. Noy 20. in Case of Pell v. Towers.

46. *Two Hundreds*, viz. L. and M. were *adjoining to two several Manors*, viz. D. and E. and A. was seised of D. and B. was seised of E. In a Replevin A. avowed, and *prescribed that all the Tenants of the other Manor have used to make Suit to the Leet within his Hundred, and that the Lord of the other Manor used to appear at the said Leet, or to pay* 4 s. *pro Anno futuro, and if not paid, then he prescribed to distrain any Inhabitant within the Hundred for the same*; and for 4s. not paid he avowed the Distress within the Manor of the Plaintiff, who was one of the Inhabitants. Williams J. cited 47 E. 3. that the Cattle of the Lord of the Manor might be distrained in any Land within the Hundred for Suit and Services. But it was afterwards agreed by all the Justices, that the Cattle of a Stranger could not be distrained. Owen 146. Pasch. 40 Eliz. C. B. Goosey v. Potts.

Noy 20. S. C but S. P. does not appear.

47. If for an Amercement for Default of Suit the Lord *prescribes to distrain the Goods of his Free-Tenant*, he *cannot take a Distress of the Beasts of his Under-Tenant*, who is not within the Prescription; Adjudged. Cro. E. 791, 792. Mich. 40 Eliz. Pill v. Towers.

48. If *I let Land* for Years, *reserving Rent, and I command one to put his Cattle into the Land, I cannot distrain them*; For my Commandment is a Wrong, and an Action on the Case will lie against the Commander. Brownl. 31. Hill. 6 Jac. Anon.

49. If one seised in Fee *makes a Lease for Life, and* after *grants to me a Rent-charge*, if the *Grantor's Cattle come upon the Ground*, I may distrain them, although I cannot distrain the Tenant in Possession, but the Grantor cannot avoid it. Brownl. 32. Pasch. 10 Jac. Anon.

50. The Defendant *avowed for Rent reserved* upon a Lease for Life. The Plaintiff pleaded in Bar, and conveyed to himself Title to 10 Acres adjoining, and that he put in his *Beasts*, and they *escaped into the Place &c. and he freshly followed to drive them out, but before he could recover them, the Defendant distrained them.* The Case had been somewhat better, if the Tenant ought to maintain the Fence. But no Judgment or Opinion. Hob. 265. pl. 347. 17 Jac. Reynolds v. Okely.

Brownl. 170. S. C. and says the Court held in this Case, because the Beasts were always in the Plaintiff's Possession, and in his View, the Defendant could not distrain the Cattle of a Stranger; but if he had permitted the Beasts to have remained there by any Space of Time, though they had not been levant and couchant, the Lessor might have distrained the Beasts of a Stranger. —— S. C. cited Mod. 63. pl. 6. —— S. C. cited 2 Lutw. 1580.

51. *Cattle driving to London to be sold* for Provisions for the City, and being *lodged in a Close by the Way*, may be distrained for Rent, though they are put into the Close *by Consent of the Landlord*; Adjudged per tot. Cur. 3 Lev. 260. Trin. 1 W. & M. in C. B. Fowkes v. Joice.

2 Vent. 50. S. C. says it was argued, that nothing appeared in the Pleading of a common Inn, and so the Matter did not come in Question; neither was it set forth that the Cattle

Cattle were driving to Market, but only to London, ad Proficuum inde faciend'; and beſides, in the Bar to the Avowry the Licence is the only Matter relied upon, which does not conclude the Leſſor from taking the Diſtreſs. And of that Opinion was the Court. And the Court held, that Cattle driving to a Market, and put into Paſture by the Way, were not privileged from being diſtrained; for it is by the Statute of Marlebridge, that Beaſts cannot be diſtrained in the Highway; and not by the Common Law. ——— 2 Vern. 129. pl. 128. Hill. 1690. S. C. Relief decreed upon the Fraud, and the Landlord to anſwer the Value of the Sheep, and to pay Coſts both in Equity and at Law; Per Commiſſioners, and they ſeemed to think, that the Grounds lying to the Inn, and uſed therewith, ought to have the ſame Privilege as the Inn, and Paſſengers Cattle not be diſtrainable there.

52. A. is *ſeiſed of a third Part of a Cloſe in Common*, and B. of the other two Parts in Common with A. — A. *lets his third Part*, reſerving a Rent. B. puts in his Cattle, or a Stranger by his Licence. Such Cattle are not diſtrainable for the Rent. 2 Vent. 227, 283. Hill. 2 & 3 W. & M. in C. B. Kemp v. Cory.

53. In all Caſes *where the Land is the Debtor*, the *Cattle of a Stranger* are as well liable as thoſe of the Owner of the Land; As Cattle of a Stranger *levant and couchant* are diſtrainable for Arrears of a Rent-Service. So if a Neighbour's Cattle eſcape into Land, out of which a Rent-charge iſſues, and are levant and couchant, (there are good Authorities, *though* they are *not levant and couchant*) they are diſtrainable for the Rent-charge, and the Owner ſhall not have them again unleſs he pays the Arrears; Per Holt Ch. J. in delivering the Opinion of the Court. Ld. Raym. Rep, 308. Hill. 9 W. 3. in Caſe of Britton v. Cole.

54. Goods in the Cuſtody of a Carrier are *privileged* from Diſtreſs for the Carrier's Rent. 1 Salk. 249. pl. 5. Hill. 8 Ann. Giſburn v. Hurſt.

(I. 2) Grant of Rent out one Manor or Place, with Clauſe of Diſtreſs in another Manor or Place.

1. WHERE a Rent-Charge is *granted out of an Ox-gange of Land in D. and* that *if the Grantor alien* the Oxgange of Land, that the *Grantee may diſtrain in the Manor of B.* and the Grantor aliens the Oxgange of Land, yet in Aſſiſe the *Tenant of the Oxgange of Land ſhall be named, and the Oxgange ſhall be put in View,* for this remains charged. Br. Charge, pl. 17. cites 1 Aſſ. 10.

2. *Rent is granted out of Land in D. and for Default of Payment to diſtrain C.* there *both* ſhall be charged, and *ſhall be put in View* in Aſſiſe; *but if* the Lands were *in diverſe Counties*, then the firſt Land only ſhall be charged, for otherwiſe he cannot have Aſſiſe in this Caſe; For he cannot have Aſſiſe in two Counties unleſs the Land be *in Confinio Com'*; Quod Nota. Br. Aſſiſe, pl. 427. cites 10 E. 3. 18. and Fitzh Aſſiſe 157.

(K) In what *Place* a Diftrefs may be taken de Jure.

By the King.

* Br. Diftrefs, pl. 6. cites S. C. ——Fitzh. Grant, pl 47. cites S. C.

1. THE King may diftrain for Rent-Services in all the Lands of the Tenant, as well thofe that are held of others as of the King * 44 E. 3. 45. Curia. † 9 H. 6. 9. 44 Aff. 22. by all the Juftices.

† Fitzh. Grant, pl. 6. cites S. C. ——— Where it is faid that the King may diftrain out of his Fee, that is, in the other Lands of his Tenant, it muft be underftood in fuch other Lands as his Tenant has in his own actual Poffeffion, and manured with his own Beafts, and not in the Poffeffion of his Leffee for Life, Years, or at Will, for their Beafts are not fubject to fuch Diftrefs. 2 Inft. 132.

* Br. Diftrefs, pl. 6 cites S. C. ——— Fitzh. Grant, pl. 47. citei S. C.

2. So the King may diftrain for a Fee-Farm in all the Lands of the Farmer. * 44 E. 3. 45. 8 H. 6. 1. b.

3. If a Town be affeffed to a certain Sum, a Diftrefs may be taken in any Part fubject to the Diftrefs for the whole Duty. 11 H. 4. 35. b.

4. If a Corporation be amerced in B. R. this may be levied upon the Vill or Land of the Vill, or upon the Goods which they have in their natural Capacity. 8 H. 6. 1. a. b.

Brownl 17. S. C. but not S. P.

5. If a Man holds of the King by Rent &c. and the Arrears incur, and the Tenant leafes it to another, the King may diftrain in the Lands of the Under-Tenant for thefe Arrearages in any Place out of the Land held. M. 17 Ja. B. between *Catford and Osmond*, per Hobart.

6. In Trefpafs for Goods taken for *Diftrefs in the High Street*, the Statute was rehearfed in the Commencement of the Writ, and the Conclufion was *Contra Legem & Confuetudinem Angliæ* &c. And adjudged good enough and purfuant; For it is made Law and Cuftom by the Statute. Thel. Dig. 102. lib. 10. cap. 11. S. 8. cites Mich. 19 E. 2. Brief 842.

7. The King may diftrain for Rent or Fee-Farm *as well in Land which is not held in him as in other*, by all the Juftices; For the King may grant Rent, Fee-Farm &c. to hold of him in which a Man cannot diftrain. Br. Diftrefs, pl. 87. cites 44 Aff. 32.

8. The King may diftrain in all other Lands of his Tenant for his *Rent-Charge*, and may diftrain for his *Services* in all the other Lands of the Tenant. Contra of his *Grantee*. Br. Diftrefs, pl. 48. cites 13 E. 4. 6.

9. *And* if the *King had had a Rent Time out of Mind*, and *had not ufed to levy it by Diftrefs* by the fame Time, his *Patentee cannot diftrain*. Br. Diftrefs, pl. 48 cites 13 E. 4. 6.

Br. Barre, pl 49. cites S. C.

10. The King may diftrain for his Debt, and may make levy of the Debt which the Debtor owes to him, by levy *of the Tenants of the Debtor*, and take the Rent of them, which fhall be a good Bar for them againft the Debtor who is their Lord; Quod Nota. Br. Diftrefs, pl. 28. cites 21 H. 7. 12.

11. The

11. The King cannot diftrain *for the Debt of the Baron* upon the *Dower of the Feme, nor in her Inheritance, nor in the joint Purchafe which fhe has* with her Baron; *But if* the Baron was *indebted to the King before the Coverture*, there the King may diftrain in the Dower of the Feme; Note the Diverfity. Br. Diftrefs, pl. 71. cites F. N. B.

12. *C. was indebted to the King, and* was *fei ed of a third Part of certain Lands in N.* and *R. was feifed of the other two Parts as Tenant in Common*, and the *Beafts of N. and R. paftured promifcuoufly* on the Land. Upon Procefs to levy the King's Debt the *Sheriff took R's Cattle*, and fold them; but held that fuch taking was not good, though otherwife it would be if the Cattle had been levant and couchant on the Land of the King's Debtor; And if my Cattle are levant and couchant on the Land of the King's Debtor, the King may diftrain them Damage-feafant, but not for the Debt; Per the Ch. Biron, and two of the Barons, but Snig feemed to doubt. Lane 96, 97. Hill. 8 Jac. in Scacc. Clare's Cafe.

13. Although the King may diftrain in any of the Lands of the Tenant, yet it muft be admitted, that if the *Tenant aliens any Part of his Lands, or* if he devifes, nay if he *leafes to a Tenant at a Rent, although but at Will*, the *King cannot diftrain upon thofe Lands, being no Part of the Lands originally charged with the Rent*; and fo it is upon a Recovery by Elegit, and therefore even the Crown is precarious in this Matter; The Tenant may at any Time determine that Right of diftraining by aliening, by devifing or fetting his Land. *It is only liable whilft it is in his own Hands*, Arg. 2 Vern. 714, 715. Hill. 1715. in Cafe of Attorney-General v. Coventry (Mayor &c.)

(L) For an *Amercement.*

[*In what Place the Diftrefs may be taken.*]

1. FOR an Amercement in the Sheriffs Tourn for ftopping a Way, the Sheriff may take a Diftrefs through the whole County. * 2 H. 4. 24. b. 8 R. 2. Avowry 194.

* Br. Diftrefs, pl. 13. cites S. C.—Br. Leet, pl. 28. and pl. 41. cites S. C.———Br. Amerciaments, pl. 13. cites S. C.———Br. Court-Baron, pl. 13. cites S. C.———Fitzh. Diftrefs, pl. 10. cites S. C.

2. So where an Amercement is within a Hundred the Lord of the Hundred may diftrain through the whole Hundred, as well out of the Land as upon the Land; For the Amercement does not extend to the Land [only] nor Iffue out of it. * 2 H. 4. 24. b. † 11 H. 4. 89. b. For the Jurisdiction of the Hundred is intire through the whole Hundred. 13 H. 4. 9. b. 8 R. 2. Avowry 194.

* Br. Diftrefs, pl. 13. cites S. C.—Br. Leet, pl. 28. and pl. 41. cites S. C.—Br. Amercements, pl. 13. cites S. C.———Br. Court Baron, pl. 13. cites S. C.———Fitzh. Diftrefs, pl. 10. cites S. C.

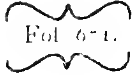
† Br. Diftrefs, pl. 18. cites S. C.———Fitzh. Avowry, pl. 57. cites S. C.

3. The Lord may take a diftrefs for an Amercement in a Leet in his own Land which is within the Hundred, if he can find the Cattle of him that is amerc'd; For the Amercement charges only the Perfon and not the Land. 47 E. 3. 13. (Fitzh. Diftrefs, pl. 15. S. C.)

4. So a Diftrefs may be taken for it in the High Street. 47 E. 3. 13. (Fitzh. Diftrefs, pl. 15. cites S. C.)

Br. Diſtreſs, pl. 10. cites S. C.—— Fitzh. Diſtreſs, pl. 15 cites S. C.— Br Leet, pl. 8 cites 47 E 3. 12. S. P.—— Br. Reſeiſer &c. pl. 5. cites 47 E. 3. 5. S. P. admitted.

5. But if a Man be amerc'd in a Leet a Diſtreſs cannot be taken for it of the Goods of the Party amerc'd in the Lands which is in the Hands of the King, though it be within the Limits of the Hundred; For during this Time it is out of the Juriſdiction of the Leet. 47 E. 3. 13.



Fol 671.

(M) By a *Common Perſon.* *In the Houſe.* [*Or what other Place.*]

In ſuch Caſe the Lord may enter into the Houſe and diſtrain for Rent or Service; Per Cur. 5 Rep 92. a. cites 38 H. 6. 26 a. and 33 E 3. Avowry 256. and he may diſtrain in the Houſe though Lands alſo are held of him in which he may diſtrain, cites 29 Aſſiſe, pl. 49.

1. A Diſtreſs for Rent may be taken in a Houſe, if the Doors be open, elſe not. 46 E. 3. 26. b.

See pl. 7 Infra.

2. [And] among the Petitions of Parliament of the 18 E. 1. fo. 7. it is ſaid that he ſhall diſtrain for Rent per Oſtria et Feneſtras prout a Diſtreſs for Rent may be taken in a Houſe. 29 Aſſ. 49. Moris eſt.

3. A Man cannot diſtrain for a Rent-Service but in the Land out of which it iſſues. 8 H. 4. 18. b. 9 H. 6. 9.

4. As he cannot diſtrain in other Land though it be within his Fee. 8 H. 4. 14. b.

5. A Diſtreſs out of his Fee for Services is not lawful. 17 E. 3 43.

6. A Diſtreſs in a Way within his Fee was lawful at Common Law. 17 E. 3. 43.

See pl 2.

7. A Man may diſtrain for the Rent of an Houſe per Oſtia et Feneſtras; among the Petitions of Parliament of 18 E. 1. folio 7. it is ſaid that he may diſtrain per Oſtia et Feneſtras prout moris eſt; it ſeems as if this was intended that he might go to the Houſe, and take a Diſtreſs, or take it out of the Windows.

8. If a Man leaſes an Advowſon for Life, rendring Rent, he cannot diſtrain for this in the Glebe. 11 H. 6. 5.

9. If a Man leaſes a Manor to which an Advowſon is appendant rendring Rent, he cannot diſtrain for the Rent in the Glebe, becauſe the Leſſor hath nothing to do therewith. 11 H. 6. 5.

10. If a Rent-Service iſſues out of Land which is in ſeveral Counties a Diſtreſs for the Whole may be taken in one County. 18 E. 3. 32. b.

11. If a Rent-Charge iſſues out of Land lying in ſeveral Counties, a Diſtreſs for the Whole may be taken in one County. 18 E. 3. 32. b.

12. So if a Rent Charge iſſues out of the Land which is in the Hands of ſeveral Men, a Diſtreſs may be taken for the Whole Rent upon the Poſſeſſion of one; For all the Rent iſſues out of every Part. 39 Aſſ. 4. adjudg'd.

This is intended of Suit Service in reſpect

13. 52 H. 3 cap. 2. *None ſhall diſtrain any to come to his Court, which is not of his Fee, or upon whom he has no Juriſdiction, by reaſon of his Hundred or Bailiwick, nor ſhall take Diſtreſſes without his Fee or in Place*

Place where he has no Juriſdiction. And he that offends ſhall be puniſhed in like Manner, according to the Treſpaſs. of a Seignory, and not of Suit Real in reſpect of Reſiance. 2dly, Or that he has Juriſdiction by Hundred, Wapentake or Bailiwick. 3dly, That he ſhall not take Diſtreſſes out of his Fee or Place where he has a Bailiwick or Juriſdiction. 2 Inſt. 104.

13. Stat. Marlb. cap. 2. is a Declaration of the Common Law, ſaving for the Penalty hereby inflicted; and therefore if A. diſtrain B. and in a Replevy A. avow as Lord for Rent or Service, B. pleads hors de ſon Fee, and it is found for B. A. ſhall not in this Replevy be puniſhed by Ranſom &c. according to this Act, but he muſt have an Action upon the Statute Et ſic de ſimilibus. 2 Inſt. 104, 105.

14. 52 *H.* 3. *cap.* 15. * *It ſhall be lawful to no Man,* This *Miſchief before this Statute was,* That whereas the King by his Prerogative might diſtrain for his Rents in any other Lands of his Tenant, being in his own actual Poſſeſſion, though they were out of his Fee, and Seigniory divers Lords took upon them alſo to diſtrain out of their Fee, which was wrong and Oppreſſion; And whereas all the King's Subjects ought to have free Paſſage in Via Regia, & Communi Strata, as well to Fairs and Markets, as about their other Affairs, the Lords uſed to diſtrain in the Highways; both which Miſchief this Statute does remedy. 2 Inſt. 131.

* This is *to be underſtood* of Diſtreſſes *by reaſon of a Seigniory*, and not for Diſtreſſes *for Rent-Charges* &c. *or by reaſon of a Leet.* 2 Inſt. 131.

This Branch *is but in Affirmance of the Common Law*, for regularly no Subject can diſtrain out of his Fee and Seigniory, and therefore if the Lord do diſtrain out of his Fee the Tenant may either have an Action of Treſpaſs at the Common Law, or an Action upon this Statute, but in ſome Special Caſe the Lord by the Common Law may diſtrain out of his Fee and Seigniory; as if the Lord come to diſtrain, and the Tenant or any other ſeeing the Lord come to diſtrain them, drive them to a Place out of the Fee of the Lord, yet in this Caſe the Lord may diſtrain them out of his Fee, becauſe the *Lord had a View of them within his own Fee*, by reaſon whereof the Lord ſhall be adjudged in a kind of Poſſeſſion of them; but if the Beaſts go out of the Tenancy of themſelves without enchaſement before the Lord can diſtrain them, there the Lord cannot diſtrain them, though he had the View of them within his Fee and Seigniory. 2 Inſt. 131.

To take Diſtreſſes out of his Fee; A *Heriot Cuſtom* the Lord may ſeiſe in the Highway, for that is no Diſtreſs but a Seiſure, but he cannot diſtrain for a *Heriot Service* there. 2 Inſt. 131.

Nor in the Highway, nor in the common Street, but only to the King or his Officers, having Special Authority. In this Branch, *non liceat ſhall be taken not ſimpliciter* to make it utterly unlawful, as to take Advantage thereof in bar to an Avowry, *but ſecundum quid*, that is to this Purpoſe, that if the Lord diſtrain in the High Street, or in the common Way, the Tenant may have an Action againſt the Lord upon this Statute; and the Reaſon hereof is, that whenſoever any Thing is prohibited by a Statute, the Party ſhall have his * Action upon the Statute, and the Offender ſhall be for his Contempt fined and impriſoned; And ſo it is declared by Act of Parliament, as hath been always obſerved. Now if the Tenant ſhould plead it in bar of the Avowry, the King ſhould loſe his Fine; for in that Nature of Suit he cannot be fined, and therefore the Tenant is to take his Remedy by Action upon the Statute, wherein the King ſhall have his Fine &c. 2 Inſt. 131, 132 ——— * S. P. cited per Cur. 3 Lev. 48. Mich. 33 Car. 2. C. B in Caſe of Woodcroft v. Tompſon

This Statute does not extend only to Diſtreſſes between Lord and Tenant, but alſo to all other Diſtreſſes whatſoever, as well at the King's Suit, as at the Suit of the Subject, ſo there be other Goods ſufficient; alſo to all manner of Executions, as well at the Suit of the King, as of the Subject, with the like Caution as is aforeſaid. 2 Inſt. 133.

In Writ upon this Statute he need not put the Price of the Chattle taken. Thel. Dig. 109. Lib. 10. cap. 19. S. 1. cites Mich 19 E. 2. Brief 842.

15. In Treſpaſs Quare Vi et Armis *Sanctuar'* fregit &c. et Averia cepit, the Bailiff juſtified for Diſtreſs *for Iſſues for the King*, and *could not find Beaſts nor Chattles of the Plaintiff in any other Place*, and well. Br. Diſtreſs, pl. 34 cites 27 Aſſ. 66.

16. The Party cannot diſtrain *in one County and drive it into another*, by Reaſon of the Statute of Marlebridge, cap. 4. but ſhall make Ranſom,

ſom, and this for Rent. But it is doubted there if a Man may do it *for a Fee*, *or* an *Honour*, *or* for *Suit*, *or Caſtle-Guard.* Quære for *Homage* if he diſtrains, and chaſes into another County. Br. Diſtreſs, pl. 36. cites 30 Aſſ. 38.

17. A Man cannot diſtrain *in a Sanctuary.* Per Skipwith. Br. Diſtreſs, pl. 63. cites 29 H. 3. 16.

Br. Diſtreſs, pl. 1. cites S. C

18. Of Common Right a Man cannot diſtrain for Rent but *in the Land out of which the Rent is iſſuing*; But if the Tenant grants to me that if I am not paid the Rent, that I ſhall diſtrain in other Land, this is good per tot. Cur. and there this is no new Rent. Br. Rents, pl. 1. cites 9 H. 6. 9.

19. *And* per Cand. if a Man *grants* to me *that if I am not annually paid* 10 s. *Rent at Michaelmas, that I ſhall diſtrain in his Land in D.* this is a good Grant of the Rent, and it is a new Rent. Contra in the Caſe above. Br. Rents, pl. 1. cites 9 H. 6. 9.

20. Note for Law, That he who diſtrains Beaſts may put them *in a cloſe Houſe if he will give them Food*; For the Diſtreſs in Pound overt is only to the Intent that the Owner may give them Food. Br. Diſtreſs, pl. 66. cites 33 H. 8.

21. The Stat. Marlb. cap. 15. did not *intend but for Diſtreſſes for Rent or Services*, and not for thoſe Things whereof no Diſtreſs can be but in the Highway; as Toll-thorough due by Cuſtom. Per Cur. Cro. E. 710. pl. 34. Mich. 41 & 42 Eliz. C. B. in Caſe of Smith v. Shepherd.

22. A *Heriot Cuſtom* the Lord may ſeiſe in the Highway, for this is no Diſtreſs but a Seiſure; but he cannot diſtrain for a Heriot *Service* there. 2 Inſt. 132.

(N) In what *Places* it may be taken for a *collateral Cauſe.*

[Freſh Suit.]

Co. Litt. 161. a. S. P. ——And ſo it is if any other Perſon does it. Ibid ——If a Man chaſes them out the Lord may diſtrain them. Br. Diſtreſs, pl. 98. cites 11 H. 4. 7.—— S P. For when they are in his View they ſhall be adjudged in Law in his Poſſeſſion, the Reaſon ſeems to be becauſe they are Tranſitory. Br. Treſpaſs, pl. 296. cites 2 E. 4. 6.

1. **WHEN the** Lord is in view of the Cattle **if the** Tenant **to avoid the Diſtreſs** chaſes them into a Place not within his Diſtreſs, **yet the Lord may take them freſhly; For he ſhall not have Advantage of his own Wrong.** 44 **E.** 3. 20. **b.**

Co. Litt. 161. a. S P.——So if the Lord had no View of them within his Fee; Or if the Cattle after the View go out of the Fee, the Lord cannot diſtrain them out of his Fee. Ibid.——If they go out without chaſing, the Lord cannot diſtrain them. Br. Diſtreſs, pl. 98. cites 11 H. 4. 7.

2. But if **the Tenant, after the Lord has the View, chaſes the Cattle for other lawful Cauſe out of his Fee and** not on purpoſe to avoid the Diſtreſs, **the Lord cannot take them.** 44 **E.** 3. 21.

3. If a Man comes to diftrain for *Damage-Feafant or* for * *Services*, and the Diftrefs goes into other Land by chafing, he may *take them in the other Land.* And per Jenney if Beafts taken for Diftrefs efcape, he who diftrains may *retake them when he will.* Br. Diftrefs, pl. 49. cites 13 E. 4. 8.

* Co. Litt. 161. a. S. P. the Lord may frefhly purfue and diftrain the Cattle, and the Tenant cannot make Refcous, though the Place wherein the Diftrefs is taken is but of his Fee; For now in Judgment of Law the Diftrefs is taken within his Fee; and fo fhall the Writ of Refcous fuppofe.

4. If a Man comes to diftrain for *Rent or Service* and *fees the Beafts in the Land* held &c. and the *Tenant chafes them out* the Lord may purfue and take them, but contra for * *Damage-Feafant* clearly. Per Brian Ch. J. Br. Diftrefs, pl. 50. cites 16 E. 4. 10.

* If a Man comes to diftrain for Damage-Feafant and fees the Beafts in his Soil, and the Owner chafes them out of Purpofe before the Diftrefs taken, the Owner of the Soil cannot diftrain them, and if he does, the Owner of the Cattle may refcue them, for the Beafts muft be Damage-Feafant at the Time of the Diftrefs, and fo note a Diverfity. Co. Litt. 161. b.

5. *And* per Brian Ch. J. where a Man *comes to diftrain for the 15th granted to the King by Parliament*, and fees the Beafts, and the other chafes them out of the Vill, the *Collector cannot diftrain them in another Vill*, quod nota. Br. Diftrefs, pl. 50 cites 16 E. 4. 10.

6. If a *Man comes to diftrain*, and the *Party chafes the Diftrefs out of the Land*, the other may *frefhly purfue*, and take the Beafts for Diftrefs. Br. Avowry, pl. 13. cites 34 H. 6. 18.

S. P. though he chafes them into the Land of another. Br. Nufance, pl 14 cites 9 E 4. 35.——If a Man chafes them out the Lord may diftrain them. Br. Diftrefs, pl. 98. cites 11 H. 4. 7.——Br. Diftrefs, pl. 90. cites 44 E. 3. 20.
See Stat. 8 Ann. cap. 14 S. 2. at Tit. Rents. (W. b).

7. If *Beafts efcape* into my Land the *Lord may diftrain them*, contra *if he retakes them before that the Lord diftrains them*, and *though* they were *levant and couchant by* 40 *Days* if the Owner takes them before the Lord, there the Lord fhall not diftrain them, but if he finds them there, if they were there but an Hour the Lord may diftrain them. Br. Diftrefs, pl. 97. cites 10 H. 7. 21.

(O) [Where the Cattle *efcape* &c. into the Land liable.] Pl. 1 to 8.

1. IF the Cattle of a Stranger efcape into the Land holden they may be diftrained though they are not levant and Couchant. Co. Litt. 47.

See pl. 2. Contra —— See (1) pl. 2.

2. If the Cattle of a Stranger efcape into the Lands holden &c. they * cannot be diftrain'd. 48 E. 3. 34. 2 H. 4. 16. b. Contra 7 H. 7. 1. b. Curia.

* Fol. 672.

3. But the Cattle of the Tenant himfelf may be diftrain'd if they efcape there. 48 E. 3. 34.

4. So if there be Arrearages, and after the Tenant aliens, and after the Cattle of the Alienee efcape there, yet they may be diftrain'd; for this is not any Efcape. 2 H. 4 16 b.

5. If a Stranger keeps or caufes his Cattle to be kept in a Place where &c. they may be diftrain'd; For this is not any Efcape. 2 H. 4. 16. b.

6. So

6. So if a Stranger hath Notice that his Cattle hath usually, or are accustomed to be in the Place where &c. they may be distrain'd; For this is not an Escape. 2 H. 4. 16. b.

7. The Grantee of a Rent-Charge cannot distrain the Cattle of a Stranger which come there by Escape, and are freshly pursued by the Owner, Demurrer. Trin. 17 Ja. B. between *Reynold and Cakeley.*

[(O. 2) At what *Time* it may be taken. Pl. 8. to the End of Roll pl. 16.]

5 Rep. 64. b. S. P. per Cur. and cites 14 Ass. 11. accordant. —— Keilw 96. pl. 5. Mich 22 H. 7. Anon. S. P. All the Court of C. B. held clearly that the Lessor may distrain for the Rent, notwithstanding the Term is past; And that if the Lessor will he may distrain the Beasts for Damage-Feasant, but says Hankford and Hill held Contra. 14 H. 4. 31 Ideo Quære, and says, see 11 H. 7. fol 12. Trespass —— Where Rent is reserv'd upon a Lease for Years at Easter and Michaelmas for one Year ending at Michaelmas, there he cannot distrain after Michaelmas; For the *Term is expired.* Br. Distress, pl. 73. cites Doctor and Student. lib 2.

8. If a Man leases for Years rendring Rent and the Rent is behind, and after the Term expires the Lessor cannot afterwards distrain for the said Rent. (it seems to be intended that he held over.) 14 H. 4. 31.

9. For Rent due the last Day of the Term, the Lessor cannot distrain; because the Term is ended before the Rent is due; For the Lessee hath the whole Day to pay it. Co. Litt. 47.

Cro. J. 442 pl. 15 S. C. and because it appear'd that the Estate, out of which the Rent was granted, was determined long before the Distress taken, so that the Defendant had no Title to avow, Judgment was given for the Plaintiff.

10. If a Man leases Land for Years rendring Rent, and after the Lessee holds over the Term, the Lessor cannot distrain upon the Land, for the Rent incurr'd during the Term because the Lease was ended before, and the Lessee not in privity of the Lease. 14 H. 4. 31 Per Hill and Hankford. Mich. 15 Jac. B. R. between *Harrison and Metcalf*, per Curiam this being mov'd in arrest of Judgment, and the Postea stay'd accordingly. Contra 23 H. 7. 96. Per Curiam Kelleway.

S. C. cited by Vaughan Ch. J. Vaugh 40. 41.

11. If a Man be seised in Fee or for Life of a Rent-charge, and after the Arrearages incurr'd he grants over the Rent to another, he himself cannot afterwards distrain for the Arrearages incurr'd before the Grant, because now the Arrearages are divided from the Freehold of the Rent, and so the Distress gone. Co. 4 Ognell 50 b. Per Curiam.

12. The same Law is of a Rent-Service. Co. 4. *Ognell*, 50. b. per Curiam.

Lat 211. S. C resolved per Cur —— See the Stat. 32 H. 8. cap. 37. at Tit Rents (S. b)

13. If Lessee for 20 Years makes a Lease for 10 Years reserving Rent, and Arrearages incur, and after Lessee for 20 Years dies, by which the Reversion and Arrearages descend to his Executors, the Executors, and Executors of Executors may distrain for the Arrearages incurred in the Life of the Testator, because these Arrearages were never severed from the Reversion, but these Executors have the Reversion, and Rent is annexed thereto, and in the same Plight as the Testator himself had it, in as much as they represent the Person of the Testator, and it is not like a Reversion which descends to the Heir, and the Arrearages go to the Executors.

tors. Trin. 3 Car. between *Wade and Marſh* adjudged in a Replevin.

14. An Attachment by Cattle in an Action of Treſpaſs ought not to be made in the Night. Hill. 37 Eliz. per Curiam.

15. So a Diſtreſs for Rent-Service, or Rent-Charge cannot be in the Night. Co. Litt. 142.

For the Tenant is to be attendant upon the Land all the Day to pay his Rent; but he is not compellable to attend in the Night. 9 Rep. 66 a. Paſch. 9 Jac in Mackally's Caſe. ——— 7 Rep. 7 a. Trin. 20 Eliz. C. B. in Milborn's Caſe, S. P. cites 12 E. 3 Tit. Diſtreſs, 17. and 11 H. 7. 5 a. accordingly. ——— S C cited 4 Le. 218 pl 352. ——— Br. Diſtreſs, pl. 99. cites 11 H. 7. 5. ——— Brownl. 176. S. P. as to Rent-charge, in Caſe of Read v How.

16. But a Man may diſtrain Cattle Damage feaſant in the Night, for otherwiſe perhaps the Cattle will be gone before he can take them. Co. Litt. 142.

9 Rep. 66. a S. P. in Mackally's Caſe. ——— 7 Rep. 7. a. in Milborn's Caſe, S. P. and cites 10 E. 3. 21. accordingly. ——— Br. Diſtreſs, pl. 99. cites 11 H. 7. 5. S. P.

17. If a Man leaſes for Years rendering Rent, and the Rent is arrear, and the *Term expires*, he cannot diſtrain, but ſhall have Action of Debt; Quod nota bene. Br. Diſtreſs, pl. 19. cites 14 H. 4. 31.

18. In *Per quæ Servitia*, if a Man *grants a Seigniory for Term of Life*; the *Remainder over by Fine*, and the *Tenant attorns to the Grantee for Life*, *ſaving his Acquittal*, and the *Grantee grants the Acquittal*, and after dies, he in Remainder cannot diſtrain till he has granted the Acquittal likewiſe; by all the Juſtices, in a Note. Br. Confeſſion, pl. 54. cites 18 E. 4. 7.

19. If a Man *grants a Reverſion depending upon a Term*, *rendering Rent*, he cannot diſtrain till the particular Eſtate be determined, and then he may diſtrain for all the Arrears, but by ſome he may diſtrain immediately if the Beaſts of the Grantee come upon the Land; Quære; For per Moyle, he has nothing to do till the Term be expired. Br. Diſtreſs, pl. 47. cites 10 E. 4. 4.

20. *So* upon a Leaſe *for Term de auter Vie*, and *Ceſtuy que Vie dies*; for in thoſe Caſes the Reverſion is determined. Br. Diſtreſs, pl. 73. cites Doct. & Stud. lib 2.

21. If the *Tenant offers the Fealty*, and the *Lord refuſes*, there he cannot diſtrain after before *a new Requeſt*, and this *to the Perſon*, and not upon the Land. Br. Tender, pl. 24. cites 21 E. 4. 17.

22. *So* of *Homage*; the Reaſon is, in as much as it ſhall be done by the Tenant *in proper Perſon*, and not by Deputy. Ibid.

23. If the *Lord diſtrains for Rent* arrear at a certain Day his Tenant's Cattle, and he ſues a Replevin &c. and the Lord avows for the Rent &c. and the *Tenant pleads Hors de ſon Fee*; if the *Lord (pendant that Plea) diſtrains for Rent behind at another Day after*, the Tenant ſhall have a Writ of Recaption, becauſe the Lord's Title ſhall be tried by the firſt Plea. But otherwiſe it is if the Tenant in the firſt Replevy pleads *Riens arrear*, *or levied by Diſtreſs*, then (pendant that Plea) the Lord may diſtrain for the Rent behind at a Day after, becauſe that the Seigniory is there confeſſed, and the Tenant ſhall not have a Recaption. F. N. B. 71. (M)

24. In Replevin the Caſe was, the Defendant *avowed for a Rent-charge due* in the Year 1660, *and afterwards he diſtrained and avowed for other Part of the Rent-charge due a Year before*, viz. Anno 1659, and this Diſtreſs was taken of the Cattle of another Perſon who was then Tenant of the Lands; and upon Demurrer the Queſtion was, Whether he was eſtopped to avow for the Arrears of the Rent-charge before the Year

Lev. 43. Palmer v. Stanage, S. C. held accordingly by all the Court, præ-

S s

ter Mallet, and Judgment for the Conufant N. fi &c. —— Raym. 21. Palmer v Stavick, S. C. adjudged for the Defendant.

Year 1660? And adjudged that he was not; but that if he had given an *Acquittance to the last Day of Payment* he could not claim the Rent due before, becaufe that was his voluntary Act and Deed, and fhall be received to claim againft it; but in an Avowry for Rent he may avow for all, or part, at his Pleafure, and the firft Avowry fhall not bar him from avowing for Rent before. Sid. 44. pl. 1. Mich. 13 Car. 2. B. R. Palmer v. Stabick.

The Reafon that Mallet went upon was, becaufe an Avowry is a Thing upon Record, and more than an Acquittance. —— Keb. 95. pl 84 Palmer v Strotwick, S. C. adjornatur. —— Ibid. 113 pl. 15 S C. adjudged accordingly —— S. P. by Powell J Comb 59. Trin. 3 Jac. B R. in Cafe of Fountain v. Gnales. And he faid, that there is a Diverfity as to an Acquittance, that where the Acquittance for the laft Quarter is under the Plaintiff's Hand and Seal, and where it is under his Hand only; For in the firft Cafe it is an Eftoppel, but in the latter it is only Evidence.

1 Salk 209. S. C. but S. P does not appear. —— Lutw. 213, 214. S C & S P adjudged accordingly. —— 3 Salk. 136 S C fays the Reporter tells us, that the Law is contrary. —— S. P and that the Leffee entered, and was in Poffeffion for two Years and an half, and the Rent being in arrear the Leffor diftrained; and adjudged that he could not by Law, becaufe by this Agreement there was an Eftate for two Years created, and no more; the other was a growing Intereft, or Eftate at Will, which being a diftinct Eftate from the firft, cannot be fubject to the Arrears of the firft 3 Salk 135 pl 1. 9 W. 3. C B. Stanfit v. Hicks. —— Ld. Raym. Rep 280. Starfill v Hicks, S. C adjudged per tot. Cur that the Diftrefs was unlawful; For the Interefts are different, and therefore the fecond Eftate cannot be anfwerable for the Debts of the former Eftate, which was before determined.

25. A *Leafe* was made *for one Year, and fo from Year to Year, Quamdiu ambabus Partibus placuerit*, rendering 12 l. a Year Rent fo long as the Leffee fhould occupy the Premiffes. The Leffor diftrained for a Year and a half due after the making the Leafe. Exception was taken that he could not diftrain for the Rent after the Year was determined fince it was but a Leafe at Will; fed non allocatur; For it was a good Leafe for two Years, and after that at Will. Ld. Raym Rep. 170. Hill. 8 & 9 W. 3 Bellafis v. Burbricke.

26. 11 *Geo.* 2. *cap.* 19. *S.* 1. *Enables the Landlord, or any Perfon by him impowered, in Cafe of Rent arrear, to diftrain Goods fraudulently carried off the Premiffes by Tenant for Life, Lives, Years, at Will, or at Sufferance, within* 30 Days *after fuch carrying off, and to fell, or otherwife difpofe of the fame, as if deftrained upon the Premiffes, unlefs fold before bona fide, and for a valuable Confideration, to any Perfon not privy to the Fraud.*

S. 2. *Provided that no Landlord fhall feize Goods fold bona fide, and for a valuable Confideration, to any Perfon not privy to fuch Fraud.*

(O. 3) At what Time for Rent after their being taken in Execution.

1. CASE by an Executor againft W. Bailiff of the Liberty of the Dutchy of Lancafter in Norfolk, and declared that *D. C.* on 6 June, 1712. *took an Eftate of Teftatrix from Mich. for one Year, and fo from Year to Year as long as both Parties fhould pleafe*, at 70 l. *A Year's Rent being due* 6 *Octob.* 1713. *W. cepit Bona & Catalla D. C. in & fuper &c. Terr' exiften' ad valentiam* 200 *l.* The Executor poft captionem & ante amotionem Bonorum & Catallorum &c. and the Teftatrix in Vita fua dedit W. notitiam de reddit' prædict' fic debit', and fhe then demanded of W. the faid Rent out of the faid Goods and Chattels, which

which he refused to pay, but carried off, and removed the same from the Premisses contra Formam Statuti in eo Casu edit' & provis'. Upon Not Guilty there was Verdict, and Judgment for the Plaintiff in C. B. and Judgment affirmed in B. R. Hill. 6 Geo. per Powis, Eyre, and Fortescue. Resolved 1st, The Action may be maintained by the Executor or Administrator, there being a Right vested by the *Statute* 8 *Ann. cap.* 17. in these Goods. The Act *is a general Prohibition, that no Goods &c. lying, or being upon any Messuage &c. shall be liable to be taken by Virtue of an Execution* &c. on any Pretence whatsoever, *unless the Party at whose Suit* &c. *shall before the Removal &c. pay to &c. all such Sums &c. as shall be due for Rent, provided the said Arrears do not amount to more than one Year's Rent, or if more, on Payment of one Year's Rent* &c. *and the Sheriff &c. is required to levy and pay to the Plaintiff, as well the Money so paid for Rent as the Execution Money.* And the Duty of the Officer is when he has Notice to keep the Goods till Payment, but if he removes he transgresses the Act, and he is liable to an Action by the Party who is injured and aggrieved; The Sheriff has Power to levy the Money, as well for the Landlord as for the Plaintiff in Execution. Where the Injury is to the Person, all fails by the Death of the Party; but when it is to the Estate, in any Manner whatsoever, the Action survives if the Estate survives. These Goods are not to be removed, but to remain as a Pledge, and it is a sort of Possession in the Landlord, and this Act of the Officer not only injures this Possession, but the Interest and Property of the Landlord. It is stronger than an Action for not setting out of Tithes, because there is only a Demand for a particular tenth Part, but no particular Property; for till Severance he had no Right but to an undivided tenth Part. A Year's Rent is secured against all Events. 2dly, That the Action was well founded, and the Officer well charged; for the Notice was to him of what was due, and then it was incumbent upon him not to have removed the Goods till Satisfaction had been made. Notice to the Plaintiff in Execution was no Notice to the Sheriff; but if it were to him, and not to the Sheriff, should the Sheriff be liable? As to what is reasonable Notice, it is not appointed by the Act. Eyre J said, that without Notice he could not transgress the Act, but if he has Notice the Action is reasonable. But per Fortescue, when the Law does not determine it, the Party must take Notice, especially here, when the Act says he shall not remove &c. When there is a Condition in a Will, the Party must take Notice in Law and Equity, but here was Notice according to the Equity of the Thing, and the right Person had Notice. Where no Person is directed to give Notice, it is at his Peril. Hill. 6 Geo. B. R. Wyndham v. Palgrave.

(P) *Pound.* [What it is, and] how he shall *demean himself* towards the Distress.

F. 1 673.

See Tit. Trespass (G. a) per totum.

1. A Pound overt is a Pinfold made for such Purposes, or the Close of him that distrains, or the Close of a Stranger, with his Consent where the Distress is taken. Co. Litt. 47.

2. A Pound-Covert, or Close, is when the Distress is impounded in an House. Co. Litt. 47.

3. If

3. He that diſtrains any thing that hath Life, ought to impound it in a lawful Pound, within three Miles, in the ſame County. Co. Litt. 47. b.

4. But if a Man diſtrains dead Goods, as Utenſils of an Houſe, or ſuch like, which may take Damage by Wet or Weather, and the like, he ought to impound them in an Houſe, or other Pound-Covert, within three Miles, in the ſame County; For if he impounds them in a Pound-overt, he ought to anſwer for them. Co. Litt. 47. b.

5. If a Man diſtrains Cattle, and puts them in a Pound-overt, the Owner ought to keep them at his Peril. Co. Litt. 47. b. For it is lawful for him to come there for this Purpoſe.

6. But if he puts the Cattle in a Pound-Covert, or Cloſe, there he ought to keep them at his Peril, and yet he ſhall not have any Satisfaction for it. Co. Litt. 47. b.

Br. Treſpaſs, pl. 250. cites S. C. —— Br. Diſtreſs, pl. 86. cites S. C.

7. If a Man takes a Diſtreſs, and puts it into a Pound-overt, and the Horſe which he diſtrains leaps three times over the Pound, which is as high as it is uſed to be, and therefore he takes the Horſe and ties him with a Rope to a Poſt in the ſame Pound, and after he ſtrangles himſelf, yet this will not excuſe him, but he may be puniſhed in an Action of Treſpaſs. 27 Aſſ. 64. adjudged.

Yelv. 96. S. C. but S. P. does not appear. —— Cro. J. 147. pl. 6. Bagſhaw v. Coward, S. C. but S. P. does not fully appear; but it is ſaid that a Diſtreſs may not be uſed, becauſe he hath it by Law only as a Gage. —— Noy 119. S. C. & S. P. reſolved, and Noy cited S. P. reſolved in one Prideaux's Caſe, becauſe it is a Puniſhment to the Owner, and in Cuſtodia Legis. —— It was argued per Cur. that if a Man takes a Diſtreſs, he cannot work it; For it is only the Act of the Law that gives him Power to the Diſtreſs; For he has no Property in it, nor Poſſeſſion in Jure. Ow. 124. Mich. 7 Jac. C. B. in Caſe of More v. Conham. —— See Tit. Eſtray (E) pl. 2. S. C.

8. If a Man takes a Cow for a Diſtreſs, he cannot milk her; For though the Cow be the better for it, yet he ought not to do good to the Owner without his Conſent, and perhaps the Owner would have come before any Damage by this came to the Cow, and if it periſh by this, yet he that took the Diſtreſs may diſtrain again, and ſo he is at no Damage. H. 4 Ja. B. R. between *Bagſhaw and Galliard*, per Curiam.

10. Writ of Beaſts taken in one County, and carried into another County, upon the Statute of Marlebridge, cap. 4. and Weſtm. 1. cap. 16. was maintained without making Mention of the Statute in the Writ. Thel. Dig. 118. lib. 10. cap. 28. S. 4. cites 30 Aſſ. 38.

11. *Diſtreſs* taken for *Damage feaſant cannot be converted to his own Uſe*, but ſhall be uſed as a Diſtreſs. Br. Diſtreſs, pl. 81. cites 28 H. 6. 5.

12. If a Man takes *Quick-Chattles* as Diſtreſs, he ought to put them *in Pound-overt*, ſo that the Owner may give them Suſtenance; *But* of *Chattle dead* a Man may put it *where he pleaſes*, but if they are *corrupted in his Default*, he ſhall anſwer for them. Br. Diſtreſs, pl. 25. cites 9 E. 4. 2. per Choke J.

13. Treſpaſs of taking Sheep, and detaining them till he paid 54 s. for Deliverance of them, the Defendant juſtified for Diſtreſs for Relief, and that he took the 54s. for their eating, abſque hoc that he took it for the Deliverance, and by the Juſtices it is no Plea; For if he did *give them Victuals, he cannot compel the Party to pay for it*; For the Diſtrainor is not compellable by the Law to give them Suſtenance. And if they *agree after the Diſtreſs upon this Sum*, yet *it is no Excuſe*, but that it is for the Deliverance. *But if they agree at the Time of the Diſtreſs taken*, that he ſhall give to them Victuals, and that he ſhall have

20 s. for it, this is a good Bargain. Br. Diſtreſs, pl. 52. cites 21 E. 4. 53.

14. If a Beaſt be put into a Place in which there are *ſharp Spikes, by which the Beaſt is ſtuck*, though it be a publick Pound, the Diſtrainer ſhall anſwer for it, for it is his Pound; Arg. 12 Mod. 660. in Caſe of Waſper v. Edwards, cites Doct. and Stud. c. 27.

15. A Pound overt is *every Place where the Owner of the Diſtreſs may come and give them Food, and be no Treſpaſſor* for there being there. Br. Diſtreſs, pl. 72. cites Doct. and Stud. lib. 2

16. Beaſts taken Damage-Feaſant *drove into another Country* and ſold there is an Abuſer. And. 65. pl. 139. Mich. 23 & 24 Eliz. Pleadal v. Knap.

17. If the *Lord takes a Diſtreſs for an Amercement in a Leet*, he may either ſell it or put it into the Pound at his Pleaſure. 8 Rep. 51. b. Trin 30 Eliz. C. B. Grieſly's Caſe.

18. Beaſts taken *in Withernam* may be worked. Le. 220. pl. 302. Mich. 32 & 33 Eliz. C. B. Chamberlain's Caſe.

3 Le. 235, 236 pl. 323. Anon.

S. P.——Becauſe they are *deliver'd to him in lieu of his own*. Arg. 12 Mod. 660. Hill. 13 W. 3.

19. If there be a *Cuſtom* within a Town *that if a Butcher kills any Beaſts* within the Town, *and ſells the Fleſh within the Market he ſhall pay 2 d. for every Hide, and that the Bailiff may diſtrain the Hide for the 2 d.* if denied; admitting the Cuſtom good, and the Diſtreſs of an Hide well taken, yet the *Bailiff cannot Tan the Hide* to prevent its being rotten, for the Cuſtom to diſtrain the Hide does not enable them *tan it*, for the Property is quaſi altered thereby, the Marks by which it might be known being taken away from the Owner ſo as he cannot have it again; adjudged. Cro. E. 783. Mich. 42 Eliz. Duncomb v. Reeve and others.

20. But by Popham, in ſome Caſes a Man may meddle with and uſe a Diſtreſs where it is for the Benefit of the Owner; as if one *diſtrains Armour*, he may cauſe it to be *ſcoured to avoid Ruſt*; Or if one diſtrains *Raw-Cloath*, he may cauſe it *to be fulled*. Ibid.

21. If a Man puts *Cattle in a Pound Covert* or Cloſe, there he ought to keep them at his Peril, and yet he ſhall not have any Satisfaction for it. Co. Litt. 47. b.

And if *they die* he ſhall be ſaid a Treſpaſſor ab initio.

Het 76. Hill. 3 Car C. B. Perkins v. Butterfield.——— 51 *Hen.* 3. *enacts that the Owner ſhall not pay for keeping the Cattle, but may feed them himſelf.*

22. Where one diſtrains *dead Goods*, or Things inanimate, he muſt put them in a *Pound Covert within three Miles* of the Place &c. and *in the ſame County*; for if he put them in another open Pound, and they be ſtolen, or receive Damage, the Perſon diſtraining will be anſwerable for them. Co. Litt. 47 b.

23 A Diſtreſs of *live Cattle* may be *kept in any open Place* in the Landlord's own Grounds, or in the Grounds of another by his Conſent, as well as in the common Pounds, if he give *Notice* to the Owner of the Cattle *where they are*; but if he gives no Notice, and the Cattle die for want of Food, the Landlord muſt make Satisfaction for them. Co. Litt. 47. b.

24. *Cattle* taken as a Diſtreſs cannot be *worked*; For it is only the Act of the Law that gives Power to the Diſtreſs; For the Diſtrainor has no Property in the Diſtreſs, nor Poſſeſſion in Jure cites 21 H. 7. Replevin. A Man has *Return irrepleviſable* he cannot work them; For the Judgment is to remit them to the Pound there to remain. Ow. 124. Mich. 7 Jac. C. B. in Caſe of Moor v. Conham, cites S. C.

Cro J. 148. S. P. but a *Cow may be milked* becauſe for the Owner's Benefit.—— If one has

Beaſts deliver'd to him *in Withernam* he may work them; becauſe he has them in lieu of his own Beaſts, and it is reaſonable that he ſhall have their Labour and Uſe for their Paſture. D 280 a Marg. pl. 14. cites it as agreed for Law by the Juſtices Hill. 33 Eliz. C. B.

Vent. 36. Welsh v. Bell. S. C. and says it appear'd also in the Declaration, that there was a Servant in the Cart, and therefore it was insisted that the Cart and Horses were privileg'd; Et Adjornatur ——— Raym 218. S C. but S P does not appear.——— 2 Lev. 73. S. C. but not S P.———Freem. Rep. 106. S. C. but not S. P.

25. In Trespass for *taking two Horses from his Cart loaden with Corn*, the Defendant justified as a Distress for *Rent-Service issuing out of the Land where* &c. The Court were of Opinion after several Debates that the Distress was well taken. Sid. 440. pl. 9. Hill. 21 Car. 2. B. R. Webb v. Bell.

26. Defendant distrained a *Trunk*, and being informed that there were Things of Value in it he caused it to be *corded* to prevent Damage; and for that he was adjudged a Trespassor ab Initio; Cited per Twisden to have been so adjudged before Roll Ch. J. Vent. 37. Trin. 21 Car. 2 B. R.

27. If *Turves lie upon a Common Damage-Feasant*, though for this a Commoner may distrain them, yet he cannot burn them. 2 Jo. 193. Pasch. 34 Car. 2. Bromhall v. Norton.

Wood. Inst. 191.

28. One *cannot break open the outer Door* to distrain for Rent per Ch. J. But per Pollexfen, If the outer Door be open one may break open the inner Door. Comb. 17. Pasch. 2 Jac. 2. B. R.

29. If a *Landlord* come into a House and *seises* upon some *Goods as a Distress* in Name of all the Goods in the House that will be a good Seisure of All; But he *must remove them in convenient Time at Common Law*; *and now since the late Statute of* * *W. & M. immediately*, *except it be Hay or Corn*; and here for that the Seisure was on Monday, though of Barrels of Beer not easily removeable, if at all without Damage, and no Removal till Wednesday when the Defendant took them by Virtue of a Replevin, in which the Lessee and not the Distrainant, was made Defendant, and besides the Plaintiff quitted Possession of them the two intervening Nights, and had not the Possession at the Time of the Taking by Virtue of the Replevin, without which there could be no Rescous, the Plaintiff was nonsuited; In this Case it appeared also, that the *Distrainant drew Beer out of one of the Barrels*; which per Holt Ch. J. made him a Trespassor ab initio as to that Barrel only. 6 Mod. 215. Trin. 3 Ann. B. R. in Case of Dod v. Monger.

* See (H)

30. If *Lands in distant Counties are demised by one Demise, reserving one intire Rent*, the Distress taken in the one County cannot be driven into the other; Per Holt Ch J. but otherwise if the Counties and Hundreds are contiguous; Per Cur. Ld. Raym. Rep. 55. Trin. 7 W. 3. in Case of Walter v. Rumbal.

31. A. distrained an *Hog* Damage feasant; Per Holt, he may put him in a *Pound-Covert*. 1 Salk. 248. pl. 3. Pasch. 12 W. 3. B. R. Vasper v. Eddowes.

32. A *common* Pound *is the Pound of the Distrainor* for the Time, and if he will use it he must take Care to keep it so, that if it be in a broken Condition, or an improper Pound for the Thing to be impounded, As a Pig &c. and the Distress escapes, the Distrainor shall not take Advantage of his own Neglect so as to bring Trespass afterwards. 12 Mod. 664. Hill. 13 W. 3. Vaspor v. Edwards.

33. Common Pounds *are* either *by Custom*, *Tenure*, or *Agreement*, among the Inhabitants of a Vill or Manor, and not by Common Law; Per Holt Ch. J. 12 Mod. 664. in S. C.

34. A Distress *may not be tied*, for that would be a Misuser, and amount to a Conversion; Per Gould. J. 12 Mod. 661. Hill. 13 W. 3. Vaspor v. Edwards.

S. P Arg. Ld. Raym. Rep. 720. cites 27 Ass. 64.

35. Distrainer

35. Diſtrainer cannot *tan raw Hides* though it be for their Preſervation, cites Cro. E. 783. Nor *milk Cows* to preſerve their Milk, or ſave them from Hurt, cites 1 Roll Abr. 673. though it be allowed, Cro. J. 148. that Kine may be milked to prevent their being ſpoiled; Per Powis J. who ſaid that he took Roll Abr. to be Law. 12 Mod. 662. Hill. 13 W. 3. in Caſe of Vaſpor v. Edwards.

36. If the *Plaintiff ſuffers the Diſtreſs to eſcape by his own Conſent*, this is a Diſcharge of the Treſpaſs, but then it muſt be ſhewn in the Bar; Per Gould. J. 11 Mod 21. pl. 1. Hill 1 Ann. B. R. in Caſe of Jaſper v. Eadowes.

37. If a Landlord diſtrains for Rent, and *keeps the Goods on the Premiſſes longer than a reaſonable Time*, which the Law allows him to remove them in, *he is a Treſpaſſor ab initio*, cited by Forteſcue J 2 Ld. Raym. Rep. 1427. as a Caſe between Cartwright and Comber at Niſi Prius, tried before the Earl of Macclesfield when he was Ch. J. of B. R.

38. No Juſtification can be good for *deſtroying* a Thing diſtrained; For all Diſtreſſes ought to be ſafely kept. 8 Mod. 330. Mich. 11 Geo. Sparks v. Keeble.

39. In *Treſpaſs* for entering his Land Defendant *pleads an Entry and Diſtreſs for Rent*. Plaintiff *replied, that Defendant continued upon the Land* 6 *Days*, and had eight Bailiffs there. On Demurrer Judgment was for the Plaintiff; For the Court ſaid, that by the Common Law a Perſon that diſtrains was *obliged to carry off the Diſtreſs immediately, and put it into a Pound-covert, or a Pound-overt, and not detain it on the Land*, and that the preſent Caſe is not within the Statute 2 W. & M. cap. 5. And Reynolds J ſaid, that the very Reaſon why Shocks of Corn could not be diſtrained at Common Law, was, becauſe they could not be carried off without Damage to the Tenant, which implies, that a carrying off the Diſtreſs is neceſſary. Barnard. Rep. in B. R. 3. 4. Mich. 13 Geo. Griffin v. Scott.

Although the Party might enter into the Houſe and diſtrain the Goods, yet *in a reaſonable Time he ought to remove them, and put them* either in a Pound-overt or Cloſe; but at Common Law no Diſtreſs could be impounded on the Premiſſes, and for that Reaſon Sheaves or Shocks of Corn were not diſtrainable for Rent, becauſe nothing could be diſtrained but what might be returned in as good a Condition as it was in when the Diſtreſs was taken, but after a Removal Sheaves of Corn could not be reſtored in the ſame Condition cites Co. Litt. 47. a. and therefore the Statute 2 *W. & M. Seſſ.* 1. *cap* 5. *gives the Leſſor Power to diſtrain Sheaves of Corn &c. and to lock up and detain the ſame upon the Place where it was found*; but that is only in the particular Caſes mentioned in that Act: Per Cur. 2 Ld. Raym Rep. 1426. Mich. 13 Geo. in Caſe of Griffin v Scott & al'.

40. 11 *Geo.* 2. *cap.* 19. *S.* 10. *Perſons lawfully diſtraining for any kind of Rent, may impound the ſame, of whatever kind, in ſuch Place, or on ſuch Part of the Premiſſes, as ſhall be moſt convenient for ſecuring the ſame, and to appraiſe, ſell, and diſpoſe of the ſame upon the Premiſſes, as in like Caſe may be done off from the Premiſſes by the* 2 *W. & M. or the* 4 *Geo.* 2. *And any Perſons may come and go to and from ſuch Place, or Part of the ſaid Premiſſes, where any Diſtreſs for Rent ſhall be impounded, and ſecured as aforeſaid in order to view, appraiſe and buy, and alſo in order to carry off and remove the ſame on Account of the Purchaſor thereof, and that if any Pound-Breach, or Reſcous ſhall be made of any Goods and Chattels, or Stock diſtrained for Rent and impounded, or otherwiſe ſecured by Virtue of this Act, the Perſon or Perſons aggrieved thereby ſhall have the like Remedy, as in Caſes of Pound-Breach or Reſcous is given and provided by the ſaid Statute.*

(P. 2) What

(P. 2) What ſhall be ſaid a Reſcous of the Diſtreſs.

S. P. But he may purſue and take them, which ſee in Nat. Brev. in the Writ of Reſcous.

1. WHERE *a Lord comes to diſtrain and ſees the Beaſts*, and the *Tenant perceiving it*, *chaſes the Diſtreſs out* &c. the Lord ſhall not have Writ of Reſcous; for he never had Poſſeſſion of the Beaſts; Per all the Juſtices. Br. Reſcous, pl. 13. cites 21 H. 7. 40.

Br. Reſcous, pl 24. cites 14 H. 4. and 44 E. 3. ——— If the *Lord diſtrains* Cattle *out of his Fee* in Lands not held of him, the Tenant may make Reſcous unleſs in ſome Special Caſes, as if the Lord come to diſtrain his Cattle which he *ſees then within his Fee*, *and the Tenant or any other* to prevent the Lord to diſtrain, *drive the Cattle out* of the Fee of the Lord into ſome other Place out of his Fee, yet *may the Lord freſhly follow* and diſtrain the Cattle and the Tenant cannot make Reſcous; Albeit the Place where the Diſtreſs is taken is out of his Fee. For now in Judgment of Law the Diſtreſs is taken within his Fee, and ſo ſhall the Writ of Reſcous ſuppoſe. Co. Litt. 161. a.

2. Reſcous *is* when the Lord in the Land held of him *diſtrains* for his Rent arrear, if the *Diſtreſs is reſcued* from him. Litt. S. 237.

3. So if the *Lord comes on the Land to diſtrain*, and the *Tenant* or another will not ſuffer him. Litt. S. 237.

Reſcous *is not but where he has Poſſeſſion of the* Cattle, or the Thing of which

4. Reſcous is *a taking away and ſetting at Liberty againſt Law a Diſtreſs taken*, or a Perſon arreſted by the Proceſs or Courſe of Law. And all is one as to the Point of the *Diſſeiſin* to reſcue the Diſtreſs *after it is taken*, *and beforehand to reſiſt* and withſtand the taking of it; but yet it is no Reſcue till it be diſtrained. Co. Litt. 160. b.

the Reſcous is ſuppoſed to be made; For if one comes to arreſt a Man, or to diſtrain, and he is diſturbed to do it, he ſhall not have a Writ of Reſcous, but an Action on the Caſe. F. N. B. 102. (F).

5. If the *Tenant reſcues the Diſtreſs*, *and after is diſſeiſed* of the Tenancy, *yet the Aſſiſe lies againſt him* for the Diſſeiſin done of the Rent by the Reſcous. Co. Litt. 160. b.

5. When a Man has a Diſtreſs, and the *Beaſts*, as he is driving them to the Pound, *go into the Houſe of the Owner*, if he that diſtrain'd them demands them of the Owner, and he delivers them not it is a Reſcous *in Law*. Co. Litt. 161. b.

(Q) *Reſcous* of a Diſtreſs. *Who may* make it.

[And what Remedy the Diſtrainer has where the Diſtreſs was with Cauſe. Roll pl. 6.]

If a Lord diſtrains his Tenant's Cattle, and a Stranger's Cattle for Rent or Service

1. IF a Man diſtrains my Cattle without a Cauſe, yet a Stranger cannot of his own Head reſcue them from him; For he hath good Cauſe to have them againſt him. 39 E. 3. 35. b.

2. If a Man diſtrains my Cattle together with the Cattle of J. S. without Cauſe J. S. or J may juſtify the Reſcue of all. 39 E. 3. 35. b. per Thorp.

behind, when there is not any Rent or Service behind, the Stranger may reſcue his own Cattle, but not the Tenant's as it ſeems. And that as it ſeems by the Statute of Marlbridge cap. 3. which wills, Non ideo puniatur Dominus per Redemptionem, yet the Opinion of Thorpe. M. 31 E. 3. is contrary; for

for he ſays, the Stranger may reſcue as well the Tenants Cattle as his own * Quære. F. N. B. 102. (E) and in Marg. cites S. C. ——— * Ibid. in the new Notes there (b) ſays, and note 4 E. 6. Diſtreſs 74. contra. See 6 E. 4. 11. 5 E. 4. 10. 11. 19 H. 7. 48 E. 3. 33. 3 H. 4. 22. 22 H. 6. 37. contra, 29 E. 3. 35. 4 Co. 11. b. Bevill's Caſe.

3. If a Diſtreſs be taken of Goods without a Cauſe the Owner may reſcue them. Co. Litt. 47. b.

S. P. per Cur. Ld. Raym. 105. Mich. 8 W. 3. in Caſe of Cotſworth v. Betiſon. ——— 1 Salk. 247. pl. 2. S. C. & S. P. in a Note there.

4. But if a Diſtreſs be taken without a Cauſe and put into the Pound, the Owner cannot break the Pound, and take them out; becauſe they are in the Cuſtody of the Law. Co. Litt. 47. b.

And. 31 pl. 75. Mich. 36 H. 8. S. P. in C. B. ——— Bendl. 30. pl. 48. S. P. accordingly by the Juſtices of C. B. and ſeems to be S. C. ——— S. P. per Cur. Ld. Raym. Rep. 105. Mich. 8 W. 3. in Caſe of Cotſworth v. Betiſon. ——— 1 Salk. 247. pl. 2. S. C. & S. P.

5. If a Man takes Cattle Damage-Feaſant and puts them into a Pound, and the Owner that hath Common there makes Freſh Suit and finds the Doors unlock'd he may juſtify the taking out the Cattle in a Parco Fracto. Co. Litt. 47. b.

Fol. 674.

6. But if the Owner breaks the Pound and takes out his Goods, he that diſtrain'd them may have his Action de Parco Fracto, and may alſo take again the Goods diſtrain'd where he finds them, and impound them again. Co. Litt. 47. [b].

7. Reſcous *by Guardian of the Land and Heir of W. B. for Diſtreſs for Amercement*, and the Defendant made Reſcous, and there it was agreed, that if a Man *diſtrains tortiouſly* the *Owner* of the Beaſts *may make Reſcous.* Br. Reſcous, pl. 12. cites 39 E. 3. 35.

8. *But* it was agreed Paſch. 4 E. 6. that *if* a Man diſtrains *tortiouſly and puts them in Pound*, that the *Owner cannot break the Pound* and take them out; For they are in Cuſtody of the Law. Ibid.

9. If a Man *diſtrains tortiouſly*, the Owner of the Beaſts may make Reſcous. Br. Diſtreſs, pl. 26. cites 39 E. 3. 35. *But* P. * 4 E. 6. it was agreed that *if he* diſtrains tortiouſly, and *impounds them* the Owner cannot take them out; For they are in Cuſtody of the Law. Br. Diſtreſs, pl. 26.

Br. Reſcous, pl. 12. cites S. C. — * Br. Diſtreſs, pl. 74. cites S. C. & P. by the Juſtices for Law.

10. If the *Lord diſtrains without Cauſe*, yet he *Tenant cannot make Reſcous* per Mombray. Br. Reſcous, pl. 25. cites 40 E. 3. 32.

11. If a Man *diſtrains my Beaſts which come into his Land by Eſcape* I may reſcue them, but if I keep or put them there, or if I have Notice that they uſe to go there, this is no Eſcape. Br. Reſcous, pl. 5. cites 2 H. 4. 16.

S. P. Br. Diſtreſs, pl. 12.

12. In Caſe of a Diſtreſs *for 2 d. a Score of Sheep of any Stranger paſſing per & trans the ſaid Vill*, and if it was denied on Requeſt that they uſed to diſtrain, it was inſiſted that a Man cannot *preſcribe to diſtrain for it Via Regia*, for that it is againſt the Stat. of Marlebridge, cap. 15. and cited 17 E. 3. 1. 43 E. 3. 40. 11 R. 2. Avowry 87. 17 E. 3. 43. that where a Lord diſtrained in an Highway the Tenant might have Treſpaſs or make Reſcous; and that againſt a Statute one cannot preſcribe, and cites 9 H. 6. 56 and Dyer 232 and 273. But this Exception was not allow'd; for it was held that *this Statute did not intend but for Diſtreſſes for Rents and Services*, and not for thoſe Things whereof no Diſtreſs can be but in the Highway. Cro. E. 710. pl. 34. Mich. 41 & 42 Eliz. C. B. Smith v. Shepherd.

Mo. 574. pl. 793. S. C. adjudged that that Preſcription is not good not reaſonable to take Toll for Paſſage in Via Regia, and the Inheritance of every Man in Paſſage in Viis Regiis is precedent to all Preſcriptions. But if the Party ſhews Cauſe for the Toll, as if he is bound

bound to repair the Bridge or Cauſey &c then it may be reaſonable Cauſe for the Commencement of the Toll and Preſcription; But for Toll Traverſe it is clear that a Man may preſcribe. ——— See Tit Toll (A) per totum.

Where a Man diſtrains the *Tenant cannot make Reſcous though no Rent be arrear*, quod nota bene. Br. Reſcous, pl. 16. cites 9 H. 7. 2.

13. The Rent muſt be behind, or elſe the Tenant may make Reſcous; For if *no Rent* be *behind* when the Diſtreſs is taken, how can the Reſcous amount to a Diſſeiſin of the Rent when none is due? Co. Litt. 160. b.

14. And *ſo* it is *if the Tenant reſiſts* the Lord to diſtrain when there is no Rent behind, this can be no Diſſeiſin of the Rent for the Cauſe aboveſaid, and this (as it appears by Littleton) holds as well in the Caſe of a Rent-Service between Lord and Tenant, as in Caſe of a Rent-charge &c. And ſo I heard Sir Chriſtopher Wray ſay that he had adjudged it. Co. Litt. 160. b

15. And *that which the Tenant may do* when there is no Rent behind, *may a Stranger do*, if his Beaſts are diſtrained. Co. Litt. 160 b.

16. If the Tenant *tender the Rent to the Lord when he is to take the Diſtreſs*, if notwithſtanding the Lord will diſtrain, the Tenant may make Reſcue. Ut ſupra.

If the Rent of the Lord be behind, and the Lord *diſtrains* the Cattle of the Tenant *in the Highway* within his Fee, the Tenant may make Reſcous; for that it is defended by Law to diſtrain in the Highway. Ut ſupra.

17. And by the ſame Reaſon, if the Lord will diſtrain *Averia Carucæ, where there is a ſufficient* Diſtreſs to be taken *beſides*; Or if the Lord will diſtrain *any thing that is not diſtrainable*, either by the Common Law, or by any Statute, the Tenant may make Reſcous. Co. Litt. 160. b. 161. a.

18. If the *Lord coming to diſtrain had no View* of the Cattle within his Fee, tho' the *Tenant drives them off purpoſely*, or if the *Cattle themſelves after the View go out of the Fee*, or if the *Tenant after the View removes them for any other Cauſe* than to prevent the Lord of his Diſtreſs, then cannot the Lord diſtrain them out of his Fee, and if he does the Tenant may make Reſcous. Co. Litt. 161. a.

19. Where *Goods* are *diſtrained without Cauſe*, the Owner may reſcue them *before they are impounded*, but he cannot afterwards break the Pound and take them out, becauſe they are then in the Cuſtody of the Law. Co. Litt. 47. b.

1 Salk. 247 pl 2. Mich. 8 W. 3. C. B. Cotſworth v. Bettiſon, S. P. accordingly. ——— Ld. Raym. Rep. 104. 105. S. C. & S. P. held accordingly.

20. If the Lord diſtrains *his Tenant's Cattle, and a Stranger's Cattle*, for Rent or Service behind, *where there is not any Rent or Service behind*, the *Stranger may reſcue his own* Cattle, but not the Tenant's, as it ſeems. And that, as it ſeems by the Statute of Marlebridge, cap. 3. which willeth Non ideo puniatur Dominus per Redemptionem; yet the Opinion of Thorp. M. 31. E. 3. is contrary; for he ſays, the Stranger may reſcue as well the Tenant's Cattle as his own. Quære. F. N. B. 102. (E).

(Q. 2) Refcous. Writ and Pleadings.

1. IN Writ of Refcous made of Goods and Merchandizes refcued, for which Toll ought to be paid, the Writ was, that the Chattles were *taken at C. for* the *Toll*, and would have detained them according to the Law &c. and that the *Defendants refcued the fame Chattles without faying where* the Refcous was made, and yet held good; For it fhall be intended at the Place where the Taking was. Thel. Dig. 99. lib. 10. cap. 9. S. 6 cites Mich. 30 E. 3. 20.

2. So in *Trefpafs for* taking an *Eftray*. Thel. Dig. 99. lib. 10. cap. 9. S. 6. cites Brief 333.

3. Refcous, becaufe the *Plaintiff diftrained in his Fee in B. in Land held of him*, and the *Defendant made Refcous*, and the *Defendant faid, that he held two Acres there of the Plaintiff, and three Acres there of N. and the Plaintiff would have diftrained in the three Acres which are out of his Fee, and the Defendant made the Refcous.* The *Plaintiff faid, that he came to the two Acres to have diftrained, and faw the Beafts there, and the Defendant perceiving it chafed them into the three Acres, which are out of his Fee, and the Plaintiff came there frefhly and would have diftrained, and the Defendant made Refcous Vi & Armis.* Cand. demanded *Judgment of the Writ*, which is, that he diftrained within his Fee, and now he confeffes that it out of his Fee, and in this Cafe he ought to have Writ accordingly; but Thorp [awarded him to] anfwer; For *there is no other Form of Writ in this Cafe*; and alfo when he came to the two Acres to diftrain, and you perceiving it chafed them into other Land, it is lawful for him to purfue and diftrain there, and this taking refers to the firft Place; by which the *Plaintiff faid, that he was harrowing in the two Acres, and when he had finifhed it, went to the three Acres to perform his Overaigne* prout &c. *abfque hoc that he chafed for this Caufe*, and the others e contra, and fo the Caufe in Iffue. Br. Refcous, pl. 3. cites 44 E. 3. 20.

Br. General Brief, pl. 4. cites S. C. —— Br. Iffues Joines, pl. 45. cites S. C —— Thel Dig. 86. pl. 9. cap. -. S. 12. cites S. C.

4. Where a Man *avows for Rent, and after diftrains and avows for Homage*, and the *Plaintiff fues Recaption, and after in the Avowry difclaims to hold of the Defendant*, by this he has not abated his Recaption; and fo fee that a Man may have Recaption *againft him who has not Tenure if he diftrains twice for one and the fame Caufe*; but if he diftrains for Rent of one Day, and after, pending the fame Replevin, diftrains for Rent of another Day, Recaption does not lie. Br. Recaption, pl. 4. cites 47 E. 3. 22.

5. *And* alfo it feems there, that where a Man *diftrains for one Caufe, and after for another pretended Caufe which is not true*, yet Recaption does not lie, and the Iffue was, if he took the fecond Diftrefs for the firft Caufe or not? Ibid.

6. In Refcous of Diftrefs it was awarded a good Plea, *that he had a great Wafte adjoining to his Manor, and he put his Beafts there, and they efcaped into the Place where &c. and the Plaintiff took them, and he made Refcous*; Nota. Br. Diftrefs, pl. 12. cites 2 H. 4 16.

Br. Refcous, pl. 12. cites S. C. and S. P.

7. *But* it was faid, that if a *Man keeps his Beafts in the Place*, or *has Notice that they ufually came to this Place*, this is not an Efcape; Quod Nota. Br. Diftrefs, pl. 12. cites 2 H. 4. 10.

Br Refcous, pl 12. cites S. C and S. P.

8. Writ

* Br. Reſcous, pl. 18. cites 5 E. 4. 8 and 7 E. 4. 19. 20. Contra that it is no Plea; For he may aid himſelf in Replevin and ſuffer the Diſtreſs, Per Choke; Quære inde. ——— S. P. Br. Reſcous, pl. 20. cites 6 E. 4. 11. ——— || *Ne unques ſeiſie after the Limitation* is no Plea, per Yelverton; Contra in Avowry. Br. Reſcous, pl 20. cites 6 E. 4. 11.

8. Writ of Reſcous upon *Diſtreſs taken for Rent arrear*; it was ſaid, that * *Riens Arrear*, and || *Ne unques ſeiſie*, are good Pleas in Writ of Reſcous, quod non negatur, tamen quære inde. Br. Reſcous. pl. 6. cites 2 H. 4. 22.

9. In Reſcous the Plaintiff was compelled to *ſhew for what Rent he diſtrained, and for what Term being in Arrear* and otherwiſe ill, by which he ſhewed the Tenure, and for 20 d. arrear ſuch a Feaſt he diſtrained, and the Defendant made Reſcous; the Defendant took Exception becauſe he *did not allege Seiſin*, et non allocatur. Br. Reſcous, pl. 7. cites 8 H. 4. 2.

10. By which he *ſaid that where A. B. granted to the Plaintiff the Seigniory, the Tenant did not attorn by which he made Reſcous*, et non allocatur *without ſhewing that he is Tertenant or other Authority*. Ibid.

11. *And* therefore he *ſaid that he as Servant to the Tertenant, and by his Command* made the Reſcous. Ibid.

12. In Reſcous the *Defendant to the Vi et Armis pleaded Not Guilty*, and *to the Reſcous* ſaid that the Plaintiff's *Servant took the Defendant's Sheep in his Several in C. and he made Reſcous, abſque hoc that he took them in A. Priſt* &c. et adjournatur. Br. Reſcous, pl. 9. cites 7 H. 6. 1.

13. In Reſcous the Plaintiff *counted that R. was ſeiſed of two Houſes and held them of him by Fealty and two Shillings Rent payable at Eaſter annually, of which Services he was ſeiſed by the Hands of the ſaid R.* as by the Hands *of his very Tenant*, and for the 2 s. Rent-Arrear ſuch a Feaſt he diſtrained, and the Defendant made Reſcous; The Defendant *pleaded Unques ſeiſie per my les mains, Priſt*, and the others e contra; Per Newton this is no Plea *in this Action*, for here *the Tenure is only traverſable and no other Thing*. Br. Reſcous, pl. 10. cites 22 H. 6. 27.

14. And from hence it follows that *Riens Arrear* is no Plea in this Action, by which Priſot imparl'd, and the like Paſchæ hoc Anno. Ibid.

15. Reſcous that he *diſtrained T. in D. for Services* &c. *and he made Reſcous*, it is *no Plea that the Plaintiff diſtrained in S. abſque hoc that he diſtrained in D.* for he *ought to juſtify the Reſcous*, per tot. Cur. By which Pole *ſaid he diſtrained in four Acres in S. which was the Frank-tenement of the Defendant, by which he made Reſcous, abſque hoc that he diſtrained in D.* but after he *ſaid that he was ſeiſed in Fee of the four Acres in S. and the Property of the Beaſts were in him, and the Plaintiff diſtrained, by which he made Reſcous, abſque hoc that the Plaintiff diſtrained in D. Priſt*, and the others e contra. Br. Reſcous, pl. 11. cites 22 H. 6. 54.

Br. Affiſe, pl. 27. cites 33 H. 6. 20. S. C.

16. Reſcous may be and yet *not Vi et Armis*. Br. Reſcous, pl. 2. cites 33 H. 6.

17. In Reſcous *Hors de ſon Fee* is a good Plea, per Cur. Br. Iſſues joines, pl. 26. cites 38 H. 6. 26.

Thel. Dig. 238. Lib. 16. cap. 10. S. 59. cites Trin. 9 H. 7. 4. S. P. and that it was adjudg'd 39 H. 6. 7.

18. Reſcous becauſe he *diſtrained for Rent-Arrear for three Days*, and the *Defendant made Reſcous*, and *it appeared that the third Day was not come at the Time of the Taking*, by which the Defendant demanded *Judgment of the Count* and that the Writ abate, and per Cur. the Count is good; for *if he had any Cauſe to diſtrain the Defendant cannot make Reſcous*, and the Matter is only to the Action for the third Day. Br. Reſcous, pl, 14. cites 39 H. 6. 7.

19. In

19. In Reſcous it is no Plea *that he held by other Services* or the like, for if he holds of him it is not lawful for him to make Reſcous. Br. Reſcous, pl. 18. cites 5 E. 4. 8. and 7 E. 4. 19. 20.

20. *Rien Arrear* is no Plea in Reſcous, but he may ſuffer the Diſtreſs and aid himſelf in Replevin. Br. Eſtoppel, pl. 162. cites 5 E. 4. 7. 8. and 7 E. 4. 19. 20.

21. Reſcous, *and alleged Tenure and Seiſin by the Hands of his Tenant as his very Tenant, and that he diſtrained and the Tenant made Reſcous*; The Defendant ſaid that *Ne unques ſeiſie per my les mains after the Limitation of Aſſiſe*, and the beſt Opinion was that it is no Plea; for if he has Seigniory there he may diſtrain, ſo *traverſe the Tenure and not the Seiſin*, for *no Limitation is given in Reſcous, but in Replevin, and Aſſiſe, and Writ of Right.* Br. Reſcous, pl 17. cites 5 E. 4. * 52.

Br. Seiſin, pl. 29. cites 5 E. 4. 62. S. C.

* It ſhould be 62.

22. In Reſcous the Defendant pleaded *Hors de ſon Fee*, and per Cur. this is no Plea in this Action nor in Treſpaſs; but he *ſhall ſay that it is held of a Stranger, and ſo Hors de ſon Fee*, and then a good Plea, and ſo he did. Br. Reſcous, pl. 19. cites 6 E. 4. 4.

In Reſcous if the *Plaintiff ſuppoſes that he diſtrained within his Fee, and the other made Reſcous*, there *Hors de ſon Fee is a good Plea*, per Cur. Brooke ſays, *Quære if he may reply for Rent Charge; for it ſeems that there is no other Form of Writ.* Br. Reſcous, pl. 22. cites 38 E. 3.

23. And per Choke and Danby Ch. J. the ſame Year Fol. 87. where the *Tenant holds by 2 d.* and the *Lord incroaches 4 d.* the *Tenant may aid it by Reſcous and ſpecial Pleading, and ſhall not be drove to Ne injuſte Vexes, or contra formam Feoffamenti.* Ibid.

24. *So* in *Aſſiſe.* Ibid.

25. *Contra in Avowry.* Ibid.

26 In Reſcous the Defendant pleaded *always ſeiſed after the Limitation*, and the *Plaintiff would have demurred*, and the *Defendant durſt not* demur, the Reaſon ſeems to be that a Man may diſtrain that never was ſeiſed, Quære. Br. Reſcous, pl. 23 cites 5 E. 4. 6.

27. If a *Man ſends his Servant to diſtrain* for Rent, or Service, or Damage-Feaſant, and Reſcous be made upon the Servant, the Maſter ſhall have the Writ of Reſcous and not the Servant, for the Wrong is done to him who ought to have the Rent or Service, or is damnified &c. F. N. B. 101. (F)

28. If a *Collector* or Sub-Collector *diſtrains for Fifteenths*, and Reſcous be made, he ſhall have a Writ of Reſcous &c. F. N. B. 101. (F)

29. If the *King's Bailiff diſtrains for Rent*, and Reſcous be made, the Bailiff ſhall have the Writ of Reſcous and not the King. F. N. B. 102. (B)

30. If the *Sheriff ſend to the Bailiff of the Liberty to levy Fines* and Amercements *for the King*, and the Bailiff diſtrains certain Cattle, and the Reſcous is made. Now the *Lord of the Liberty* ſhall have a Writ of Reſcous *of the Reſcous* done to the Bailiff, *and for the Battery and Aſſault* made upon him, *and for the Loſs of his Service*, and all in one Writ. F. N. B. 102. (B)

31. In Reſcous &c. the Plaintiff *declared that he had diſtrained 40 Sheep of the Defendant's, and 80 of R. S.'s Damage-Feaſant, and that the Defendant took, chaſed, and reſcued all of them*; the *Defendant juſtified the putting his 40 Sheep* in the Place where, as for *Common, and that* the Plaintiff de injuria ſua propria chaſed them, and that the Defendant would have taken them from him, but *they ran amongſt the other* 80 *Sheep of R. S.* and flocked with them, *and becauſe he could not ſever them he chaſed them* &c. quæ eſt eadem Reſcuſſio. Upon a Demurrer the Plaintiff had Judgment, for though the Defendant had ſome Colour to reſcue his own Sheep, he had none to reſcue the Sheep of a Stranger who appeared not to have any Right of Common. He ſhould have ſaid, that

2 Roll Rep. 163 S. C. Haughton J. ſaid that in Treſpaſs the Defendant might juſtify the chaſing the Sheep of R. S to ſever them from his own, but as to driving,

them away he could not do ſo by any Means, Quod Doderidge conceſſit, but ſaid that if Defendant had put the Sheep of ~. S into the Common again, it had been good, Judgment for the Plaintiff. ——— Palm 172. Genings v Pliſto, S C adjudged for the Plaintiff. But Doderidge ſaid that Defendant might have aided himſelf in Pleading, if he ſaid after, that he had ſevered the 40 Sheep and had reſtored the 80 to the Plaintiff

that he chaſed them all to ſuch a Place to ſever them. Cro. J 568. pl. 6. Paſch. 18 Jac. B. R. Jennings v. Playſtoe.

32. It was agreed in a Caſe by Hobart, that where a Man brought an Action de parco fracto, and declared upon the Breach of a Pound, and alſo of the taking out of Beaſts; and the Defendant as to the taking out of the Beaſts, *pleaded Not Guilty*, and as to breaking of the Pound he ſaid, *that he was Lord of the Soil upon which the Pound ſtood, and that he brake off the Lock and put a Lock of his own*; and Hobart ſaid in this Caſe, that he ought to plead the general Iſſue, for in Verity this is not any Breach of the Pound, except the Beaſts come out of it; And Jones J. was of Opinion, that if he put out the Beaſts this Action would not lie, becauſe the Freehold was in him, but he ought to have a *ſpecial Action upon the Caſe*. Win. 80, 81. Paſch. 22 Jac. C. B. Anon.

(Q. 3) Pound-Breach. What is. And how puniſhed.

1. WHERE one *breaks the Pound and takes the Diſtreſs*, yet he who diſtrained may retake them and put them in again, notwithſtanding that he may have Parco Fracto; quod non negatur. Br. Avowry, pl. 13 cites 34 H. 6. 18.

2. The *Diſtrainor* may have *Parco Fracto* for the Breach of the Pound, and *not the Lord*. Arg. 12 Mod. 660. cites Dr. and Stud. c. 27.

3 A. brought Parco Fracto, and declared upon the Breach of a Pound, and alſo of the taking out of Beaſts; As to the taking out of Beaſts the Defendant pleaded Not Guilty, and As to the breaking the Pound he ſaid he was *Lord of the Soil* on which the Pound ſtood, and that he broke the Lock and put a *Lock* of his own. Per Hobert, He ought to plead the general Iſſue, for in Truth this is not any Breach of the Pound except the Beaſts come out. And per Jones J. If he put the Beaſts out he may not have this Action, becauſe the Freehold was in him, but he ought to have a ſpecial Action on the Caſe. Winch. 80. Paſch. 22 Jac. C. B. Anon.

4. If the *Door of the Pound be open*, it is no Pound-Breach to take the Diſtreſs out of it; per Powell J. 2 Lutw. 1262. Trin. 7 W. 3. Alwayes v. Broom.

5. *2 W. & M. Stat. 1. cap. 5. S. 4. Upon any Pound-Breach or Reſcous of Goods diſtrained for Rent, the Perſon grieved ſhall in a ſpecial Action upon the Caſe recover treble Damages and Coſts againſt the Offenders, or againſt the Owner of the Goods if they come to his Uſe.*

This is only meant treble Damages and ſingle Coſts; and he may ſue either the Owner or the actual Offender in all Caſes, and the Owner if the Goods come to his Uſe or Poſſeſſion, but if he recovers againſt the Offender he ſhall not ſue the Owner afterwards Sir Barth. Shower's Obſervations, ut ſupra, fol. 162, 163.

6. If the Owner breaks the Ponnd and let the Diſtreſs go, the Diſtrainor may have a Parco Fracto, *or may retake the Diſtreſs*; per Gould J. 12 Mod. 661. Hill. 13 W. 3. Vaſpor v. Edwards.

(Q. 4) Eſcape

(Q. 4) Eſcape. What Remedy lies.

1. IF a Man *diſtrains Beaſts* and *they go back to the Owner of their own Accord*, he who diſtrains *cannot retake them by Reaſon of the firſt Diſtreſs unleſs he comes freſhly*; For there is Negligence in the Diſtrainor; per Danby J. Br. Diſtreſs, pl. 25. cites 9 E. 4. 2.

2. Where the Perſon diſtraining puts the Diſtreſs in a *broken Pound, or ſuch as cannot keep the Thing impounded*, and the Diſtreſs eſcapes, he cannot maintain an Action for the ſame Treſpaſs, and its being a common Pound varies not the Caſe. 12 Mod. 658, 663 664. Hill. 13 W. 3. Vaſpor v. Edwards.

Ld. Raym. Rep. 719. S. C. adjudged.

3. If *Diſtreſs* taken Damage feaſant *eſcapes*, the Diſtrainer cannot bring *Treſpaſs* unleſs he *ſhews that the Eſcape was without his Default*, and ſaying that it was without his Conſent and Will is not ſufficient. 12 Mod. 658. Hill. 13 W. 3. Vaſpor v. Edwards.

4. *But* if they *eſcape without his Default* he has other Remedy; becauſe he cannot otherwiſe ſecure them than by impounding; For he cannot tie them; Per Powis J. 12 Mod. 662. in Caſe of Vaſper v. Edwards, cites 27 Aſſ. pl. 64.

5. *So* if they are *ſtole out of the Pound*-overt he is not anſwerable for them, nor remedileſs unleſs the Things ſtolen were not proper to be put into a Pound-overt; Per Powis J. 12 Mod. 662. cites Co. Litt 47 b.

(Q. 5) Death of Beaſts in the Pound; At whoſe Loſs it ſhall be.

1. IF the *Beaſts die in Pound after Offer of ſufficient Amends*, this is at the Peril of the Owner if they are in Pound-overt; *But if they are not in Pound-overt*, this is at the Peril of the Diſtrainor. But *if the Writ of the King comes to deliver them*, and the *Diſtrainor reſiſts it*, there *if they die*, this is at the Peril of the Diſtrainor, and the Owner ſhall recover his Damage by Action upon the Statute for diſobeying the Writ. Br. Diſtreſs, pl. 72. cites Doct. and Stud. lib. 2.

2. If *Cattle diſtrained* be put in Pound-overt, the Owner at his Peril muſt feed them, and if they *die* the Diſtrainor ſhall bring his *Action, or* * *diſtrain again*; Per Powis J. 12 Mod. 662. cites D. 280. Co. Litt. 47. Dr. and Stud. 102. and ſaid, that the Reaſon is becauſe he has loſt his Pledge without any Fault in him.

*If the Diſtreſs was for Rent; Per Powis J. 12 Mod. 663. in S. C.

(Q. 6)

(Q. 6) Actions and Pleadings.

1. WRIT of Treſpaſs for Diſtreſs *taken in the High Street*, contrary to the Statute of Marlebridge, was *without ſaying contra pacem*, and yet adjudged good. Thel. Dig. 114. lib. 10. cap. 24. S. 1. cites Mich. 19 E. 2. Brief 842.

2. [So] Writ of Diſtreſs taken in the High Street, contrary to the Statute of Marlebridge, was *was without Ad grave dampnum*, and yet held good. Thel. Dig. 115. lib. 10. cap. 25. S. 1. cites Mich. 19 E. 2. Brief 842.

3. It ſeems by the Argument of a Recaption, that where a Man diſtrains, he *ſhall ſhew for what Cauſe he diſtrains*, or at leaſt if he ſhews Cauſe *this is material as to the Recaption*, though he avows for other Cauſe. Br. Diſtreſs, pl. 61. cites 28 E. 3. 92. and Fitzh. Tit. Recaption 6.

4. It was granted per Cur. that of *Rent*, if the *Tenant tenders upon the Land*, the other cannot diſtrain. Br. Diſtreſs, pl. 36. cites 30 Aſſ. 38.

5. If a Man *takes Beaſts for one thing*, yet when he comes into Court of Record he *may make Avowry for what Thing he pleaſes*; Per Cur. 3 Rep. 26. cites it as adjudged Mich. 34 E. 1. Tit. Avowry, 232.

6. Of *taking in the High Street* a Man ſhall *not have Replevin, but Writ upon the Statute*. Thel. Dig. 117. lib. 10. cap. 27. S. 8. cites Trin. 11 R. 2. Avowry, 87.

7. But *otherwiſe* it is *of Oxen of his Plough, or Sheep*, taken againſt the Statute. Thel. Dig. 117. lib. 10. cap. 27. S. 8. cites Trin. 11 R. 2. Avowry, 87. Quære.

8. If the *Rent of three Terms be arrear*, and the *Lord diſtrains for the Rent of the firſt Term*, and the *Tenant ſues Replevin*, and the *Lord avows*, and the *Tenant pleads Hors de ſon Fee, or* other ſuch *Thing which brings the Seigniory in Debate*, there the Lord cannot diſtrain for the Rents of the other Terms till the Seigniory be tried; Per Brickhill for Law, quod conceditur per all the Juſtices. Br. Diſtreſs, pl. 14. cites 7 H. 4. 4.

9. In *Treſpaſs between Lord and Tenant upon Diſtreſs*, the *Tenure* is only traverſable. Br. Traverſe Per &c. pl. 360. cites 10 H. 6. 24.

10. *Contra in Avowry*, note the Diverſity. Br. Ibid.

11. In Treſpaſs the *Defendant ſaid that he leas'd to the Plaintiff for 10 Years, rendring annually* 20 *s. at two Feaſts* &c. and for 10 s. arrear he diſtrain'd, and the Plaintiff was not permitted to ſay, that De ſon tort Demeſne without ſuch Cauſe; But *ſhall ſay that De ſon tort Demeſne abſque hoc that he leas'd, or* abſque hoc *that any Rent was arrear*. Br. De ſon tort &c. pl. 29 cites 10 H. 6. 3.

12. Treſpaſs of three Horſes taken; Suliard ſaid, Actio non; For J. S. was ſeiſed of the Cloſe where &c. and held of him by Fealty and 10 s. &c. and for the *Rent arrear* he came and found the Horſes levant and couchant by which he took them, and within his Fee; the Defendant ſaid that they *eſcaped in default of Incloſure* of the Tertenant, who ought to incloſe it, *as he was chaſing them in the Highway*. Suliard ſaid they were levant and couchant there by ſix Days after the Eſcape. Per Brian he may well diſtrain them. Per Choke when the Beaſts of a Stranger enter in default of Incloſure of the Tenant of the Franktenement, there if the Owner has Notice of them and does not take them away, the Lord may diſtrain them. Per Catesby J. where the Beaſts enter in default of Incloſure, the Owner of the Land cannot diſtrain them Damage-Feaſant, though they are there by half an Year, and

and therefore the Lord cannot diſtrain. But where the Tenant of the Land is not bound to incloſe it, there if Beaſts enter the Lord may diſtrain. But ſee Brian Ch. J. above made the beſt Reaſon, as it ſeems Br. Diſtreſs, pl. 56. cites 22 E. 4. 49

15. If Diſtreſs be *ſtole or ſet at large by a Stranger* he ſhall not be anſwerable for it; but even in that Caſe if *Replevin* be brought, and an *Elongatur* return'd, as it muſt be, there ſhall be a *Withernam*, and the Diſtrainer liable till he *ſhew that Matter*, which being no Default of his will excuſe him. Per Holt Ch. J. 12 Mod. 660. Hill. 13 W. 3. Vaſpor v. Edwards

16. If Diſtreſs be *ſtole* out of Pound, and *Elongat'* be returned, the Diſtrainer *to prevent a Withernam may ſhew* that they were ſtolen. Per Powis J. 12 Mod. 662. in Caſe of Vaſpor v. Edwards, cites 32 H. 6. 27. b. Br. Ret. brev. 135. Nat. B. 74. and ſome Books ſay the Sheriff may return it.

(R) What ſhall be ſaid *Exceſſive*, and what not.

1. **If** 40 Sheep **are taken** for 2d. **and** 16 Oxen for 9d. **this is Exceſſive.** 41 **E.** 3. 26.

2. **If** two Oxen for four Pair of Gloves, ten Sheep for one Pair, and ten for another, **it is an exceſſive Diſtreſs.** 29 **E.** 3. 24. **adjudg'd.**

3. But **if a Man takes** five Horſes join'd in a Cart for 3 d. Rent **this is not Exceſſive for the Intierty.** 8 **H.** 4. 15.

Cheynie ſaid it was Exceſſive ad quod non fuit reſponſum. But Brooke ſays that it is not becauſe they were join'd in one Plough, and *could not be ſever'd* Br. Diſtreſs, pl. 15. cites 8 H 4. 16.

A Man cannot *ſever* a Diſtreſs, and therefore in ſome Caſes a Diſtreſs of great Value, as a *Cart and Horſes* may be taken for a ſmall Matter becauſe not ſeverable; Admitted Arg. 2 Vent. 185. Trin 2 W. & M. in C. B in Caſe of Clark v. Tucker.

4. **No Diſtreſs** for Homage **ſhall be ſaid Exceſſive for the high Eſteem thereof in the Law.** 42 **E.** 3. 26. **Co.** 4 *Bevill* 8. **b.**

5 **The** ſame **Law of** Fealty. **Co.** 4. *Bevill.* 8. **b.** 29 **E.** 3. 24.

He who diſtrains *for Homage* may take as many of the Beaſts as he can find upon the Land; For, for Homage the *Diſtreſs ſhall not be ſaid Exceſſive.* Per Belk. Quære: For Finch was contra, but it was not adjudged, therefore Quære. Br Diſtreſs, pl. 4. cites 42 E 3. 26 —— Though the Lord diſtrains the Tenant ſo that he is not able to manure his Land Ibid. —In Aſſiſe it was ſaid for Law, that if the Tenant holds of his Lord by *Homage* the Diſtreſs cannot be Exceſſive, nor for *Suit of Court* nor *Fealty*, but it was ſaid that the Law is not very clear for Suit nor Fealty. Br. Diſtreſs, pl. 35. cites 28 Aſſ. 50.

6. **A Diſtreſs of more than the Value ſhall not be ſaid Exceſſive** for the Expences of Knights of Parliament, **becauſe the King is in a Manner Party.** 13 **H.** 4. **Fitzh. Avowry** 239.

Br. Diſtreſs, pl. 79. cites 11 H. 4. 2. S. P. —— Diſtreſs ſhall not be ſaid Exceſſive where the *King is Party*, As for Fees of Knights of the County for the Parliament, and no Miſchief; For by Payment of it they ſhall re-have the Beaſts. Br Prerogative, pl. 98. cites 11 E. 4 2. —— S. P. 2 Inſt. 107. but Lord Coke adds that the Statute of Marlbridge is General and extends to All.

7. No Diſtreſs can be Exceſſive for *Homage*, *Fealty*, or *Suit*, and Aſſiſe lies not for too often diſtraining or for exceſſive diſtraining for thoſe Duties. F. N. B. 178. (I) in the new Notes there (b.) cites 28. Aſſ. 50. and 42 Ed. 3. 26.

8. If a Man diſtrains *a Load of Grain and four Horſes for* 2 *s.* this is exceſſive Diſtreſs; Contra if they are *annexed to the Waggon*; for then it is a Thing intire, which cannot be ſevered. Br. Diſtreſs, pl. 88. cites 20 E. 4. 3.

9. *And* it was in a Manner agreed, that a *Fold of Sheep in the Field* may be diſtrained for 2 s. and ſhall not be ſaid exceſſive; for the Diſtrainer cannot ſever them. Br. Diſtreſs, pl. 88. cites 20 E. 4. 3.

(R. 2) Cauſeleſs and exceſſive Diſtreſs. Remedy for it.

If the Lord diſtrain *two or three Oxen for* 12 d. or the like ſmall Sum, and the Owner bring a Replevy of the Oxen, and the Lord avow the taking of them for the 12 d. &c. of his own ſhewing he ſhall make Fine &c. or the Party may have his Action upon the Statute 2 Inſt. 107.

1. 52 *H.* 3. *cap.* 4. THE *Diſtreſſes ſhall be reaſonable, and not too great; and he that takes great and unreaſonable Diſtreſſes ſhall be grievouſly amerced for the Exceſs.*

If the Lord diſtrain *an Ox or Horſe for a Penny*, if there were *no other Diſtreſs upon the Land* holden, the Diſtreſs is not exceſſive; but if there were a Sheep or Swine &c. then the taking of the Ox or Horſe is exceſſive, becauſe he might have taken a Beaſt of leſs Value. 2 Inſt. 107

Mod 71. pl. 25. The King v. Legingham, S. C. & S. P. by Twiſden, ſed adjornatur ——— Ibid. 288. pl. 34 Trin. 29 Car. 2. B. R. The King v. Ledgingham, S. C. held that it will not lie. ——— Raym. 205. S. C. and by Twiſden Information lies not for Diſtreſſes, becauſe they are private Offences: And ſo Judgment againſt the Defendant was ſtaid. ——— Vent. 104. S. C. & S. P. held accordingly; For exceſſive Diſtreſſes were not puniſhable until the Statute of Marlb cap. 4. which ſays, that he who ſo diſtrains ſhall be amerced, whereas upon an Information he muſt of Neceſſity be fined; and cites 2 Inſt. 107.

2. An Information was brought againſt a Lord of a Manor for taking unreaſonable Diſtreſſes upon ſeveral Tenants of his Manor; but Judgment was ſtayed; for the taking unreaſonable Diſtreſſes is *puniſhable by Action on the Statute of Marlebridge, and not by Information.* Lev. 299. Mich. 22 Car. 2. B. R. The King v. Leſingham.

3. Avowry for 2 d. and for 9 d. and that he took *two Sheep for the* 2 *d.* and 15 *Oxen for the* 9 *d.* and therefore he was amerc'd to 20 s. for the exceſſive Diſtreſs; quod nota. Br. Diſtreſs, pl. 2. cites 41 E. 3. 26.

4. 2 *W. & M. Stat.* 1. *cap.* 5. *S* 5. *If any Diſtreſs or Sale ſhall be made for Rent where no Rent is due, the Owner of the Goods, his Executor, &c. may by Action of Treſpaſs, or upon the Caſe, recover double the Value of the Goods diſtrained with Coſts.*

5. *Treſpaſs* does not lie for entering and taking an exceſſive Diſtreſs; and ſo a Judgment in C. B. was reverſed. Gibb 85. Trin. 2 & 3 Geo. 2. B. R. Lyne v. Moody.

(R. 3) Remedy by Aſſiſe of Souvent Diſtreſs.

1. IN Aſſiſe, the *Defendant ſaid that the Plaintiff himſelf is ſeiſed* &c. to which the *Plaintiff ſaid, that the Defendant claimed Seigniory in his Land, and had diſtrained him by Beaſts of his Plough, and by Souvent Diſtreſs*, ſo that he could take no Advantage of the Land; The *Defendant ſaid, that the Land was held of him in Jure Uxoris by Homage, Fealty, and Eſcuage, and Suit of Court and Rent*, and for the Fealty and Suit he diſtrained. Br. Aſſiſe, pl. 274. cites 27 Aſſ. 51.

2. *And* it was ſaid there by ſome, that Aſſiſe *does not lie by Souvent Diſtreſs, but where the Lord diſtrains*; For *if another diſtrains he may make Reſcous*; And it was held, that it is a *good Plea* for the Plaintiff, in Caſe of Souvent Diſtreſs, *to ſay that he does not hold of him*, but then the Aſſiſe of Souvent Diſtreſs does not lie, by ſome. Ibid.

3. *And* it was ſaid, where *Lord Meſne and Tenant are*, and the *Lord diſtrains for the Services of the Meſne*, the *Tenant may ſay that Riens Arrear* in the Aſſiſe; Contra in Replevin; Quære of the Souvent Diſtreſs; for the Plaintiff dared not demur. And hence it ſeems that he thought that the Aſſiſe did not lie of Souvent Diſtreſs but where the Lord of whom &c. diſtrains. Ibid.

4. *For Suit* the Souvent Diſtreſs is maintainable, for this cannot be extended to any Value, Quære of *Fealty*; For by ſome the ſame Law of Fealty, but Rent is valuable in certain. Br. Diſtreſs, pl. 33. cites 27 Aſſ. 51.

In Aſſiſe, the *Tenant ſaid, that the Plaintiff himſelf is ſeiſed of the Franktenement*; Judgment of the Writ; The *Plaintiff ſaid, that the Defendant had diſtrained him by Souvent Diſtreſs*, ſo that he could not plough his Laud, and prayed the Aſſiſe; to which the *Defendant ſaid, that the Plaintiff held of him by Homage Fealty, and Suit of Court*, for which Services he had diſtrained; Judgment if Aſſiſe; For, *for Homage the Diſtreſs cannot be ſaid exceſſive*; And the Plaintiff ſaid that he held of J. who held over of the Defendant by 12 d. and as to this Riens arrear, and prayed the Aſſiſe, and the Aſſiſe awarded, and by the Opinion of ſome of the Juſtices, *Aſſiſe does not lie for Souvent Diſtreſs where the Lord diſtrains for Homage Fealty or Suit* Br Aſſiſe, pl. 291. cites 28 Aſſ. 50. —— 4 Rep. 8. a. Mich. 17 & 18 Eliz. C. B. Bevil's Caſe, S. P. held accordingly, and cited S. C. and 11 H. 4. 2. a. 42 E 3. 46. a. and Br. Diſtreſs, 80.

5. If the Lord, or other Man who has a Rent iſſuing out of the Lands, do *often diſtrain for the Rent or Service where none is behind*, the Tenant may have Aſſiſe for this Diſtreſs by the Common Law; and that Aſſiſe lies between the Lord and the Tenant, or between the Lord Paramount and the Tenant Paravail, as appears 27 Aſſ. 51. But it ſeems reaſonable, that the Tenant have the Aſſiſe of Souvent foits diſtrained againſt him who claims a *Rent-charge* out of the Land, tamen quære. F. N. B. 178. (I)

6. Aſſiſe of Souvent Diſtreſs *lay at Common Law*, in which the *Writ ſhall be general, and the Count ſpecial*, that the Lord Souvent foits diſtrained &c. and *Judgment* ſhall not be that the Demandant recuperet Seiſinam, for he has that, but *quod teneat abſque multiplici Diſtrictione*. 8 Rep. 50. a. b. Mich. 6 Jac. C. B.

(R. 4)

(R. 4) Several Diſtreſſes for the ſame Thing. Lawful in what Caſes.

The Word (not) is omitted in the Editions of Brook, and therefore miſprinted.

1. WHERE the *Lord* comes to diſtrain, and *takes an Ox*, *which is* [*not*] *Sufficient for the Rent arrear*, and then there are *no more Beaſts there*, he *may come at another Time and take a Cow*, and *at another Time and take another Cow*, and *at another Time another Cow*, till he has ſufficient Diſtreſs. Br. Diſtreſs, pl. 96. cites the printed Abridgment of Aſſiſes, Tit. Bar.

2. In Replevin the Defendant avowed; the *Plaintiff pleaded Hors de ſon Fee* &c. and *pending this Iſſue the Defendant cannot diſtrain again*; Quære; For it is ſaid elſewhere, that pending an Aſſiſe, if a Man diſtrains he ſhall abate his Aſſiſe; But contra of Replevin. Br. Diſtreſs, pl. 62. cites 18 R. 2. and Fitzh. Recaption 3.

3. Where a Man *takes Diſtreſs for Rent*, *and upon Avowry has Return irreplevisable*, if *a Beaſt dies in the Pound*, now he may diſtrain anew; for the Sum of Rent, or Valuation of the Damage, is not adjudged to the Avowant in the Replevin, and then the Beaſt taken by him in Execution, but where he had taken the Beaſts by Diſtreſs, and that is replevied from him. Now upon the Right of diſtraining appearing the Beaſts are reſtored unto him in that State as they were before, to remain with him as a Diſtreſs lawfully taken by Judgment of the Court, and not to be replevied, be it in Rent-Service, or Rent-Charge, or Damage-Feaſant, that he may diſtrain and retain till the Rent or Damage be ſatisfied, ſo that even as *if the Beaſt had died before Judgment* he might have diſtrained again, So *after Judgment*, for it is alike in both Caſes; Per Hobart Ch. J. Hob. 61. cites 14 H. 4. 4. 15 E 4. 10.

4. In Reſcous, where *Return of Beaſts is adjudged* to a Man this is no Payment of the Rent, but only a Pledge, till he be ſatisfied or paid the Rent; For if the *Beaſts die in the Pound* he may diſtrain de novo; per Brian, quod nota. Br. Diſtreſs, pl. 22. cites 15 E. 4. 10.

Br. Avowry, pl. 139. cites S. C.

5. Lord and Tenant by Fealty and 3*d*. *Rent*, the Lord dies, the *Feme is endowed* of the Seigniory, the Feme of the Lord *may diſtrain for* 1 *d*. *and the Heir for* 2*d*. and ſo now the Tenant is charged with two Diſtreſſes where he was charged but with one before; but this is not inconvenient, for he pays no more Rent than he paid before. Br. Diſtreſs, pl. 59. cites 24 H. 8.

6. *So* where *a Seigniory* is *divided by Partition between Heirs Female* &c. Br. Diſtreſs, pl. 59. cites 24 H. 8.

7. If for 10 *l*. *Rent* due at one Day, a Man *diſtrains Goods of the Value of* 40 *s*. *only*, and *at the Time of the taking* the Diſtreſs *there are Goods of a ſufficient Value* upon the Premiſes, he cannot for the ſame Rent diſtrain again; for it is his Folly that at the firſt he diſtrained no more; adjudged. Mo. 7. pl 26. Mich. 3 E. 6. Anon.

8. But if there be *Rent in Arrear at ſeveral Days*, a *Diſtreſs may be taken for what was due at one of the Days*, *and after* a Diſtreſs may be taken *for what was due at the other Days*; Per Brown. Mo. 7. pl. 26. Mich. 3 E 6. Anon.

D. 280. a. Marg pl 14. cites it as ſo agreed per Cur 7 Jac. C B. For they are to be impound-

9 In a *Repleg' the Plaintiff is Nonſuit*, and the *Defendant had Retorn*, *and the Plaintiff ſued a ſecond Deliverance*, *and is alſo Non ſuit* upon that, by which the Defendant is to have a Retorn irreplevisable; but whether the Defendant ought to avow, ſhewing the Certainty of the Place, Day, and Beaſts, in order to have a Writ of Inquiry of Damages, was doubted. Divers thought he need not, but that he might

might juſtify the detaining till the Plaintiff offered ſufficient Amends for his Damages, others held he might work the Beaſts, but others e contra; becauſe he had not a Property in 'em but as a Gage; And he may *put them again into the common Pound*, *and if they die there he may take another Diſtreſs for the firſt Cauſe*, inaſmuch as he was never ſatisfied. D. 280. pl. 14. Mich. 10 & 11 Eliz. Anon.

ed again, and cites 19 E 2 Replevin 26.

10. If one *takes Trop petit Diſtreſs for Rent*, and after *takes another Diſtreſs for the ſame Rent*, this is not good, for he cannot avow two Diſtreſſes for the ſame Rent; for it was his Folly that he took not a better Diſtreſs at the firſt; But Nota in the Abridgment of the Aſſiſes it was ſaid, That *if there be not ſufficient Diſtreſs when he diſtrained he may diſtrain again.* Cro. E. 13. pl. 8. Hill. 25 Eliz. C. B. Anon.

Mo 7. pl. 26. Mich. 3 E 6. Anon. S. P. held accordingly And per Montague, Recaption lies for the ſecond Diſtreſs. ——— 2 Lutw 1536 cites ſame Caſes and S P. adjudged accordingly; And the Reporter adds a Quære if the ſecond Diſtreſs had been juſtifiable, admitting it had been pleaded that at the Time of Caption of the firſt Diſtreſs there was not ſufficient upon the Land demiſed and that the firſt Diſtreſs was not but of ſuch a Value &c.

11. By *Act of the Party* the Tenant ſhall not be made liable to two Diſtreſſes, though by *Act in Law* he may. Cro. E. 742. pl. 18. Hill. 42 Eliz. C. B. in Caſe of Wotton v. Shirt.

12. 17 *Car.* 2. *cap.* 7. *S.* 4. *Where the Diſtreſs ſhall not be found to be to the Value of the Arrears, the Party, his Executors or Adminiſtrators, may diſtrain again for the Reſidue.*

By 19 Car 2. cap 5. this Act is made to extend to Wales and Counties Palatine. ——— It was a Miſchief before this Statute, that in Caſe a Diſtreſs was too little one could not diſtrain again (be the Demand never ſo great) but the other might plead Levied by Diſtreſs which ſhews that Diſtreſſes could not be ſplit; Per Holt Ch. J. Comb 546. Mich. 7 W. 3. B. R. Johnſon v. Bane.

13. In Treſpaſs for taking 10 Beaſts 1 Apr. and alſo for taking 12 more on the ſaid firſt Day of April; The Defendant pleaded, that the Plaintiff had a Leaſe granted to him rendering Rent, and that there *was 70 l. Rent in Arrear*, and that he (the *Defendant*) *did take the firſt 10 Beaſts for 60 l. Parcel* of the ſaid 70 l. *and the other 12* Beaſts *afterwards for 10 l. Reſidue* of the ſaid 70 l. and upon a Demurrer to this Plea it was adjudged ill; for one cannot avow for two Diſtreſſes made for one and the ſame Rent; it was the Defendant's Fault to diſtrain too little at firſt. But the Reporter tells us, that if the Defendant had *pleaded, that at the Time of the taking the firſt Diſtreſs there was not ſufficient to be taken for the whole Rent* upon the Land, and that the firſt Diſtreſs was but only of ſuch a Value, it had been good. 3 Salk. 137. pl. 6. Mich 8 W. 3. C. B. Anon.

2 Lutw. 1532 1536. Trin. 15 W. 3. Wally and Savil S P adjudged that the ſecond Diſtreſs was not lawful.

14. If Diſtreſs for *Damage-Feaſant dies in a Pound or Eſcape* the Party ſhall not retake them, *but* if it were *for* * *Rent*, in either Caſe he may diſtrain de novo; and Eſcape of Cattle out of Pound is not like Eſcape of Priſoner out of Gaol; For if Pound be not good, the Diſtrainant may be his own Keeper, and put them in his own Pound, but he cannot be Keeper of his Priſoner, and every Pound-Keeper is the Servant of him who impounds the Cattle pro hac vice; per Holt. 12 Mod. 397. Paſch 12 W. 3. Anon.

* S. P. per Powis J. or he may bring *Debt.* 12 Mod. 663.

15. If *Cattle diſtrained die in the Pound* the Diſtrainor may diſtrain again if the Diſtreſs was for Rent. Arg. Ld. Raym. Rep. 720. cites Dr. and Stud. cap. 27.

(S) *How* it is to be taken.

Notice for what a Diſtreſs is taken.

1. **IF the** Lord **diſtrains** for Rents or Services **he need not give Notice to the Tenant for what Thing it is he diſtrains it; for the Tenant by Intendment of the Law knows what is in Arrear from his Land.** 45 E. 3. 9.

2. **The** ſame **Law is if the Lord diſtrains** for an Amercement in a Leet. 45 E. 3. 9.

3. A *Bailiff* who diſtrains *ought to ſhew in whoſe Right* he diſtrains. Br. Diſtreſs, pl. 77. cites 7 H. 4. 28.

Br. Covenant, pl. 30. cites S. C.

4. The King may diſtrain *for his Debt or* for a *Thing granted by Parliament, though no Clauſe of Diſtreſs be expreſſed* in the Act of Parliament thereof. Br. Diſtreſs, pl. 51. cites 17 E. 4. 6.

5. If the *Bailiff* upon the Diſtreſs ſhews the Cauſe and Reaſon of it he cannot afterwards *vary* from it, but the other Party may trick him by Traverſe. But if he diſtrain'd generally without ſhewing Cauſe, he may ſhew what Cauſe he will, and the other Party ſhall anſwer to it. And when a Bailiff diſtrains, he ought, if he be requir'd, to ſhew Cauſe of his Diſtreſs, but if he be *not requir'd* then he is not tied to do it. Le. 50. pl. 64. Paſch. 29 Eliz. C. B. Buller's Caſe.

6. 2 *W. & M. Seſſ.* 1. *cap.* 5. *S.* 2. *For ſelling Diſtreſſes for Rent in five Days if not replevied, requires five Days after the Diſtreſs taken, and Notice thereof with the Cauſe of taking left at the Manſion Houſe or other moſt notorious Place in the Premiſſes.*

The Perſon diſtraining muſt give *Notice* but need not be immediately, but *at any Time* after the Diſtreſs But then the five Days are to be computed from the Notice. The Notice ought to be *in Writing*, though the Act doth not in expreſs Words require it, yet the Nature of the Thing doth, for Notice is to be left at the moſt notorious Place, which can never be intended a *Parol* Notice. The Notice ought to contain the *Party's Name, from whom* ſuch Diſtreſs is made, the *Name of the Land* or Farm, or ſome general Diſcription of the Thing out of which the Rent iſſues, and the *Quantity of Rent in arrear and when due*; and it is adviſable to name the Time *when the Diſtreſs was taken*, and the *Place where it is carried*, That the Tenant or Owner may know where to reſort to make his Replevin. (All which ſeems to be the Intention of the Act, in requiring Notice, with the Cauſe of taking.) Sir Barth. Shower's Obſervations on this Statute.

Perſonal Notice anſwers the Meaning of the Statute, though it appoints local Notice; For Perſonal Notice is better; Per Holt Ch J. Comb 336 in S. C.——Notice to the Owner is ſufficient, but if not it ſeems to be ſupplied after a Verdict by the Words Juxta Formam Statuti Notitiam dedit &c. And it ſeems to be at the Election of him who diſtrains to give Notice either to the Tenant or to the Owner of the Goods; Per Cur. 4 Mod. 392. 395. S C —— 12 Mod. 76. S C and per Cur. the Intent of the Statute was only to give a certain Notice, and ſeeing that in this Caſe they have gone further than the Letter of the Act a Perſonal Notice muſt needs be ſufficient. And though the Notice was given to the Owner only of the Goods, and not to the Tenant in Poſſeſſion, the Court held Notice to either ſufficient, the Words of the Statute are in the Disjunctive.—— Ld Raym. Rep. 53. S. C. and ſame Points held accordingly. But if the Owner had ſued a Replevin then the Notice muſt have been given to him.

7. *Perſonal Notice* is *ſufficient* for Notice is the Thing required. Notice to the Owner is ſufficient againſt him in Trover; but if the Tenant had brought Replevin, that would not have ſerved as to him, but he muſt have had Notice alſo. Per Cur. 1 Salk. 247. pl. 1. Trin. 7 W. 3. B. R. Walter v. Rumball.

8. The Notice may be *to the Party, or left at the chief Manſion-Houſe*; if *no Perſon there* affix it on the fore Door of the Houſe; if more Houſes than one, at the Chief or Beſt. If *no Houſe, but Barn or Stable*, at the Door thereof; At the Gate or *moſt common Entrance into a Field* or Wood.

Wood. If in a *common Field*, where neither Hedge, Gate or Tree, then affix a Stick at the most usual Entrance, with the Notice on it. Sir Barth. Shower's Observations on the Statute 2 W. & M.

9. Upon the 2 W. & M. cap. 5. Notice of the taking the Distress is sufficient when it is given *to the Party himself*, as if he be met with at any Place; and such Notice *saying that the Distress was taken for Rent due at Michaelmas last without particularly mentioning the Quantum* was held sufficient per Trevor Ch. J. C. B. at the Sittings. Mich. Vac. 11 Ann. Chesterfield (Earl) v. Farringdon, & al'.

For more of Distress in General, See **Avowry, Rent**, and other proper Titles.

Donative.

(A) Original.

1. DONATIVES *began* only by the Foundation and Erection of the Donor, and as the Incumbent comes in by the Donor, so he may *resign it* to him, and this determines his Incumbency. Cro. J. 63. Pasch. 3 Jac. B. R. Fairchild v. Gayer.

It began by the Consent of all Persons who had any Manner of Interest, viz. the Ordinary and Parishioners. Per Popham Ch. J. Yelv. 61.——It is a *Lay Foundation* as it is said. 2 Roll. 343.——It is of the Foundation and Erection *of the Donor* not by the Ordinary. Per Eyre J. Show. 499.

2. Donatives are *either by Royal Foundation or by Royal Licence, or* by *original Agreement with the Ordinary.* 3 Salk. 140.

(B) Considered How.

1. BENEFICE Donative by the Patron only *is a Lay Thing* and *the Bishop shall not visit*, and therefore shall not deprive, and then *if he meddles* in it *he is in the Case of Premunire* by some. Br. Premunire, pl. 21. cites 8 Ass. 29. And in this Case was Barlow Bishop of Bath in the Time of E. 6. and was compell'd to obtain a Pardon, inasmuch as he had deprived the Dean of Wells, which was Donative by Letters Patents of the King by Act of Parliament made thereof, but 8 E. 3. above is not adjudg'd.

2. Donatives usually *pass as Lay Fees*, and the passing of them as Lay Fees alters not the Nature of the Chapels. Arg. Sty. 81. Hill. 23 Car. in Case of Rawson v. Bargue.

(C) Power

(C) Power of the Patron.

1. THE Donative *Patron* when the Church is *void* may take the *Profits to his own Use* if the Parishioners will pay them, till a new Incumbent is made. Arg. 2 Roll Rep. 100. cites Fitzh. Aide 103. 6 H. 7. 14. but he has no Remedy to compel them to pay the Tithes to him.

2. A Donative cannot fall in *Lapse*, but the Patron may lose the Profits if he will, but if any take the Profits from him, he cannot maintain the Action; but he ought to put in his Clerk and he maintain the Action. Arg. Cro. J. 518. cites 33 E. 3. Aid 107. 6 H. 7. 14. 17 E. 3. 45.

3. Incumbent of a Benefice Donative may *resign* to his Patron, and it being of the Foundation of his Patron is also of his *Visitation* and Correction, and the Ordinary has nothing to do with him. Mo. 765. pl. 1062. Pasch. 3 Jac. B. R. Fairchild v. Gayer.

And where there are *two Patrons* a Resignation *to one* only is good. For it enures to both as a Surrender shall do, especially where they both consent thereto and grant it de Novo as here they did. Cro J. 63. S. C. ——— Resignation by the Word of *Ecclesia* is sufficient, and extends to all the Possessions. Cro. J. 64. S. C.

4. The Patron cannot *present a Layman*. Per 3 Justices against Popham Ch. J. Yelv. 61. Pasch. 3 Jac. B. R.

(D) Power of the Ordinary.

1. WHERE it is Donative by the Founder and his Heirs *the Ordinary cannot Visit it, and when* a Free-Chappel Donative is *void* the *Founder may retake it and not appoint another Incumbent*, contra of a Presentative. Br. Presentation, pl. 43. cites 6 H. 7. 14. Per Keble.

2. Note, that the Ordinary cannot visit a Free Chapel Donative. King E. 1. had divers Chapels which his Commissioners shall visit and not the Ordinary, *but those which have Cure of Souls shall be visited by the Ordinary*; Per Keble. Br. Deposition, pl. 9. cites 6 H. 7. 14.

3. If the Patron of such a Donative *will not collate* there is no Remedy to compel him; and he may in Time of Vacation take all the Profits and sue for the Tithes in the Spiritual Court; per Popham, but denied by the rest. See Yelv. 61. Pasch. 3 Jac. B. R. Fairchild v. Gaire.

Contra if it be with Cure of Souls. Arg. says the Bishop may compel Parl. Cases 176. cites Cro. Car. 330. 2 Roll 331. ——— It was said by Counsel that in Case of a Donative the Ordinary might compel the Patron to put in a Clerk. But Holt Ch. J. said, He cannot. Holt's Rep. 659. ——— The Bishop may compel the Patron *by Ecclesiastical Censures*, to nominate a Clerk Wood. Inst. 265.

4. The Parson of a Donative is privileged from the Jurisdiction of the Ordinary in respect of the Place, but if he *preach Heresy* the Patron may Commission and *examine* the Matter, and thereupon oust and deprive him, and so it happened in **Covert's Case**, as Gawdy and Wms. J. said, wherein the Bishop of Winchester was the Donor of such a Donative. Brownl. 202. Pasch. 3 Jac. B. R. in Case of Fairchild v. Gayer, cites 13 E. 4.

The Parson of a Donative is liable to the Ecclesiastical Jurisdiction, as he is a Member of the Ecclesiastical Body, for personal Offences, though for Matters relating to the Church he is exempt; and therefore the Spiritual

Spiritual Court ought not to deprive him; but for Drunkenness or preaching Heresy they might censure him. 2 Ld Raym. Rep. 1206. Mich. 4 Ann in the Case of Colefatt v. Newcomb, said by the Reporter in a Note at the End of the Case to have been told him by Mr. Mead and Mr. Salkeld, that they had known the same Distinction taken by the Ch. Justice, and the Reporter says, that that seems upon the Consideration of the Case in Yelv. to be the better Opinion.

5. The *Rectory* only is *exempt* from the Jurisdiction of the Ordinary, *and not the Patron*, and this goes as well to the Charges to be taxed upon the Church by the Ordinary, Attendance in Visitations &c. Per three J. Yelv. 61. Pasch. 3 Jac. B. R. in Case of Fairchild v. Gayer.

6. Ordinary may *sequester* a Church Donative if the *Patron does not present*, and the Incumbent thereof may be *deprived*. Arg. Roll Rep. 453. cites 3 Jac. Gaer v. . . . .

7. The Incumbent of a Donative *of the King* is not *visitable or deprivable* by any Ecclesiastical Authority, but *by the Chancellor or by Commissioners under the Great Seal.* 12 Rep. 41. Mich. 5 Jac. in the Exchequer, in Nich. Fuller's Case.

8. If the Bishop go about to *visit* a Donative this Court of B. R. will grant a *Prohibition*; Per Hale Ch. J. Mod. 90. pl. 56. Mich. 22 Car. 2. B. R. Anon.

9. The Incumbent of a Donative was *cited* in the Spiritual Court *to take a Licence from the Bishop to preach*, and the Pretence was that it was a Chapel, and that the Parson was Stipendiary; And per Cur. If it is a Donative and the Bishop will visit, a *Prohibition* shall be granted. 3 Salk. 141. pl. 3. Anon.

The Ordinary in this Case cannot punish him for preaching without a Licence, but he may proceed to cite him, to convict him for so doing. If he preach any Thing against the Doctrine of the Church, or marry without Licence, the Ordinary may proceed to punish him; A *Prohibition was granted as to the Suspension, and* the *Spiritual Censures*, and putting him out of Possession; but *not as to certifying to the Justices* for preaching without a Licence; Per Holt Ch. J. Holt's Rep. 659. Mich. in Case of Bewick v. Twisden.

10. As to Ley's Opinion in Davis 47, that a Sentence of *Deprivation by an Ordinary* was effectual in Law till reversed, it is not Law; For it is all Coram non Judice, cites Br. Præmunire. 21. F. N. B 42. The Ordinary cannot *visit* a Benefice Donative. Arg. Parl. Cases 53. in Case of Philips v. Bury,

Donatives which are conferred by Laymen are Sine-Cures. Vent. 15. per Curiam obiter. Pasch. 21 Car. 2. B. R.

11. Though Donative be *exempted from the Ordinary's Jurisdiction* the Clerk of it is not, who may be punished by Ecclesiastical Censures, but not to Deprivation. 12 Mod. 640. Hill. 13 W. 3. Finch v. Harris

12. *Libel in the Spiritual Court*, for that J. S. being the Parson of &c. did make himself drunk at the Sacrament, and that he was a Whoremaster; and upon Suggestion that they would proceed to *Deprivation, and that the Benefice was a Donative*, a *Prohibition* quoad the Suing in order to deprive was granted, but not quoad the other Matter. Farr. 31. Trin. 1 Ann. B. R. Anon.

13. The Ordinary *has a Power as to the Parson of a Donative, tho' not to the Place*; For if the Parson marries without a Licence, or *commits any Misdemeanor*, the *Ordinary may punish him* in that Respect, *but he cannot regulate the Seats in the Church.* And *if the Patron will not present the Ordinary may compel him*; and the *Parson is exempt from Attendance at Visitations*; Per Holt Ch. J. 3 Salk. 140. pl. 1. Anon.

2 Ld. Raym Rep. 1206. Mich. 4 Ann. in Case of Colefatt v. Newcomb. Powell J. said he had known Prohibitions denied frequently to Suits against Parsons of Donatives for marrying without Licence.

5. A Minister of a Donative was *sued in the Ecclesiastical Court, because when he read Prayers he did did not read the whole Service*, but left out what Parts of it he thought fit, and for *preaching without a Licence.* Powell J. (absente Holt) took a *Difference where the Suit* in the Ecclesiastical Court *is in order to the Deprivation and where only for Reformation of Manners*; that *in the first Case the Court will prohibit, but not in the last*; and therefore in this Case if the Spiritual Court proceeded to Deprivation, the Court would prohibit them but not till then. 2 Ld Raym. Rep. 1205. Mich. 4 Ann. Colelatt v. Newcomb.

(E) Right of the Patron preserved; In what Cases.

1. ADmission and Institution of a Clerk presented to a Donative vacant by a *Stranger* is no *Usurpation* to the true Patron, but it is all utterly void Co. Litt 344.

Show. 415. S. C. and S. P. —— Arg. Parl. Cases 176. S. C.

2. In Case of a Donative, if the King makes *the Incumbent a Bishop*, he shall not present, for they are not incompatible. Cumb. 302. Mich. 6 W. & M. in B. R. Obiter. in Case of The King v. Dr. Birch.

——— A Donative with Cure of Souls will be *void by Promotion* of the Incumbent. Arg. Show. 415. cites Yelv 61. and 2 Roll. 341. that the King shall not present to a Donative on the Promotion of the Incumbent, was admitted by all in Case of the King v. Dr. Birch. ——— In the said Case it is given as the Reason by S. Eyre J. That a Donative makes no Figure in the Order and Oeconomy of the Church, and a Bishoprick and a Donative are compatible. Show. 499.

(F) Destroyed.

Cited Parl. Cases 181. in the Case of the King v. Doctor Birch.

1. ADmission and *Institution* is not requisite in case of a Donative, but if to such a Donative the *Patron presents* to the Ordinary, and suffers Admission and Institution thereupon, he thereby has made it always presentable. Cro. J. 63. pl. 1. Pasch. 3 Jac. B. R. Fairchild v. Gayer.

2. Presentation may *destroy* an Impropriation, but not a Donative, because the Creation thereof was by Letters Patents, whereby Land is settled to the Parson and his Successors, and he to come in by Donation; Per Holt and Powell. 4 Salk. 541. pl. 3. Mich. 1 Ann. B. R. Ladd v. Widow.

For more of Donatives in General, See **Presentation**, and Watson's Compleat Incumbent.

Double Pleas.

(A) Double Plea. What is.

1. IN Account, the *Tenant said that he is within Age, and was within Age at the Time of the Receipt*, and held double, but this is to the Action. Thel. Dig. 214. lib. 15. cap. 3. S. 6. cites Pasch. 16 E. 3. Accompt 52.

2. In Writ upon the *Statute of Labourers*, the Defendant *said, that he was the Apprentice of the Plaintiff, and the Plaintiff would not instruct him in his Mystery, but beat him*; Judgment of the Writ, and held double, by which he held him to this, that he was his Apprentice, and not his Servant &c. Thel. Dig. 215. lib. 15. cap. 3. S. 20. cites Mich. 39 E. 3. 28.

3. *Prior would have avoided the Fine of his Predecessor, because he was dative and removeable*; The *Defendant said, that he had the Moiety of an Advowson for the Annuity in demand, and also that he had a Common Seal, and is perpetual.* And per Thirn, this is double, viz. *the Moiety of the Advowson*, and that it is *perpetual.* Br. Double, pl. 128. cites 11 H. 4. 69.

4. In Writ upon the Statute supposing the *Forestalling* to be *in the Port of Cicester*; The Defendant *said that the Port of Cicester is no Vill, nor Hamlet, nor Place known &c. but a Place which extends itself into diverse Vills* &c. and held double; by which the Defendant held himself to this, that it extended itself into divers Vills, and this last Plea held good. Thel. Dig. 215. lib. 15. cap. 3. S. 19. cites Pasch. 7 H. 6. 24. 37.

5. If the *King confirms W. N. in the Advowson of D. and wills by the same Patent that he shall not be thereof vexed nor troubled*, and *he pleads it accordingly*, yet this is not Double; Per Cur. Br. Double Plea, pl. 117. cites 32 H. 6. 21.

6. If a Man *pleads Devise of Goods, and that he took them by Command of the Executor*, this is not Double; For the one cannot be without the other; For the Devisee cannot take them without Command to take, or by Delivery of them to him made. Contrary of Gift of Goods; For the Donee may take them. Br. Double Plea, pl. 140. cites 37 H. 6. 30.

7. *Several Causes of Suspicion of Felony* are not Double; For it is only a *Conveyance to prove the Cause to arrest him.* Br. Double, pl. 148. cites 2 E. 4. 8.

8. Note, per Brian, if a *Man makes two Attornies in one and the same Action conjunctim & divisim*, they ought to join in Plea; For if they *sever in Plea* it shall be said Double; Quære. Br. Double, pl. 156. cites 12 H. 7. 10.

9. In *Case against a Sheriff*; The Plaintiff *declared that an Execution was directed to him, by Virtue whereof he had taken Goods to the Value of the Debt, and had sold them, and had not returned the Writ.* Defendant demurred,

demurred, alleging that it was Double; but per Cur. if *the one Matter is depending on the other*, the Declaration shall not be Double, and here all is for not returning the Writ. Gouldsb. 96. pl. 13. Trin. 30 Eliz. Matthew's Case.

10 *Inducement* does not make a Plea Double. Goldsb. 88. pl. 13. Pasch. 30 Eliz. White's Case.

11. Whether, where the *Words in a Deed* are *sufficient to pass a Thing by several Means*, and they are *pleaded generally without shewing any Election* which way the Thing passes, this be a Double Plea was doubted. Skin. 63. pl. 7. Mich. 34 Car. 2. B. R. in Case of Pauling and Hardy.

12. Where *Matter of Fact and Law* is assigned for Error it is Double, and Plaintiff may have Advantage of it on a Demurrer, but after In nullo est Erratum pleaded it is too late. Carth. 338. Hill. 6 W. 3. B. R. Edmonds v. Probert.

As to *Agreement.*

13. Note, by the best Opinion, that where a *Man supposes that he retained a Carpenter to make a House, and that the Carpenter assumed to do it* &c. *or* that he *retained such a Servant to serve* &c. to *which* &c. *the Servant agreed*, this is not Double; For it is no Bargain unless both Parties assent. Br. Double, pl. 116. cites 11 H. 6. 18.

14. And per Newton, a Man may *aver all Matters agreed in an Assumption in one and the same Action.* Br. Double, pl. 116. cites 11 H. 6. 18.

15 As a Man may declare of *all the Covenants in one and the same Indenture*, and it is not Double; Quod non negatur. Br. Double, pl. 116. cites 11 H. 6. 18.

Annuity.

16. *Annuity* was granted *pro Consilio & Auxilio habend'*; The *Defendant shewed that he had demanded Counsel and Aid of the Plaintiff, who was a Physician, and he would not give it*; and it was held that the Demand de Consilio & Auxilio is not Double; For *the one depends upon the other.* Br. Double, pl. 20. cites 41 E. 3. 6.

Assise.

17. In Assise the *Tenant pleaded Fine upon Grant and Render of the Ancestor of the Plaintiff to two with Warranty, and that the one released to the other, who infeoffed the Tenant*; Judgment &c. and *relied upon all the Fine and Warranty*, and admitted. Br. Double, pl. 38. cites 38 E. 3. 34.

18. *So* of a *Deed with Warranty.* Br. Double, pl. 38. cites 38 E. 3. 34.

19. *Contra* it is said elsewhere *of Feoffment with Warranty*; for the Feoffment may be without Deed, and the Warranty by Deed. Br. Double, pl. 38. cites 38 E. 3. 34

20. In Assise, the *Tenant pleaded the Deed of the Great Grandfather with Warranty to W. P. who infeoffed J. who infeoffed the Tenant*; Judgment &c. The *Plaintiff said, that after this his Great Grandfather was seised, and died seised, and his Grandfather entered, and died seised, and he entered as Heir, and was seised, and disseised by the Defendant*, and relied upon the dying seised of his Great Grandfather, and nevertheless well, and otherwise Double. Br. Double, pl. 37. cites 38 E. 3. 21.

21. *Assise of Rent*; the *Tenant said, that A. brought Assise of other Land against B. Father of J. which Deed of Grant of the Rent is now shewn, and recovered the Land and Damages, and took Elegit for Execution of the Damages, and had the Moiety of the Land put in View in Execution, and pleaded all in certain*, (as he ought) *and after A. who recovered leased his*

his Estate to the now Tenant, and after B. granted the Rent charge now in Plaint to the Plaintiff his Son and Heir apparent, and after B. granted, ratified, and confirmed to the now Tenant for Term of their Lives, and after B. by his Deed shewn &c. *released all his Right to the Tenant, and warranted the Land to him and died, and* so *demanded Judgment, because the Plaintiff as Heir of B. the Grantor is bound to warrant the Land discharged, if against the Deed of your Ancestor Assise ought to be, and averred that Execution is not yet incurred, and* it was held Double, viz. *the Execution before the Charge*, and the *Release with Warranty*, by which he relied upon the Release with Warranty. Br. Double, pl. 87. cites 31 Aff. 13.

22. In Assise, *Lease for Term of Life*, and *Release of the Lessor with Warranty*, was admitted for a good Plea, and it was not excepted for the Doubleness; For it seems that it *is only Conveyance*, but the *Plaintiff was not Heir to the Warranty*; For this countervails Feoffment with Colour. Br. Double, pl. 142. cites 37 H. 6. 16.

23. In Assise, the *Tenant pleaded a Gift in Tail, and Confirmation in Fee*, this is Double. Br. Double, pl. 110. cites 30 H. 6. 9 E. 4. 4.

24. In Assise, the *Tenant pleaded in Bar that J. S was seised, and leased to A. for Life, and after granted the Reversion to his Father, and the Tenant attorned and died, and the Father entered and died, and the Tenant entered as Heir*, and gave Colour; and per Cur. this *Grant of the Reversion*, and the *Entry of the Heir* upon this Title are Double, though he does not plead it as a Dying Seised; For if the Father was disseised and died, and he re-entered, he is in as Heir, and the Entry of another toll'd, and so Double, by which he relied upon the Grant of Reversion. Br. Double, pl. 29 cites 9 H. 4. 4. 5.

25. And there it was agreed, that where the *Plaintiff alleges a Dying Seised* after, and the *Tenant alleges a Continual Claim in his Father, and another in himself after the Death of his Father*, it is Double, by which he held him to the Claim of his Father. Br. Double, pl. 29. cites 9 H. 4. 4. 5.

26. *So* of a *Lease for Life and a Release*, it is Double; for the one of the Matters with Colour to the Plaintiff makes a good Bar; So of a *Grant of the Reversion* in Assise, *and after the Tenant surrendered, and the Grantee died seised*, this is Double; For the dying seised is sufficient. Br. Double, pl. 110. cites 30 H. 6. and 9 H. 4. 4.

27. But *where the Contention is between the Heir of the Donor or Grantor, and the Tenant upon the Execution of the Fee simple*, there *he may plead both*, and it is not Double; For he cannot do otherwise. Br. Double, pl. 110. cites 30 H. 6. and 9 H. 4. 4.

28. *In Assise, and* divers *other Actions of Trespass two Descents* are Double; *But* it is said there, that *in Formedon* it is otherwise; for there the *Gift* only is traversable, and not the *Descents*. Br. Double, pl. 16. cites 33 H. 6. 32.

29. In *Assise*, the *Tenant pleaded Fine levied by the Ancestor of all in Demand, and concluded to the Moiety, and pleaded Recovery or Release of the Ancestor of the Whole, and concluded to the other Moiety*; Judgment if Assise, and it was challenged for Doubleness, and the best Opinion was that it is not Double, unless he concludes his Plea to the Whole, quod nota, by which the Plaintiff pass'd over and made Title. Br. Double, pl. 139. cites 37 H. 6. 23.

30. *Assise by two of the Office of Clerk of the Crown in the Chancery*, and *to one the Defendant said that he was an Alien born*, and *to the other, that there was no such Office*, and per Cur. the last Plea goes to all, and therefore both make it Double; for the last Plea goes to both the Defendants, and therefore he has pleaded a Plea to both, and two Pleas a-

gainst the Alien born, by which he amended his Plea. Br. Double, pl. 152. cites 7 E. 4. 29.

Br. Assise, pl. 382. cites S. C. —— Jenk. 182. pl. 68. cites S. C. by the Judges in the Exchequer Chamber.

31. In Assise, the *Tenant said that he himself was seised till by the Plaintiff disseised, against whom he brought Assise and recovered*, this Plea is not Double, per Hussey Ch. J. and Fineux, and tot. Cur. concessit, and yet he alleged *Seisin and Disseisin*, and also a *Recovery*; but the one is *Conveyance* to the other. Br. Double, pl. 95. cites 9 H. 7. 23.

Audita Querela.

So Defeasance by Indenture, and *Release of all Actions*, is Double, and therefore he held him to the Indenture, and yet it seems that the Release is not good; For Release of Actions shall not serve for Execution. Br. Double, pl. 123. cites 44 E 3. 36.

32. In Audita Querela, the *Conusor put two Releases*, the *one general*, and the *other of the Sum in the Statute Merchant*, and therefore was compelled to keep to one; For each grows to all. Br. Double, pl. 63. cites 24 E. 3. 27.

Avowry.

33 Avowry *for Rent reserved between three Sisters for Equality of Partition*, and the *Plaintiff said, that the Place where the Distress was taken was not Parcel of the Land put in Partition, and that this is in the Seisin of the King*, and therefore Double; Per Cur. by which he *took the Seisin of the King by Protestation, and the other Matter by Plea.* Br. Double, pl. 2. cites 2 H. 6. 14. 15.

34. Avowry *for Homage and 20 s. Rent*, the *Plaintiff prayed Aid*, and the *Plaintiff and the Prayee joined and said that one A. was seised of the Seigniory whose Estate the Defendant has, and one B. was seised of the Tenancy and of other Land, whose Estate the Prayee has in the Tenancy, to which B. the said A. then Lord, released all his Right that he had in the Land, rendering 1 d. for all Services*, and demanded *Judgment if for several Services* &c. and not double, per Martin, viz. The *Release* and the *Tenure of this Land and other by one entire Service*, because he *relied upon the Release*, Judgment if for several Services &c. quod admittitur &c. Br. Double, pl. 4. cites 3 H. 6. 28.

35. In Avowry the *Defendant avowed because* J. *Lord of the Manor of D. was seised of the Services* &c. *and Fine se levavit between him and one P. upon Conusance of Right come ceo* &c. *which P. granted and rendered to the said J. for Life, the Remainder over to the Avowant*, and *alleged Seisin in the Tenement for Life who is dead, and in him in Remainder who now avows*, and the Avowry was held double, because he alleged a *Seisin in the Lord of the Manor in Fee and two others, the one in the Lord for Life, and another in him in the Remainder*, where *one Seisin in the Conusor and another in the Grantee for or in him in Remainder suffices*; for they two are *as one and the same Lord*, and therefore shall not allege it in both &c. and therefore he amended the Avowry. Br. Double, pl. 14. cites 20 H. 6. 7.

* S P Br. Double, pl. 121. cites 3 H. 6. 43.

36. Avowry *of a Rent-Charge* the *Plaintiff said, that after the Grant the Avowant and J. were seised in Fee, and enfeoffed A. B. who enfeoffed the Plaintiff*, and this is single Plea and is not double, viz. The * *Seisin* and *Feoffment*; for a Feoffment cannot be pleaded without Seisin. Br. Double, pl. 89. cites 4 H. 7. 17.

37. *So in Writ of Aiel*, to say that *after the Death of the Grandfather the Demandant himself was seised and enfeoffed him*; Per Townsend, Brian and Haughes J. B. Double, pl. 89. cites 4 H. 7. 17.

38. Avowry

38. Avowry *for* 10 *s. due for two Acres of Land of the Defendant*, the *Plaintiff said that he had of him these two Acres and two other Acres by* 4 *s. absque hoc that he held the two Acres by* 10 *s.* and therefore double; per Keble; For he ought to take the one by Proteftation, Contra per Brian, and that the Plaintiff cannot do otherwife; for the falfe Avowry of the Defendant fhall not prejudice the Plaintiff. Quære. Br. Double, pl. 93. cites 8 H. 7. 5.

39. The Cafe on the Pleading to an Avowry was thus; *A. feifed of the Place where &c. and other Lands granted* to the Plaintiff 20 *l. per Ann. in Fee out of the other Lands, with Claufe of Diftrefs, and after fold the Lands charged to the Defendant, and to free them* of this Incumbrance *granted a Rent of* 20 *l. per Ann. out of the Place where &c.* to commence *from the Time that a Diftrefs for the* 20 *l. fhould be taken in the Lands charged, and fhews how that at fuch a Day a Diftrefs was taken*; and therefore &c. in Bar of the Avowry they come and *traverfe abfque hoc that any Diftrefs was taken for Rent-Arrear &c.* to this they demur fpecially, for that it is a complicated Traverfe, whereas it fhould be a Point fingle, and that Riens-Arrere &c. and of this Opinion was the Court, and ordered Judgment, Nifi they re-plead and pay Cofts. Skinn. 63. pl. 8. Mich. 34 Car. 2. B. R. Amias and Chaplein.

Champerty.

40. In Champerty the *Defendant faid, that the Plaintiff in the firft Suit for whom it is fuppofed that he maintained was an Alien born in Burgundy out of the King's Allegiance, and can neither fpeak Englifh or Latin, and prayed this Defendant who could fpeak his Language to obtain him Men of Law to be of his Counfel, and where the fame Alien was in Debt to this Defendant he granted him that if he recovered in this Suit, that he fhould be paid of the Sum fo to be recover'd &c. by which he gained him Counfel*, which is the fame Maintainance &c. and a good Plea, and is not double; quod nota. Br. Double, pl. 58. cites 15 H. 7. 2.

Br. Champerty, pl. 6. cites S. C.

Confpiracy.

41. Confpiracy *againft two becaufe they procuried A. to ouft the Plaintiff of his Land, againft which A. one J. N. recovered by Scire Facias, by which the Plaintiff loft his Warranty*, and the *Procurement*, and the *Recovery* was not adjudged vitious for doublenefs; For the Procurement without doing more does not give Caufe of Action. Br. Double, pl. 157. cites 42 E. 3. 1.

Covenant.

42. Covenant *for oufting of a Termor*, the *Defendant juftified by Claufe of Re-entry for Rent arrear*, and the *Plaintiff faid that there being a Difcourfe between him and the Defendant that the Defendant fhould be at Table with him and fhould recoup his Rent fecundum ratam, &c. and that he was at Table for fo long Time which amounted to* 40 *s. of the Rent, and as to* 4 *s. he tender'd it to the Defendant and he refufed and enter'd*, and this *Difcourfe* and the *Tender* was held good, and not Double; For the *one goes to part of the Rent and the other to the Reft*. Br. Double, pl. 27. cites * 47 E. 3. 77.

* All the Editions of Brook are as here, but the fame is mifprinted.

43. In Writ of Covenant a Man may *allege as many Covenants broken* as he will, and it is not Double. Br. Double, pl. 94. cites 9 H. 7. 13.

Cuftom.

44. Cuftom *to tax a Sum for Reparation of a Church by Affent of the Parifhioners* was not held double; but the *Affent* is the Effect, and the *Cuftom* fhall enforce; Per Thorp. Br. Double, pl. 24. cites 44 E. 3. 19.

Br. Cuftoms, pl. 6. cites 44 E. 3. 18, 19.

Debt.

45. Debt *againft Executors* who *plead Plene adminiftravit & Riens enter mains* the Day of the Writ purchafed nor ever after, this is not a Double Plea; For *Affets anfwers all*; quod nota; Per Cur. Br. Double, pl. 3. cites 3 H. 6. 4.

46. Where

Br. Taile, de Excheuer, pl 3. cites S. C. accordingly.

46. Where a *Man shews Bill of 40 l. to the Collector of Tenths, and he refuses to pay*, by which *he brings Debt*, the *Collector shall plead that Writ was directed reciting the Act of Parliament, because the Mayor of the Staple had lent to the King 1000 l. the which shall be first paid, and that the Writ commanded him to pay to him 300 l. and another Bill came to him by another of 100 l. before the Bill of the Plaintiff shewn, and beyond 400 l. he has not any Thing in his Hands to pay*; Judgment &c. and the Plaintiff demurr'd and therefore was barr'd, and brought Writ of Error, and per Cur. the Plea shall be good and not double as the Plaintiff assigned, viz. the *Act of Parliament*, and that he *had only* 400 *l.* For the 400 l. is the Matter, and the other is only the *Recital and Introduction*; and also it is a Particular Act whereof Strangers to it shall not be bound to take Conusance as of a General Act. Br. Double, pl. 74. cites 37 H. 6. 15.

47. Debt *upon Obligation*, the *Defendant said that he is Lay and not letter'd, and the Deed was not read to him by other Days of Payment, and also that he sealed it and deliver'd it to T. N. as an Escrow, to the Intent that* if J. N. named in the Obligation would seal it, then to deliver it as his Deed, and if not, to retain it, and said that J. N. sealed it, and yet T. deliver'd it to the Plaintiff *and so Not his Deed*, and is not double, viz the *Nient literat'*, and the *Delivery as an Escrow*, because he concludes Non est factum, which is only the Plea, and the other is but Evidence; and a Man *may allege 20 Matters to avoid a Deed when he concludes Non est factum*; quod nota, per Cur. Br. Double, pl. 80. cites 38 H. 6. 13.

48. In Debt the *Plaintiff counted that the Prior of J. Parson of O. in proper Use leased to him for six Years, and he leased to the Defendant for four Years rendering Rent, and for the Rent-Arrear* &c. The *Defendant said that before this the Prior leased to W. N. for 10 Years the same Year; and after he leased to the Plaintiff, and after W. N. surrendered, to which the Prior agreed, and after leased to the Defendant for ten Years, and that the Vicar is endowed of the small Tithes, and leased them to the Defendant also, and the Plaintiff would have taken them, and the Defendant would not suffer him*, and this was held double, viz. *The old Lease* and *the Endowment of the Vicar*, by which he relied upon the old Lease, and took the other by Protestation. Br. Double, pl. 34. cites 9 H. 5. 8.

Br. Count, pl. 10. cites S. C.

49. The Plaintiff comes and *counts upon an Obligation of an Abbot, Predecessor sealed with his Seal only*, and counts *how the Thing came to the Use of the House*, and yet well and not double. Br. Double, pl. 10. cites 9 H. 6. 25.

50. *Debt upon Obligation against Executors*; Per Danby, the *Deceased made the Defendant and A. his Executors* and died, after whose Death *Alice administered as Executrix, to whom the Plaintiff by the Deed &c. released, and after the Defendant married the said Alice*; and per Paston, Ascue and Port. the Plea is not double, viz. The *Release*, and that he has *another Executor*; for it is not alleged that A. is alive, and he *concludes upon the Release to the Action*; and per Cur. he may answer without abating the Writ, by which the Plaintiff said, that not his Deed &c. Br. Double, pl. 52. cites 22 H. 6. 59.

51. Debt *upon Obligation* which had *a Condition that if the Defendant was ready when he should be warned at D. at the Costs of the Plaintiff to account and to pay*, that then &c. and *said that he was not warned to come at the Costs of the Plaintiff*, Judgment &c. per Persey the Plea is double, viz. the *Garnishment* and the *coming at the Costs* &c. & non allocatur. For if there are *divers Conditions in one Defeasance*, he ought to answer to All. Br. Double, pl. 124. cites 46 E. 3. 16.

52. Debt

52. *Debt against an Abbot upon an Obligation sealed * with the Covent Seal*, the *Defendant said, that the Abbot imprisoned the Prior, and menaced all the Monks to make the Obligation* by which they made it; Judgment. And it was held double, the *Imprisonment* and the *Menace*; by which he held him to the Menace by Award; for this goes to all by reason of the Menace of all; for the greater Number suffices. Br. Double, pl. 54. cites 15 E. 4. 1. 2.

* Orig. (center). — S. P. and yet the Imprisonment of the Prior is no Plea; For it was brought against the Abbot-Successor of him who made the Obligation, and so see that *two Matters* shall be double, *though the one be no Plea*, as a Feoffment with Warranty in Assise; For a Feoffment only is no Plea, and therefore it is usual to rely upon the Warranty to avoid the Doubleness. Br Double, pl. 1??. cites S. C.

53. *Debt upon Obligation of* 10 *l. with Condition to pay* 5 *l.* the *Defendant pleaded Payment to the Bailiff of the Plaintiff by his Command, which came to the Use of the Plaintiff*, this is a double Plea, by which he relinquished the *coming to the Use of the Plaintiff*, and then a good Plea; quod nota. Br. Double, pl. 107. cites 22 E. 4. 25.

54 *Debt upon Obligation of* 40 *l.* against D. who *said that he had paid the* 40 *l. and the Plaintiff had re-delivered the Obligation in lieu of Acquittance, and after the Plaintiff re-took it with Force and Arms*, Judgment si Actio. Per Vavisor the Plea is double, viz. the *Payment* and the *Re-delivery of the Obligation* in lieu of Acquittance. Per Colow, No; For it is *pursuant*, *as* to say that J. N. was *seised in Fee, and enfeoffed him*, this is not double, viz. the *Seisin* and *Feoffment* are not double. Per Keble, it is single; For it shall not be said double, but where the Court shall be inveigled to give Judgment where the one Part is found with the Plaintiff, and the other with the Defendant, or for the Mischief where the Plaint answers to one Part, and the Defendant concludes to the other, and here there is not any of these Points; For the Payment is only for one conformity of the Plea, and the one may *depend* upon the other, and that *Payment* and *Acquittance* is not double; quod fuit concessum. Townsend and Brian ad idem; For here the *Payment is not issuable nor contrariant to the Re-delivery of the Obligation*, and so by All, it is not double, but because the Re-delivery is no Plea, therefore the Plaintiff recover'd. Br. Double, pl. 88. cites 1 H. 7. 14.

55. *Debt upon Obligation* which was *upon Condition to stand to the Arbitrement of J. N. so that he made it and delivered it to the Parties by such a Day*, the *Defendant said that no Arbitrement was made nor delivered before the Day*, and this is double, per tot. Cur. For it is a good Plea that he did not make any Arbitrement by the Day, and it is a good Plea that he did not deliver the Arbitrement before the Day. Br. Double, pl. 90. cites 5 H. 7. 7.

56. And the same quod *non deliveravit arbitrium in Script'* &c. where the Submission is to be in Writing. Br. Double, pl. 90. cites 5 H. 7. 7.

57. And ibid in a Note, *Debt upon Indenture*, the Plaintiff *counted of several Covenants broken*, and not double; For the Defendant pleaded all performed, and the Plaintiff shall shew one broken only upon which the Issue shall be joined. Br. Double, pl. 90. cites 5 H 7. 7.

58. *Debt against a Successor of an Abbot*, he *counted of the Obligation of the Predecessor, and of a Contract which came to the Use of the House*, this is double. Br. Double, pl. 161. cites 10 H. 7. 21.

59. *One Action* of Debt was brought *on two Bonds*, and the Defendant pleaded *Non sunt facta*, or per Minas; and adjudged good by *one Plea*. Noy. 132. Denton's Case.

60. Where a Man *pleads two Deeds of the Ancestor of the Plaintiff*, though none of them shall be a Bar by itself, yet it shall be double and insufficient. Br. Double, pl. 78. cites 21 H. 7. 10.

Descent.

* Orig (pur) and so are all the Editions.

61. Note per Brian & Cur. that *two Descents of one Tail* shall be double; For a Man cannot traverse the Gift where there was such Gift in Fact; and if he traverses the one Descent, the other may rely * upon the other. Br. Double, pl. 154. cites 20 E. 4. 3.

Detinue.

62. *Detinue of Charters*, the *Plaintiff counted of a Bailment made by his Father to re-bail to him or his Heirs, and shewed how the Land was given by his Ancestor, whose Heir he is in Tail, and that the Reversion is reverted to him as Heir by the Death of the Tenant in Tail without Issue*; and this is double by three Justices, viz. the *Bailment* to re-bail to him or his Heirs, and the *Title to the Land*, by which he *relinquished the Descent of the Reversion*. Br. Double, pl. 7. cites 9 H. 6. 4.

* S. P. Per Newton. Br Double, pl. 45. cites 19 H. 6. 11.

63. Note, that *in Detinue of Charters* the *Plaintiff counted how the Deed was delivered to the Defendant to ensue the Estate of the Land, and said that he is Heir to the Land* &c. This is not double. * Contra if he had said that the Deed had been *delivered to re-deliver* to the Plaintiff, and that he is *Heir to the Land*; For this is two Titles, Nota differentiam. Br. Double, pl. 8. cites 9 H. 6. 14.

64. In Detinue the *Garnishee came and said that the two Obligations in Demand were deliver'd to the Defendant upon Condition, that if the Plaintiffs and Garnishee stood to the Arbitrement of the Defendant, and if* &c. that *then each should have his own Obligation, but otherwise if any broke the Award, and the other performed it, that he who performed it should have both, and that they awarded that the Plaintiff should recover the Profits of a Manor from Midsummer to Michaelmas, and should pay* 10 *Marks to the said Garnishee, and that the Plaintiff should make Partition of the same Lands and suffer the Garnishee to chuse his Moiety, and the Plaintiff shall have the other Moiety*, and *said that W. the Plaintiff did not make the Partition, nor did he pay the* 10 *Marks*, and prayed delivery of the Obligation. Per Newton, Paston, & Cur. the Plea is double, the one that the Plaintiff *did not make a Partition*, the other that the Plaintiff *did not pay to the Garnishee* the 10 Marks; For *both entitles the Garnishee to the Writings*. Br. Double, pl. 48. cites 21 H. 6. 18.

Dal. 30. pl. 9. S. C. held accordingly. —S. C. cited 2 Lutw. 1492.—

65. In *Detinue* for Goods bailed the Defendant pleaded, that *after the Bailment Plaintiff married J. S. who during the Espousals released* to the Defendant, and held by all the Justices not to be Double, for he could not plead the Refusal without shewing the Marriage. Mo. 25. pl. 85. Pasch. 3 Eliz. B. R. Audley's Case.

Dower.

66. In *Dower* the *Tenant said that he had nothing but in Ward with W. N. of the Grant of G. of whom the Ancestor of the Infant Son of the Baron held in Chivalry* &c. Per Hals, the Plea is double, one that he has *nothing but in Ward*, and the other that he *held jointly*, and because if he shall be compelled to hold to the one, he at another Time shall lose the other, therefore for the Mischief, he shall have the Plea; Per tot. Cur. Br. Double, pl. 33. cites 9 H. 5. 4.

Entry.

67. *Entry sur Disseisin made to C. his Cousin, whose Heir he is, viz C. was the Daughter of T. Sister of the Demandant*, the *Tenant said that J. Brother of the Demandant, whose Heir the Demandant is, was seised in Fee, and gave to T. and A. in Tail between whom C. was issue, and C. died without Heir of her Body, and J. your Brother entred as in his Reversion and enfeoffed the Tenant and after by his Deed released to us*, Judgment if against the Deed comprehending Warranty &c. and because he *relied upon the Deed with Warranty*, therefore good, notwithstanding

withstanding that he alleged Tail where the Demandant demanded Fee-Simple, and the Feoffment, and Release with Warranty. Br. Double, pl. 65. cites 24 E. 3. 75.

68. Entry *in Nature of Assise, Defendant pleaded that he is in by Lease for 40 Years of the Lease of the Predecessor of the Plaintiff by Indenture, and so has he nothing but for Term of Years, and that the Demandant himself is seised of the Franktenement,* Judgment of the Writ, and per tot. Cur. this is a double Plea, viz. *Lease by Indenture,* and that the *Plaintiff himself is seised of the Franktenement.* For if the Plaintiff answers to the Lease, the other may demur because he does not deny but that he himself is Tenant of the Franktenement; and if he answer to the Franktenement, the other may likewise rely upon the Lease by Indenture, which is Estoppel; by which he was *awarded to hold him to the one,* and so he did, viz. that the Plaintiff himself is Tenant. Br. Double, pl. 68. cites 4 H. 6. 27.

Thel. Dig. 215. Lib. 15. cap. 3. S. 23. cites Trin. S. C.

70. *Entry in Nature of Assise in 100 Acres of Land;* the *Tenant said that he had Common there appendant to his Manor of B. by which he put his Beasts in, absque hoc that he claimed any thing but the Common, and absque hoc that he had other Possession or Estate in the Land, and that W. N. was Tenant the Day of the Writ purchased, and yet is, not named in the Writ;* Judgment of the Writ; and per Cottesmore J. it is a good Plea, and not Double; For the Common is nothing to the Purpose, and the Plea is a *special Nontenure,* and the *Common is mentioned to prove his Entry into the Land to use his Common, and not to have Franktenement in the Land,* by which the Plaintiff imparled. Br. Double, pl. 44. cites 8 H. 6. 33.

Escheat.

71. *Escheat upon Seisin of A. supposing that he died without Heir;* the *Tenant said that A. had Issue K. who entered and endowed the Feme of A. and after released to her, whose Release the Tenant has;* Judgment &c. And by the best Opinion the Plea is Double; For the *Seisin of the Heir goes to the Writ,* and the *Release conveyed the Right, and goes to the Bar,* by which he relied upon the last Seisin of K. the Heir of A. to which the Demandant said, that the said A. had no such Daughter as K. who survived &c. Br. Double, pl. 159. cites 11 H. 4. 10.

Forcible Entry.

72. Trespass of Forcible Entry; the *Defendant said that J. was seised, and gave to his Father in Tail, who died seised,* and *the Land descended to him,* and *he entered and was seised till by the Plaintiff disseised, upon whom he entered;* Per Littleton, the Plea is Double, viz. the *Gift* and *Descent,* and Lacon and Prisot contra; For it is sufficient to say that he was seised till by the Plaintiff disseised, upon whom he entered, and *cannot say seised in Tail without shewing How,* and therefore the Residue is only *Conveyance* to it. Br. Double, pl. 18. cites 3 H. 6. 15.

73. *Contra in Assise,* and then if he *shews specially How he was seised by Tail,* as here, the Plea is not the better, and *one Answer may make an End of all,* viz. *Ne dona pas;* by which the Plaintiff replied, and the Defendant imparled &c. Br. Double, pl. 18. cites 3 H. 6. 35.

74. In Forcible Entry, the *Defendant justified his Entry by Gift to J. for Life, the Remainder to his Father in Tail, who was seised, and died seised, and he entered as Heir in Tail;* the *Gift in Tail* and the *Descent* is Double, therefore he ought to take the one by Protestation, and the other by Matter in Fact, Quod fuit concessum; Per Hody and Paston, but it is not argued. Br. Double, pl. 129. cites 9 H. 6. 13.

75. Tref-

75. Trespass upon the Statute of *Forcible Entry*; the *Defendant alleged Bar*, and the *Plaintiff alleged Descent to him to avoid the Entry of the Defendant*, and *he avoided it by continual Claim made by his Predecessor, and by himself*; Per Port. the Plea is Double; For if the Ancestor died in the Life of your Predecessor, then your Claim is void, and if he died in your Time, then the continual Claim in the Time of your Predecessor is not good; by which he alleged continual Claim in his Time only, and that the Ancestor died in his Time, aod then well; Quod Nota; and otherwise Double. Br Double, pl. 50. cites 22 H. 6. 37.

Formedon

76. In *Formedon*, the *Tenant pleaded a Fine of the Ancestor upon Conusance of Right with Warranty*, and not Double, nor was the Tenant compelled to rely upon the one by Award; For it is only one intire Deed. Br. Double, pl. 25. cites 46 E. 3. 14.

77. In *Formedon*, the *Tenant said that the Donee was seised in Fee till by the Donor disseised, and after the Donor married the Donee to his Daughter, and gave to him in Tail, and compelled him by Menace to take the Gift, whose Estate the Tenant has, and so remitted to the Fee Simple*; *Judgment* &c. and per Culpepper and Martin, the Plea is Double, viz. the *Disseisin* and *Remitter by Reprisal*, and the *taking by Menace*; Contra per Hank. and that the Disseisin and Reprisal is the Effect. Brook says Contrarium videtur Lex. Br. Double, pl. 31. cites 12 H. 4. 19.

S. C. cited 2 Lutw. 1402 in Case of Pell v. Garlick —— 12 Mod. 507. cites S. C.

78. In Formedon in Descender the Plaintiff declared of a Gift in Tail to his Father who died, and that the Land descended to Demandant's elder Brother, who also died without Issue. The Tenant pleaded *that the elder Brother had Issue a Daughter, who levied a Fine to him*, and he relied upon the Fine and the Proclamation. It was objected that this Plea was Double, that the one is the Issue, and the other is the Fine. But per Cur. since he cannot come to the one without shewing the other, it shall not be Double; besides, here he relies upon the Estoppel. Gouldsb. 88. pl. 13. Pasch. 30 Eliz. White's Case.

Garnishment.

79. Where a Plea includes double Matter, as *Garnishment by the Sheriff to levy a Fine*, and *Garnishment by the Party*, this is Double, *tho' one shall not be material*. Br. Double, pl. 127. cites 11 H. 4. 18. per Thirn and Cnlpeper.

Juris Utrum.

80. In Juris Utrum the *Tenant said, that his Father was seised and died seised, and the Predecessor of the Plaintiff abated, against whom he recovered in Mortdancestor and entered, and so this is his Lay-Fee, and not the Frankalmoigne of the Plaintiff*; and this is not double, per Cur. viz. the *Recovery* and the *Lay-Fee* &c. for he ought so to conclude, because it is a Writ of Right in its Nature, and so in Writ of Right if he pleads a Recovery he shall concludes and so has he more mere Right. Br. Double, pl. 1. cites 19 H. 8. 7.

Maintenance.

81. In *Maintenance*, the *Defendant justified as Attorney of the Plaintiff*, and the *Plaintiff said, that he gave 10 s. to one Jury, and 10 s. to another, to give Verdict for his Client*, and it is not Double, per tot. Cur. Because *all* does not *prove but one special Matter*; Quod *miror!* Br. Double, pl. 114 cites 11 H. 6. 10.

Monstraverunt.

82. In Monstraverunt, the *Defendant said that he held of a Manor in the same Vill, which is sub Titulo Terræ Episcopi de E. tempore E. Regis & Confessoris,*

ris, and not in the Manor of the same Name contained in the Book of Doomsday sub Titulo Terræ Regis, and that the Plaintiffs held of him at Will, and it was held double Matter; *for each of them is a good Bar.* Br. Double, pl 19. cites 40 E. 3. 45.

83. In Replevin, *Avowry* is made *for Rent reserved upon Equality of Partition made between two Coparceners*; the *Plaintiff said that there were three Coparceners, and the third was Extra Patriam Tempore Partitionis, and returned within Age and entered, by which they made new Partition* &c. and the *Re-entry*, and new *Partition* were suffered by Award, and the Plea single; Nota. Br. Double, pl. 62. cites 24 E. 3. 52.

84. In Replevin, the Defendant said, that the *Property of the Beasts is in another, and that he took* [illegible] *Vill*; and this is Double; Quod Nota. Br. Double, pl. 21. cites 42 E. 3. 18.

Thel. Dig. 214 lib. 15. cap. 3. S. 16. cites 42 E. 3. 19 S. C. that the Defendant was compelled to hold himself to the one. —— *But* in Replevin, *as to one Ox*, the Defendant *said, that the Property was to a Stranger, and as to another Ox, that he took it in another Place, and in another Vill* &c. And this last Plea was held Double; For the one Part of the Plea goes to the Place, and the other to the Vill. Thel. Dig. 214. lib. 15 cap. 3 S. 16. cites Mich 9 H. 6. 39.

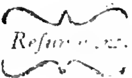
85. In Replevin the *Demandant avowed by two Avowries upon the Plaintiff for two several Tenures of two Acres* &c. *as upon Tenant of Fee-Simple*, and the *Defendant said that the Father of the Defendant, whose Heir* &c. *gave them to him in Tail, to hold by one and the same Tenure; Judgment of the Avowry supposing two several Tenures*, and it is not double, viz. The *Tenure of Fee Tail*, and the *intire Tenure*; because he *relied upon the last.* Br. Double, pl. 12. cites 9 H. 6 26.

Br. Avowry, pl 8. cites S. C.

86. In Replevin if a *Man pleads two Matters to the Avowry, of which the one goes in the Abatement of the Avowry* to prove that they ought to have made another Manner of Avowry, *and the other Matter goes in Bar of the Avowry*, this is double. Br. Double, pl. 158. cites 35 H. 6. 51.

87. In Replevin *where the Defendant ought to have gaged Deliverance*, he *said, that the Beasts died in Default of the Plaintiff where the Defendant distrained for such Cause and put them in open Pound* &c. the *Plaintiff said that the Defendant esloigned them to a Place unknown, and there they died in Default of the Defendant*; & non allocatur; For it suffices to say that he *esloigned* them only, which *shall be intended out of the County* &c. and it is sufficient to say that they died in Default of the Defendant; quod nota per Cur. therefore two Matters. Br. Double, pl. 91. cites 5 H. 7. 9.

88. In Replevin the *Tenant in Tail of a Rent purchased the Land and made a Feoffment in Fee of Land discharged with Warranty, and died, and Assets is descended, the Issue in Tail was vouched for the Rent*, and this Matter is pleaded in Bar of the Avowry; and because he *did not shew whether the Ancestor who made the Feoffment with Warranty was Ancestor Collateral or Lineal*, therefore per Cur. the Bar is ill, and it *shall be intended Ancestor Collateral*; Per Vavisor J. and then this and the *Assets* is double, and he ought to have rehearsed the *Warranty* or upon one of them. Br. Double, pl. 78. cites 21 H. 7. 10.



89. Resummons *upon Writ of Ward against Executors*, who *said that the Heir was of full Age in the Life of Testator, and that they have fully administered*; and Wilby awarded the Plaintiff to answer to the last Plea, and awarded that the Plaintiff should recover the Ward, and that they try the Issue of Fully administered for Damages. Br. Double, pl. 61. cites 24 E. 3. 49.

Quare Ejecit.

90. Quare Ejecit infra terminum against B. *that C. was seised and leased to him for 10 Years, and B. ejected him*; Port. said, that C. *leased and entered, and enfeoffed us, and after the Plaintiff made a Regress, and after surrendered to us, and we entered, which is the same Ejectment.* And per Newton and others, the Plea is not double, viz. The *Lease*, and the *Feoffment*, and the *Regress* of the Tenant, and after the *Surrender*; For he cannot come to plead the Surrender without *conveying the Reversion* to him; quod nota. Br. Double, pl. 45. (bis) cites 19 H. 6. 55. 56.

Recordare.

91. In Recordare the *Lessor avowed for a Fine for Alienation made by his Tenant*; the *Tenant pleaded that the Lord was seised of the same Land within Time of Memory, and by Deed aliened to R. whose Estate the Plaintiff has, to hold to him by certain Rent and Services pro omnibus Serviciis et demand'*; and this held double, viz. The *Unity of Possession*, and the *Deed to hold* ut supra; and yet he cannot plead the Gift, but he ought to allege the Seisin in the Donor or Feoffor; nor can a Man plead a Deed of Feoffment with Warranty, but he shall mention both, but he ought to rely upon the Warranty only, or rely upon the Deed of Gift in the Case Supra only, and then this is not double; quod nota; Per Hank. & nemo negavit. Br. Double, pl. 32. cites 14 H. 4. 5.

Scire Facias.

92. Scire Facias *out of a Fine* by which *W. and K. his Feme gave to M. in Tail, saving the Reversion to K. and his Heirs, of whose Inheritance the Land was, and that W. died, and K. married R. and [M.] died without Issue, by which R. and K. brought the Scire Facias to execute the Fine*, the *Tenant said that W. and K. were seised as in their Reversion after the Death of M. and enfeoffed T. whose Estate he has*; Judgment si Actio; Per Wich. the Plea is double, viz. *Seisin* by the Reversion after the Tail determined, which is Execution, and also *Feoffment* after; Per Thorp, the Feoffment is the Substance, and the Seisin is only *Conveyance*, by which answer. Br. Double, pl. 36. cites 38 E. 3. 16.

93. By which the *Plaintiff said that another Time he recovered upon Scire Facias upon the same Fine against the same Tenant, and after the Execution he enfeoffed the same T. upon Condition, and for the Condition broken he entered, and the now Tenant brought Writ of Disceit and reversed the first Judgment and Execution, after which he was not warned and entered and now the Plaintiff brought other Scire Facias*; Per Belk. the Plea is double, one that the *Feoffment is undone by the Condition*, and another that his *Seisin is undone by Writ of Disceit*; Per Finchden, the Conclusion is all upon the Feoffment by which the other passed over. Br. Double, pl. 36. cites 38 E. 3. 16.

Trespass.

94. In Trespass the *Defendant said that the Franktement belonged to a Stranger who leased to him for five Years, which yet indure, by which he entered and did the Trespass*; Judgment &c. Godred said the Plea is double, viz. The *Franktenement* is in a Stranger, and he has a *Lease* for five Years, but tot. Cur. contra eum; For *the Lease is only Conveyance.* Br. Double pl. 6. cites 3 H. 6. 50.

95. Trespass upon the Statute of *Forestalling at the Port of C.* Paston said there is *no such Vill, Hamlet or Place known out of the Vill and Hamlet, but* is a Place which *extends into divers Vills*, viz. into A. B. and D. Per Strange, this is double, viz. *No such Vill* or Place &c. and also that it *is a Place which extends into divers Vills &c.* Br. Double, pl. 40. cites 7 H. 6. 22.

96. In

96. In Trespass the *Defendant pleaded Arbitrement* &c. who *awarded that he should pay* 10 *l. to the Plaintiff in Satisfaction of the Trespass, which he has paid*; Judgment and the Plea good, and not double, viz. The *Arbitrement* and the *Payment*; for the one is *pursuant* upon the other; for per Martin, Arbitrement is no Plea if he does not plead it performed, or says that he has been at all Times ready, and yet is &c. Br. Double, pl. 43. cites 8 H. 6 25.

97. In *Trespass* the *Defendant pleaded his Franktenement*; the *Plaintiff shall not say that before this J. N. was seised and enfeoffed A. who enfeoffed the Plaintiff*; For it suffices to say, that A. was seised in Fee and enfeoffed the Plaintiff &c. Br. Double, pl. 131. cites 19 H. 6. 32.

98. Trespass *Quare Filium suum et Hæredem rapuit et abduxit apud D. Defendant shewed by Protestation that he had re-delivered the Infant, and for Plea, that the Plaintiff married Jane P. and had Issue the Son, and J. died, and after it was noised in the Country that the Plaintiff was dead, and that the Defendant as Prochein Amy of the Infant saw the Infant in Ward, scil. ill-governed and out of good Ward, in Negligence of N. his Nurse, by which he took the Infant as lawfully he might* &c. and it is not double, scil. that he is *Prochein Amy*, and that the *Infant was ill-governed*; for the one *depends upon the other*, but if he had not taken the Re-delivery by Protestation but for Plea, then it had been double. Br. Double, pl. 47. cites 21 H. 6. 15.

99. Trespass of a Close broken and Grass spoiled, the *Defendant pleaded his Franktenement*; the *Plaintiff said* that to this he shall not be received; For the *Father of the Plaintiff whose Heir* &c. *enfeoffed him with Warranty by the Deed which he shewed* &c. Judgment if against the Deed of his Ancestor which comprehends Warranty he shall be received to say that it is a Franktenement. The *Defendant said that R. N. was seised in Fee, and enfeoffed him and his Father and to the Heirs of his Son, and the Father enfeoffed the Plaintiff, by which he entered into the one Moiety in the Life of the Father by Alienation to his Disinheritance, and into the other Moiety he entered after the Death of of the Father for the Disseisin of this Moiety*; Per Newton, the Plea is double; for if any of the Issues are found for the Defendant the Plaintiff shall be barr'd; for if he enters into a Moiety only then the Plaintiff is Tenant in common with the Defendant, and one Tenant in common or Joint-tenant cannot have Action against the other. Br. Double, pl. 51. cites 22 H. 9 50. 51.

100. *By which* the *Defendant pleaded as above, and alleged the Entry into the Whole in the Life of the Father*, and the *Plaintiff alleged the Feoffment of the Father with Warranty as above, absque hoc that R. enfeoffed the Defendant and his Father Modo et Forma*, and so ad Patriam. Br. Double, pl. 51. cites 22 H. 6. 50. 51.

97. In Trespass, the *Plaintiff counted that a Lease for Years, and a Deed indented of it was devised to him by the Lessee, and he died, and the Executors bailed to him* &c. and it is not Double, viz. the *Devise* and the *Bailment* of the Executors, for the one is *Conveyance* to the other; Quod Nota, per Cur. Br. Double, pl. 15. cites 27 H. 6. 8.

98. In Trespass, the *Defendant prescribed in a Way to the Market of B. and to the Church of D.* and held Double; Quære inde; For it seems that he ought to claim the Way as his Title is; Quære; for it is only the Opinion of the Reporter in a short Note. Br. Double, pl. 128. (bis) cites 28 H. 6. 9.

103. Trespass *of Assault and Menace*, these Words *dixit, retulit, & publicavoit* &c. make not any Plea double or treble, per Cur. Br. Double, pl. 72. cites 37 H. 6. 20.

104. Treſpaſs *in Land*, the *Defendant juſtified for the third Part for one Cauſe, and for the two Parts for another Cauſe*, this is not Double; For *it cannot be that the third Part is in Severalty*, and then the Plaintiff and Defendant ſhall not be Tenants in Common; for if they were Tenants in Common, Juſtification for the one Part undivided ſuffices. Br. Double, pl. 141. cites 37 H. 6. 38.

105. In Treſpaſs, where a Man *pleads a Recovery and ſhews Title, by which he recovers alſo*, this is Double; Per Littleton, which Danby J. denied; For the one is *ſubſequent* to the other. Br. Double, pl. 75. cites 39 H. 6. 24. & concordat 9 H. 7.

106. In Treſpaſs *Abatement* and *Intruſion* are Double, and yet it ſeems that both ſhall be of one and the ſame Nature, and where a Man pleads Double Plea, and relies upon the one, then it is not Double. Br. Double, pl. 147. cites 39 H. 6. 27.

107. Treſpaſs upon the *Caſe eo quod liberavit Obligation' defend' ad ſalvum Cuſtod' & reliberand' cum* &c. *and that the Defendant has broken it.* The *Defendant ſaid, that it was bailed to him by the Plaintiff to deliver to W. N. the which he has done, abſque hoc that he broke it*; Per Priſot, the Plea is double; for it is a good Plea that it was delivered to him to deliver to W. N. which he has done; and then [if] he breaks the Obligation, Action is given to W. N. and not to the Plaintiff, which is another Matter of Bar; by which Coke *ſaid* for the Defendant *ut ſupra, abſque hoc that he broke the Obligation before the Delivery made to W. N.* and per Cur. now he *ought to ſhew what Day he delivered it to W. N.* and *ſo he did, and traverſed ut ſupra*; then the Plaintiff demurred, and the Defendant ſimiliter, and it ſeems that this Traverſe is pregnant, viz. the Breaking before the Delivery to W. N. Br. Double, pl. 84. cites 39 H. 6. 44.

108. In Treſpaſs a *Leaſe at Will*, and a *Licence to cut the Underwood*, is not Double; For Tenant at Will cannot cut Underwood without Licence. Br. Double, pl. 149. cites 2 E. 4. 22.

Br. Treſpaſs, pl. 302. cites S. C.

109. Treſpaſs *of a Cloſe broken*, viz *two Acres*, and the *Defendant juſtified the breaking of one, and the Entry* * [*into one*] *for one Matter, and into the other for another Matter*, and therefore double, per Cur. for he has juſtified two Breakings; *Quære*; For contra in Treſpaſs upon 5 R. 2. Br. Double, pl. 153. cites 18 E. 4. 11.

* All the Editions are without thoſe Words.

110. In Treſpaſs where *Deſcent is pleaded*, the *Plaintiff pleaded Diſſeiſin to his Father by him who died ſeiſed, and that his Father made Continual Claim and died, and after he made Continual Claim, and the Diſſeiſor died ſeiſed within the Year* &c. and per Cur. he ſhall plead the one Continual Claim only, viz. of him in whoſe Time the Deſcent came. Br. Double, pl. 53. cites 15 E. 4. 22.

111. In Treſpaſs it was agreed, that where a Man *makes a Bar or Title by Gift in Tail of Land or Advowſon*, and *alleges divers Deſcents or Preſentations*, this is not Double; For the Traverſe of the Gift anſwers to all. Br. Double, pl. 104. cites 19 E. 4. 4. —— And yet contra per Brian and Cur. 20 E. 4. fol. 3. But Quære thereof. Ibid.

112. In Treſpaſs, if a Man makes *Avowry or Replevin or Juſtification in Treſpaſs for Homage, Fealty, Suit, Rent* &c. this is not Double; For this *is all one and the ſame Tenure. Contra* if it be for a *Rent-Charge and Rent-Service* in one and the ſame Avowry. Br. Double, pl. 94. cites 9 H. 7. 13.

113. Treſpaſs *againſt ſeveral of a Cloſe broken*; the *Defendant ſaid that each of them has Common there appendant to his Franktenement ſeverally, by which they entred and broke* &c. *to uſe their Common*, and a good Plea, per Cur. and not Double; For *it ſhall be intended that each juſtified for his own Intereſt, and none for the Intereſt of his Companion.* Br. Double, pl. 59. cites 15 H. 7. 10.

114. B. :

114. *But* in Trefpafs of a Clofe broken, *if the Defendant fays that A. has Common there, and B. fimiliter, and C. fimiliter, and he as their Servant, and by their Commandment put in the Beafts*, this is Double, per Cur. Br. Double, pl. 59. cites 15 H. 7. 10.

115. *But* if he *fays that he put in two Beafts for A. and three for B. and the reft for C.* this is a good Plea, and is not Double, per Cur. Br. Double, pl. 59. cites 15 H. 7. 10.

116. In Trefpafs it was agreed, that where *one intitled himfelf that A. was feifed in Fee, and infeoffed B. who infeoffed C. who infeoffed D. whofe Eftate the Defendant has, and gave Colour to the Plaintiff by the firft Feoffor*, this is not Double; and the reafon feems to be, becaufe all thefe are only *Conveyances*. Br. Double, pl. 60. cites 15 H. 7. 11.

Utlawry.

117. Defendant pleads *ten Outlawries* againft the Plaintiff; this is Double; for he is as much difabled by one as by the other nine, to which feveral Anfwers are required. Carth. 8. Trin. 3 Jac. 2. B. R. Trevillian v. Secomb.

Ward

118. In Ward the Plaintiff *counted that he held of him by Homage, Efcuage and Servage, which gives Ward by Ufage of the Country*, and therefore double; by which he was compelled to keep to the one. Br. Double, pl. 26. cites 46 E. 3. 25.

119. If the Defendant in Ravifhment of Ward *traverfe the Title of the Plaintiff, and makes Title to himfelf*, this not double; for he ought fo to do; nota. Br. Double, pl. 28 cites 2 H. 4. 12

Br. Ravifhment de garde, pl. 6. cites S. C.

120. Ward of Land and Body, the *Defendant pleaded a Feoffment*, and the *Plaintiff alleged*, that it was by *Collufion, and* it was upon *Condition to infeoff the Heir at full Age to toll him of his Ward*, and therefore double, viz. The *Collufion* and the *Condition*, by which he omitted the Condition and held him to the Collufion, to which the Defendant faid that it was Bona Fide, and not by Collufion; but per Cur. Trin. 4 H. 6. Fol. 29. the Plea pleaded in Bar is not good if he does not *traverfe the dying in his Homage*. Br. Double, pl. 5. cites 3 H. 6. 32.

121. In Ward the *Tenant pleaded Jointenancy by Fine to the Anceftor and to him, and that he is in by Survivor*; Judgment &c The *Plaintiff faid that the Conufor enfeoffed certain Perfons to enfeoff the Heir at his full Age by Collufion to toll him of his Ward, abfque hoc, that thofe who were Parties to the Fine had any Thing at the Time levied*, and it was held double, viz. The *Collufion* and the *Voidance of the Fine*, by which he held himfelf alone to the Voidance of the Fine. Br Double, pl. 39 cites 7 H. 6. 20.

S. P But Brook fays Miror inde; for by the Traverfe he relied upon one, and therefore it feems beft that he plead the Feoffment without fpeaking of the Collufion, and traverfe the Seifin at the Time of the Fine. Br. Double, pl. 130 cites 4 H. 6 14.

Warrantia Chartæ.

122. Warrantia Chartæ *quod de eo tenet et unde chartam fuam habet*, this is not double Lien but ancient Form of the Writ; quod nota per Cur. Br. Double, pl. 64. cites 24 E. 3. 74.

123. Scire Facias *upon a Fine*, the *Plaintiff conveyed himfelf by Defcent to two Coparceneus, and from them to him*, and the *Tenant pleads Releafe with Warranty of thefe two Parceners, Judgment if contrary to the Deed of his Anceftors, which comprifes Warranty, Action* &c. the Plaintiff faid that it was double by reafon of the *two Warranties*, and therefore he held him to the one, notwithftanding that he pleaded according to the Fine. Br. Double, pl. 35. cites 9 H. 5. 12. 13.

124. If a Man pleads *Release with Warranty and relies upon the Whole*, this is not double; for one Answer may make an End of all. Br. Double, pl 117. cites 32 H. 6. 21.

125. But *Feoffment with Warranty* is double if he does not rely upon the Warranty; for Feoffment may be without Deed, and [passes] by two Circumstances. Br. Double, pl. 117. cites 32 H. 6. 21.

126. But *Release with Warranty*, or *Confirmation and Grant that he shall not be vexed* as above, all this *passes by one Deed or Patent*. Br. Double, pl. 117. cites 32 H. 6. 21.

Wast.

126. Wast *in Grange* as *to a Moiety the Defendant Decay before the Lease*, and *as to the rest it was uncovered by Tempest, and before the Defendant could repair it the Plaintiff entered, and was seised the Day of the Writ*; Judgment &c. and per Hank. this is double, The *Tempest* and the *Entry* of the Plaintiff. Contra per Hull, for the Entry is all the Matter; for the Tempest is not Wast unless the Defendant permits the Timber to putrify after the Tempest. Br. Double, pl. 30. cites 12 H. 4. 5.

127. Wast *in cutting* 10 *Oaks the Defendant said that the Plaintiff granted the* 10 *Oaks to R. C. and commanded the Defendant to cut and deliver them to the said R. C.* which he did. Per Markham, the Plea is double, viz. The *Grant* and the *Commandment*. Per Newton and Paston the Plea is good; for it is *pursuant*, by which the Plaintiff replied and denied the Commandment; quod nota. Br. Double, pl. 49. cites 21 H. 6. 46.

(B) Allowed in what Cases.

1. IN *Assise of Rent* the Tenant *cannot plead Misnosmer of himself, and if it be found, Hors de son Fee* &c. for the first Plea is waived by the other. Thel. Dig. 214. lib. 15. cap. 3. S. 1. cites Pasch 3 E. 3. 78. 3 Aff. 9.

2. In *fur Cui in Vita of a House and 2s. Rent*, the Tenant *said that the Demandant had put in View only a House, and so he supposes that the Rent is arising from this House, in which House he has nothing unless jointly with such a one not named*; Judgment of the Writ, and held that he shall have the two Pleas. Thel. Dig. 214. lib. 15. cap. 3. S. 2. cites Trin. 5 E. 3. 192.

3. In Writ of *Waste* as to Parcel, the Tenant *falsified the Demise, supposed by the Writ, in Abatement of the Writ, and as to other Parcel he said that it was within the Vill* supposed by the Writ &c. and had both the Pleas. Thel. Dig. 214. lib. 15. cap. 3. S. 5. cites Pasch. 8 E. 3. 402.

4. In *Writ of Entry* the Tenant pleaded *that one Tho. was seised and died seised, from whom the Tenements descended to three Daughters, and the Tenant is Issue of one of them, and he has the Estate of the other by Purchase, and one Ro has the Estate of the third by Purchase, and so he holds in common pro indiviso with Ro. not named* &c. And held that he shall not have the two Pleas, scil. the Nontenure of the third Part, and the Tenancy in common of the Whole. Thel. Dig. 214. lib. 15. cap. 3. S. 7. cites Trin. 8 E. 3. 218. Quære.

5. In

5. In *Trespass for a Close broken brought by two, as to one of the Plaintiffs the Defendant said that he was Tenant in Common of this Close with the Plaintiff*, Judgment of the Writ, *and as to the other Plaintiff the Defendant pleaded Not Guilty* &c. Thel. Dig. 215. Lib. 15. cap. 3. S. 21. cites 8 E. 3. 436. in Mortdanceiter. Quære.

6. In *Quare Impedit*, the Defendant may *plead Darrein Presentment* to the Writ, *and make Title of Right also to the Presentment*, and his Plea shall be taken according to that which he concludes to the Writ by the Darrein Presentment, or Action by the Title. Thel. Dig. 215. Lib. 15. cap. 3. S. 22. cites Mich. 8 E. 3. 426.

7. In *Debt by two Femes as Executrixes of the Testament of such a one*, the Defendant as to one *said that she was Covert of Baron the Day of the Writ purchased, and yet is &c.* And *as to the other that she has taken Baron pending the Writ* &c. and had both the Pleas, but the Issue was taken upon the one. Thel. Dig. 214. Lib. 15. cap. 3. S. 8. cites Mich 8 E. 3. 441. Mich. 9 E. 3. 477.

8. In *Assise of Rent* the Tenant *pleaded Misnosmer of the Vill, and* if it be found &c. *That another is Tenant of the Rent not named* &c. Thel. Dig. 214. Lib. 15. cap. 3. S. 10. cites Mich. 15 E. 3. Assise 95.

9. The Tenant *pleaded Non-tenure of Parcel and shew'd who was Tenant, and as to the other Parcel pleaded Non-tenure also by reason of Recovery, and Execution sued against him pending the Writ*, and had both the Pleas. Thel. Dig. 214. Lib. 15. cap. 3. S. 11. cites Trin. 15 E. 3. Brief 285.

10. In *Trespass of Beasts taken*, the Defendant cannot *plead That the Deliverance is made by Replevin in the County, and also justify as Distress* &c. Thel. Dig. 214. Lib. 15. cap. 3. S. 12. cites Mich. 17 E. 3. 585.

11. In *Writ of Aiel* the Tenant was received to *plead Last Seisin in his Father who was Son and Heir to the Grandfather, and that the Demandant was Son and Heir to the younger Son of the Grandfather, and so he could demand nothing.* Thel. Dig. 214. Lib. 15. cap. 3. S. 9. cites cites Hill. 10 E. 3. 483.

12. In *Assise the Tenant said that he had another Surname, and pleaded Jointenancy with one not named* &c. And held good without saying that he is the same Person &c. and the Plaintiff cannot reply to the Misnosmer but to the Jointenancy. Thel. Dig. 214. Lib. 15. cap. 3. S. 4. cites Mich. 5 E. 3. 215. and says see 22 Ass. 1.

13. A Man shall plead *Nontenure of Parcel of which another is Tenant, and also that the Demandant himself is seised of Parcel.* Thel. Dig. 214. Lib. 15. cap. 3. S. 13 cites Mich. 19 E. 3. Brief 244. And that a Man shall plead 20 *Nontenures to the Writ, but* the Tenant was *not* received to plead *Nontenure of Parcel and Jointenancy of Parcel* also. Pasch. 22 E. 3. 6.

14. In *Writ of Aiel* it is said that the Tenant may *plead last Seisin in the Demandant, and* after *waive this and plead last Seisin in the Father of the Demandant.* Thel. Dig. 214. Lib. 15. cap. 3. S. 14. cites Pasch. 32 E. 3. Nuper Obiit. 2.

15. In *Assise of Common*, the *Defendant said that the Land in which* &c. *is* 60 *Acres, and that the Grantor had nothing in the Land unless in five Acres at the Time of the Condition*, and *to the five Acres that the Grantee of the Common who granted his Interest to the Plaintiff had nothing in the Common at the Time of the Gift*, and had both the Pleas; For the one Plea goes to the five Acres, and the other Plea to the rest, Contra if each Plea had been pleaded to the Whole. Br. Deux plees, pl. 31. cites 37 Ass. 14.

16. *Debt*

16. *Debt against Executors* who *pleaded Acquittance as to Parcel, and fully administred as to the Rest*, and both were suffered, quod nota. Br. Deux plees, pl. 27. cites 28 E. 3. 91.

Br. Conusance, pl. 10. cites S. C.

17. *Three Issues were permitted in alleging that the Bailiffs of the Franchise after Conusance of the Plea granted had failed of Right to the Plaintiff*, inasmuch as it *confirms the Jurisdiction of the Court of the King, and the King is as Party to it*, the Plea of which shall not be challenged for doubleness. Br. Double, pl. 119. cites 40 E. 3. 11.

18. In *Dower* the *Tenant said that Baron had nothing unless in Special Tail to him and his first Feme*, the *Remainder to J. N. in Tail*, the *Remainder to the Baron in Fee*, the *Baron died and* he in the *Mesne Remainder surviv'd*, the *Demandant said to Parcel Nient comprise*, and *to the Rest that he in Remainder did not survive the Baron, by which the Baron was seised in Fee; For he had no Issue by the first Feme*, and he had both the Pleas, and yet if the Baron surviv'd she ought to have Dower. Br. Deux plees. pl. 34. cites 46 E. 3. 16.

But see 4 H. 6. 29 the Plea is not good if he does not *traverse the dying in his Homage* Per Cur.

19. In *Ward of Land and Body*, the *Defendant as to the Body pleaded Delivery by the Plaintiff himself upon certain Conditions perform'd to re-deliver, and othewise to retain him* &c. and *to the Land that the Ancestor in his Life infeoffed J. N. Que Estate he has*, and because this last Plea goes to all, therefore per Cur. he was drove to the one, by which he held him to the Feoffment. Br. Deux plees, pl 2. cites 3 H. 6. 32.

20. In *Dower against one Jo.* he *said, that he and one Ro. not named, held the Tenements jointly as Guardians in Chivalry by the Nonage of such an one Heir* &c. Judgment of the Writ &c. And adjudged that he should have the Plea &c. notwithstanding that it is Double, viz. that he was Guardian not named Guardian, and the Jointenancy. Thel. Dig. 215. lib. 15. cap. 3. S. 17. cites Pasch. 9 H. 5. 4.

21. In *Dower*, the *Tenant said, that he had nothing but in Ward with W. N. of the Grant of G. of whom the Ancestor of the Infant, Son of the Baron, held in Chivalry* &c. Per Hals, the Plea is double, one that he has *nothing but in Ward*, and the other that he *holds jointly*; and because if he should be compelled to hold to the one, he at another Time should lose the other, therefore for the *Mischief* he shall have Plea; per tot. Cur. Br. Double, pl. 33. cites 9 H. 5. 4.

22. It is held, that *in Appeal of Death*, the Defendant may *plead that there is another Appeal pending, and Nul tiel Vill &c. also, and Misnosmer of himself, and Nul tiel Vill* &c. and pray Allowance of them &c. *and as to the Felony plead Not Guilty*. Thel. Dig. 215. lib. 15. cap. 3. S. 18. cites Hill. 4 H. 6. 15.

23. A *Rule* is laid down, that when a Man has two *Matters*, he may plead either of them, and if he *cannot come at one without alleging the other*, the alleging it will not make his Plea double; Arg. 12 Mod. 507. in Case of Pell v. Garlick, cites 5 H. 7. 38.

24. In *Scire Facias out of a Fine*, the Tenant *pleaded that it was once executed, and also that he is in by Tail made before this Fine*, and held that he should have both. Thel. Dig. 214. lib. 15. cap. 3. S. 15. cites Pasch 32 E. 3. Scire Facias 102. 145. and 18 H. 6. 3.

25. *Assise by the Master and Confreres of the Fraternity of the* nine Orders of the Angels in B. in the County of Middlesex, the *Defendant said that there is not any such Corporation by the Name ut supra in the same County, and if* &c. *nul tort* &c. and was not suffered to have both, for the first Plea goes in Bar, and he *shall not have the Bar and also a general Issue*, Quod Nota, per Cur. Br. Barre, pl. 91. cites 22 E. 4. 34.

26. Where Double Plea is pleaded, and the *Demandant relies upon the one Article, and so to Issue*, there no Party shall have Advantage of the Doubleness afterwards. Br. Repleader, pl. 18. cites 22 H. 6. 14.

27. Where

27. Where there is *but one Tenant, and one Defendant,* he *cannot have two such Pleas as each of them do go to the whole; But where* there are *divers, each* of them *may plead several Pleas,* which extend to the whole. Co. Litt. 303. a.

28. The *Plea which contains Duplicity,* or Multiplicity *of distinct Matter to one and the same Thing whereunto several Answers* (admitting each of them to be good) *are required, is not allowable in Law;* And this Rule *extends* to Pleas Perpetual or Peremptory, and *not to Pleas Dilatory;* For in their Time and Place a Man may use divers of them. Co. Litt. 304 a.

29. Double or treble Pleas are allowable *in an Assise of Novel Dissei-sin, Mortdancestor, Juris Utrum, Attaint,* or *Certificate of Assise,* which would have Juries returnable on the first Day before any Plea pleaded; For these are Festina Remedia; But Double Pleas are not allowable in other Actions; For there is an original Writ, Plea, and Issue, and upon this a Venire Facias &c. and a Trial. Jenk. 75. pl. 43. cites 3 H. 4. 2.

30. *Prescription* by Freeholders, *and Custom by Copyholders,* may be joined in one Plea. Lev. 269. Trin. 21 Car. 2. B. R. Potter v. North.

31. Duplicity is not a good Exception to a Plea *in Abatement;* But in Plea *in Bar* Duplicity of Matter makes the whole void; admitted. But the Court took a *Difference* between a Plea of *Outlawry in Disability,* and *other Pleas in Abatement,* and that a Plea of ten Outlawries is double, because a Plaintiff is disabled as well by one as by the other nine. Carth. 8. Trin. 3 Jac. 2. B.R. Trevilian v. Secomb.

Ibid. cites Co Litt. 304. and 4 H. 6. 16. a.

32. One Defendant could not plead two Pleas that went to the whole, (but now by 4 & 5 *Annæ* for Amendment of the Law he may.) 1 Salk. 218. pl. 3. Mich 5 W. & M. in B. R. Combe v Talbott.

33. 4 & 5 *Annæ, cap.* 16. *S.* 4. Enacts, that *it shall be lawful for any Defendant or Tenant, or Plaintiff, in any Replevin, in any Court of Record, with Leave of the Court, to plead as many several Matters as are necessary.*

Plaintiff brings a Writ of Error to reverse a common Recovery. Defendant moved for Liberty to plead Double. The Motion was opposed, because the Act for the Amendment of the Law, whereby a Defendant, by the Leave of the Court first obtained, may plead Double, was not to be understood of a Defendant in a *Writ of Error,* but a Defendant in an original Action: But it was insisted upon by the Counsel on the Side with the Motion, That this Act did extend to the Defendant in a Writ of Error, as well as in an original Action; that the one might have as great Occasion of pleading double as the other; That it had lately been resolved, that a Writ of Error did not abate by the Death of one of the Plaintiffs, whereas, as the Law stood before that Act of Parliament, it would; That by the same Reason by which the Word Plaintiff, in that Part of the Act of Parliament, was to be extended to a Plaintiff in Error, the Word Defendant should likewise. It was further urged, that the pleading Double was at their own Peril; for if the Court had not Power by this Act of Parliament to grant them Leave to plead Double, the other Side may demur; And to this Opinion the Court inclined; But the Court made their Motion fruitless, by declaring, that one of the Things they designed to plead, did upon the Record appear to be false. 10 Mod. 326. Pasch 2 Geo. B. R. Hurtson v. Aglionby.

The Court was moved for Leave to plead and *demur,* but refused the same; For demurring is not pleading. 10 Mod. 280 Hill. 1 Geo B. R. Havton & al' (Assignees) v Jeffreys.

An *Heir* shall not have Leave to plead *Riens per Descent* with another Plea, except he make *Affidavit* that he has Riens per Descent; nor shall an *Administrator* have Leave to plead *Plene Administravit, and No Assets,* without an Affidavit that he has no Assets. 10 Mod. 334. Trin. 2 Geo. B. R. Carrington v. Warren.

34. Upon a Writ of Error brought upon a *Judgment* in C. B. *in a Formedon in Remainder* for Lands in Lincolnshire, the Case was this, viz. Sir Edward Hussey the *Demandant counted of a Gift by Sir Thomas Hussey* to J. B. R. M. and T. L. Esq; *in Fee, to the Use of the said Sir Thomas, and the Heirs Male of his Body begotten upon the Body of S. his Wife,* and for Default of such Issue, *to the Use of the Heirs Male of the Body of the said Sir Thomas,* and for Default of such Issue, *to the*

Comyns's Rep 260 pl. 143 S. C. but no Judgment.

Use of William Hussey, Esq; for Life, and after his Deceafe *to the Use of the first and every other Son of the said William in Tail Male*, and for Default of fuch Iffue, and if the faid Williams's Wife fhould be with Child at the Time of his Deceafe, and fuch Child fhould be a Son, *to the Use of* fuch *posthumous Son, and the Heirs Male of his Body*, and for Default of fuch Iffue, *to the Use of Sir Edward the Demandant*, and that the faid *William H. died in the Life-time of the said Sir Thomas without Heir Male* of his Body, *and* that *there was not any posthumous Son* of the faid William, and that afterwards the faid *Sir Thomas died without Heir Male of his Body*, fo that the Right remained in the faid Sir Edward the Demandant &c.

The Tenants, having obtained Liberty to plead Double, *pleaded* 1ft. *That* the faid *Sir Thomas being seised* of &c. *in Fee the 8th. Decemb.* 1682, *by Indenture of Bargain and Sale* between the faid Sir Thomas of the one Part, and the faid J. B. R. M. and T. L. by the Name of T. L. of London, Merchant, of the other Part, *bargained and sold to the said J. B. R. M. and T. L.* the &c. *for one Year*, from the Day next before the Date of the faid Indenture, by Virtue of which Indenture of Bargain and Sale &c, the faid J. B. &c. were poffeffed &c. *and that on the 9th of December* 1682, *by another Indenture made between the said Sir Thomas and several others* (naming them) *of the one Part, and the said J. B. R. M. and T. L.* by the Name of as above, *of the other Part*, the faid *Sir Thomas released his Reversion* of the &c. *to the said J. B. R. M. and T. L. and their Heirs, to the Use of the said Sir Thomas for Life without Impeachment of Waste, and after his Deceafe to the Intent that S. his Wife should receive* 600 *l. per Annum for her Life*; and as to the faid &c. charged with the faid 600 l. per Ann. after the Deceafe of the faid Sir Thomas, to the Ufe of the faid J. B R. M. and T. L. for 500 Years, upon Truft &c. And after the Determination of the faid Term, to the Ufe of the Heirs Male of the Body of the faid Sir Thomas, begotten upon the Body of his faid Wife, and for Default of fuch Iffue, to the Ufe of the Heirs Male of the Body of the faid Sir Thomas, and for Default of fuch Iffue, to the Ufe of William Huffey of London, Merchant, Brother of the faid Sir Thomas, for Life, and after his Deceafe to the Ufe of the firft, and every other Son of the faid William in Tail Male, and for Default of fuch Iffue, and if the faid William's Wife fhould be with Child at the Time of his Death, and fuch Child fhould be a Son, to the Ufe of fuch pofthumous Son, and the Heirs Male of his Body, and for Default of fuch Iffue, to the Ufe of the faid Sir Edward the Demandant for Life, (with divers Ufes over by way of Remainder) and that *by the same Indenture of Release it was provided, that the said Sir Thomas might revoke, or alter all or any of the Uses or Estates in the said Release, and declare and limit any other Uses or Estates*, as to the faid Sir Thomas fhould feem meet, and that *on the* 12 *Feb.* 1 *Jac.* 2. *the said Sir Thomas, in Pursuance of the said Power, by a Writing signed and sealed &c. revoked the said Use and Estate limited to the said Sir Edward* the Demandant, *and that afterwards*, viz. 1 *May* 1701, *the said Sir Thomas, by another Writing signed and sealed &c. revoked all the Uses and Estates limited by the said Release concerning the Lands in Question, and limited the Use thereof to himself in Fee, and died so seised, upon whose Death the Lands descended to the Defendants as his Heirs* &c. *absque hoc that the said Sir Thomas gave the Lands* in Queftion, *Modo & Forma as the Demandant has alleged &c.*

And the *said Tenants for their second Plea pleaded the same Matter in Bar, concluding with an hoc parat' verificare* &c.

The

The Demandant averred, that the said William Hussey, Esq; and the said William Hussey of London, Merchant, Brother of the said Sir Thomas, are the same Persons, and demurred to the Pleas, and for Cause said, that the several Matters pleaded by the Tenants were inconsistent and repugnant in themselves, and every of the said Pleas are either Contradictions to itself, or to the other, (viz.) the second Plea was repugnant to the first in this, that the second supposed and confessed the Gift of the Lands in Question as the Demandant alleged, and upon that Supposition it was founded, otherwise it was superfluous, and to no Purpose, and the Inducement to the Traverse in the first Plea supposed the Gift to be made to the same Effect contained in the Writ and Count, though not in the same Words, and upon that Supposition the said Power of Revocation, and the Revocation of the Use and Estate limited to the said Sir Edward, were in both the Pleas (though insufficiently) pleaded, yet the said Gift, as alleged by the said Sir Edward, was by the first Plea traversed and denied, and so the first Plea repugnant to itself, and to the second Plea; and where in the said Pleas after the Pleading of the Indenture of Bargain and Sale it was said, By Virtue of which Indenture of Bargain and Sale &c. whereas it ought to have been said, By Virtue of which Bargain and Sale &c. and not By which Indenture &c. Also the Tenants did not produce nor allege to have produced the Writings mentioned to be sealed with the Seal of the said Sir Thomas, whereby the Uses aforesaid were alleged to be revoked. Moreover, if the first Plea was not repugnant as aforesaid, it at the best only amounted to the General Issue, and so ought to have been pleaded Generally; and though it was lawful for the Tenants with Licence to plead several Matters, no one can plead several Matters which are inconsistent, or the same Matter several Ways.

Lastly, that the Pleas were insufficient, because it did not appear whether William Hussey named in them, and William Hussey named in the Writ and Count, were the same Person or divers, nor whether the said William, at the Time of the first Revocation, was dead without Heir Male of his Body, or leaving such Issue, or was then alive. The Tenants joined in Demurrer, and in C. B. the Pleas were held good, and Judgment given for the Tenants.

The Demandant brought Writ of Error, and assigned the general Error, and also the said Matters shewn for Cause of the Demurrer, and upon Argument the whole Court held the Pleas good, and as to the Repugnancy of the said Pleas which was the chief Point insisted upon, held that the said Pleas were consistent; for both the Pleas consisted of the same Matter though it was pleaded with divers Views, and to divers Intents, the Reason whereof was, because the Tenants doubted whether the Deed, being something various in its Limitations from the Gift counted upon, would be adjudged the same Gift, and therefore got Leave to plead Double, to the End they might be safe, whether the Deed was adjudged the same, or not the same Gift whereupon the Demandant counted. Judgment affirmed. MS. Rep. Hill. 3 Geo. B. R. Hussey v. Hussey.

35. Double Plea was allowed on a Promise of Marriage, viz. *Non Assumpsit and Infancy*. Gibb. 175. pl. 23. Pasch. 3 Geo. 2. B. R. Holt v. Ward.

So *in Case upon several Promises*, viz. *Non Assumpsit and the Statute of Limitations*. Gibb. 189. pl. 1. Hill. 4 Geo. 2. B R. Decosta v. Carteret.

36. A Motion was made for Liberty to *rejoin double*, as being within the Equity of the Act, which allows pleading double. But the Court said, that they thought that this would be intirely inconvenient and

and out of the Reason of the Act, and therefore refused it. 2 Barnard. Rep 6. Trin 5 Geo. 2. Anon.

Cases of Pract. in C. B. 154. S. C. accordingly.

37. A Rule to plead double, viz. *Non Assumpsit*, and a *General Release* was discharged because these Pleas are *contradictory*. Notes in C. B. 228. Hill 6 Geo. 2. Gibson v. Cole.

Cases of Pract. in C. B. 154. S C accordingly.

38. In *Trespass* for entering of Plaintiff's Close and pulling down a Weare. Defendant moved to plead double, viz. *Liberum Tenementum* and a *Justification* of pulling down the Weare *as a Nusance*, and a Rule Nisi was obtained; but was afterwards on hearing Counsel on Sides discharged by the Court, the Matters prayed to be pleaded being inconsistent. Notes in C. B. 229. Trin. 6 & 7 Geo. 2. Halsey v. Feltham.

Cases of Pract. in C. B. 154. S. C. accordingly.

39 Defendant obtained a Rule Nisi to plead double, *Non Assumpsit* and *Non Assumpsit infra sex annos*. Plaintiff shewed for Cause, that the Rule to plead was expired before the Motion to plead double was made; but Court held that Defendant was *proper to move to plead double any Time before Judgment signed*. Notes in C. B. 229. Mich. 7 Geo. 2. King v. Boswell.

Cases of Pract. in C. B. 154 S. C. and the Motion denied.

40. Action was brought *against an Innkeeper for detaining two Horses* of the Plaintiff's. It was moved to plead double, viz. *Not Guilty*, and an *Accord and Satisfaction*, and would have compared it to Non Assumpsit and Non Assumpsit infra sex annos. The Court denied to make any Rule, the Matters prayed to be pleaded being *contradictory*. Notes in C. B. 230. Hill. 7 Geo. 2. Dursley v. Cole.

41. A Rule was made for Plaintiff to shew Cause why Defendant should not plead double, viz. *Non Assumpsit* and *Non Assumpsit infra sex annos*. Plaintiff on shewing Cause, produced an Affidavit *that Defendant had not appeared*, and consequently not being in Court was not proper to make the Motion, and the Rule was discharged. Notes in C. B. 233. Mich. 8 Geo. 2. Benn v. Geary.

Cases of Pract. in C. B. 153. S. C. says that the Motion was granted. —— See the Note at the next Plea.

42. It was moved to plead double, *Non Assumpsit* and *Plene Administravit*, which was denied by the Court, *no Affidavit* being *produced that Defendant had fully administered*. Notes in C. B. 234. Mich. 8 Geo. 2. Heathfield v. Allen.

Cases of Pract. in C. B. 153. S. C. and says that the Motion was granted. — Ibid. 154. The Reporter adds a Note that Affidavit must be made by the Executor or Administrator that he hath fully administered and by the Heir that he has nothing by Descent, before Motion.

43. On Motion to plead double, *Solvit ad Diem* and *Riens per Descent*, it was objected that an *Affidavit of the Fact* as to Riens per Descent ought to be produced from the Heir, as from an Executor or Administrator in a Plene Administravit, and the Objection was held good. No Rule. Notes in C. B. 234. Mich. 8 Geo. 2. The Burgesses of Wisbetch v. Frier.

44. Defendant *Non Assumpsit infra sex Annos*, and *Plaintiff demurred* to the Plea; The Matters in Question *being Actions between Merchant and Merchant*; and *Defendant* thereupon *moved to add to his former Plea a general Non Assumpsit upon Payment of Costs*; but this was *denied*. Notes in C. B. 234. Hill. 8 Geo. 2. Peirson v. Ives.

45. Motion to plead double, viz. *Non Assumpsit*, and *several Matters set off against Plaintiff's Demand* was denied per Cur. as *contradictory*. The general Issue must be pleaded with Notice to set off pursuant to the Statute. Notes in C. B. 236. Pasch. 8 Geo. 2. Jarratt v. Robinson.

46. A

46. A Motion to plead double, viz. *Nil debet* and *Nil habuit in Tenementis* was refused. Per Cur. The latter may be given in Evidence upon the former. Notes in C. B. 236. Trin. 8 & 9 Geo. 2. Marshal v. Lawrence.

Cases of Pract. in C B. 154 S. C. accordingly.

47. In a Prohibition it was moved to plead double, viz. *That J. C. &c. named in the Declaration at a Meeting &c. did not make up a true and just Account &c. and that the Account mentioned in the Declaration was not examined, allowed and approved by the Vestry*; and the same was granted on hearing Counsel on both Sides. Cases of Practice in C. B. 122. Mich. 9. Geo. 2. Coates v. Smith and Midgeley.

48. In Trespass it was moved for Defendant for Leave to plead doubly, viz. *Non cul'* and *Liberum Tenementum* of the Liberty of St. Catherine's, and obtained a Rule to shew Cause, which was afterwards made absolute upon an Affidavit of Service, no Cause being shewn. Notes in C. B. 241. 10 Geo 2 Stibbs v. Neeves.

Cases of Pract. in C. B 153. S. C. the Motion was granted and not opposed.

49. In Replevin the Court gave Leave to plead doubly, viz. *That Plaintiff in Replevin had not Property*, and a *Justification as a Distress for Rent*. Notes in C. B. 244. Mich. 10 Geo. 2. Bird v. Spincks.

Cases of Pract. in C. B. 153. S. C. accordingly.

50. *After a Judge's Order for Time to plead, pleading an issuable Plea*, Defendant moved to plead double Matter, and the Question was, Whether a Rule for that Purpose ought to be granted or not? The Court took Time to consider, and after conferring with the Judges of the other Courts, gave Defendant Leave to plead doubly, pleading issuable Pleas, and taking short Notice of Trial. Notes in C. B. 244. Mich. 10 Geo. 2. Leighton v. Leighton.

Cases of Pract in C B. 154. S C. accordingly.

51. Defendant had *pleaded Non Assumpsit infra sex annos*, and moved to add to that Plea *Non Assumpsit generally*, which was denied. After Defendant hath pleaded a single Plea, he cannot have Leave to plead doubly. Notes in C. B. 245. Hill. 10 Geo. 2. Nevil v. Fisher.

Cases of Pract. in C. B. 154. S. C accordingly, after a single Plea of Non Assumpsit.

52. In Trespass it was moved to plead doubly, *Not Guilty*, and a *Justification*, which was denied as contradictory. Notes in C. B. 245. Hill. 10 Geo. 2. Barnett v. Greaves.

Cases of Pract in C. B. 154. S C. accordingly.

53. Assumpsit. *Defendant paid 10 l. on the Common Rule*, and afterwards obtained a Rule to plead double, *Non Assumpsit* and *Non Assumpsit infra sex annos*. Plaintiff moved to set aside the double Plea with Costs, and had a Rule to shew Cause, which was made absolute. Plaintiff by the Rule to pay Money into Court is confined to plead the General Issue, and no other Plea. The Motion afterwards to plead Double is an Imposition on the Court. Notes in C. B. 245, 246. East. 10 Geo. 2. Buck v. Warren, Attorney, in Case.

Cases of Pract. in C. B. 154 S C accordingly.

54. It was moved to plead double, viz. *Damage-Feasant*, and under a *Demise from Defendant to Plaintiff*. Ch. J. said he thought them inconsistent; but as Defendant obtained a Rule to shew Cause, and Plaintiff did not oppose it, it must be absolute. Notes in C. B. 246. East. 11 Geo. 2. Church v. Fendall.

Cases of Pract. in C. B. 153. S. C. accordingly.

55. The Court gave Defendant Leave to plead doubly, viz. a *Distress for Damage-Feasant and for Rent in arrear*. This is not stronger than Not Guilty and Liberum Tenementum, *solvit ad Diem* and a *mutual Debt*, which have been granted. Notes in C. B. 247. Trin. 11 & 12 Geo. 2. Baynes v. Lutwidge.

Cases of Pract. in C. B. 153. S C accordingly

56. Defendant having obtain'd a *Rule to plead* doubly (*Non Assumpsit & Non Assumpsit infra sex annos*) Plaintiff mov'd to discharge it,

insisting that *Defendant* who *was a Prisoner in the Fleet at the Time of* his being charg'd with *the Declaration before this Rule obtained was discharged at the Sessions of the Peace, by the* compulsory Clause in the *Insolvent Debtors Act* 10 *Geo.* 2. *and being at large could not regularly apply for the Rule to plead doubly, withoutt first entering a common Appearance; which was not done.* The Question was never determined, but by Consent the Plaintiff had Leave to discontinue without Costs. Notes in C. B. 274. Trin. 11 & 12 Geo. 2. Cock v. Kerredge.

Cases of Pract. in C. B. 153. S. C. accordingly.

57. Rule made absolute to plead double, *Non assumpsit*, and Defendant's *Discharge under the Insolvent Debtors* Act. 10 Geo. 2. Notes in C. B. 252. East. 12 Geo. 2. Jones v. Body.

Cases of Pract. in C. B. 153. S. C. accordingly.

58. A Rule the same Term in Case of **Lisle v. Jennyns**, had been made to shew Cause, and absolute on Affidavit of Service (no Cause being shewn) to plead *Non est factum*, and *Defendant discharged* under the said Act. Notes in C. B. 252. Jones v. Body.

(C) Allow'd in what Cases, where there are several Defendants. And where the one pleads one Plea, and the other another.

1. IN *Writ against Ro. and W. Ro. made Default after Default*, and *W. was received to plead Sole Tenancy of Parcel, and Jointenancy of the Residue.* Thel. Dig. 214. Lib. 15. cap. 3. S. 3. cites Mich. 5 E. 3. 209. 229.

2. In a Writ of Error it was said Arguendo that where *Præcipe* is brought *against two Jointenants, Parceners*, or such like, *each may plead in Bar by himself of his Part*, and if *the one pleads a Plea which goes to all*, and it is *found for him and the Plea of the other is found against him*, yet *he shall loose his Moiety.* Br. Deux plees, pl. 4. cites 9 H. 6. 46.

3. *But* Quære if *Bastardy* be *pleaded by the one in Action Ancestrel, and another Plea by the other*, and the *Bastardy is found for him who pleads it, and the other Plea is found against the other* if this shall not serve both, But it was said that all is one, and that each may lose his Part; but Quære, because it was not adjudg'd. Ibid.

4. *But* if the *one pleads to the Writ and the other to the Action*, there the *Plea to the Writ shall be first try'd*; For if it be found for him all the Writ shall abate, and this shall serve both. Ibid.

5. *But in Trespass in Personal Action against two*, and the *one pleads one Plea, and the other another Plea which goes to all*, there *this shall serve both*; Quære in Action real. Ibid.

6. *And in Action* brought *against one* if he *pleads one Plea to Parcel, and the other Plea to the Rest, which goes to all*, there *the Plea which goes to all shall be accepted only*, and not the other be it in Action Real or Personal, because it is pleaded by one and the same Person. Ibid.

7. Quære where *two Pleas are pleaded by two in Præcipe quod* reddat *whether the one goes to all.* Ibid.

8. *Forger de Faits against three*, the *one made Default*, and *two appear'd*, and the *one pleaded the Death of the Third, who did not come, at D. in another County before the Writ purchased*, and the *other pleaded Not Guilty*, and *Ven. fac. issued upon both*, and after the *Plaintiff pray'd two Nisi Prius's upon those two Issues, and triable in two Counties.* Per Moyle

Moyle he cannot have both, but if the Iſſue of the Death be try'd then the other Iſſue is void, though it be try'd alſo. But per Priſot the Plea of the Death goes to the Writ, therefore the other ſhall have thereof Advantage, *Quære of ſeveral Pleas to the Action*, and therefore here the one may make an End of all, and therefore this ſhall be firſt try'd, and if it be found againſt the Defendant, then the other Plea ſhall be try'd for the other, but if it be found for the Defendant who pleaded the Death, the Writ ſhall abate in all, by which *Niſi Prius was granted only of the County where the Death is alleg'd.* Br. Deux plees, pl. 20 cites 37 H. 6. 37.

9. *In Præcipe againſt two*, if the *one pleads Baſtardy* and the *other Releaſe of the Demandant*, both ſhall be tried, and if the *Baſtardy* be *found* the other Iſſue is void becauſe the Baſtardy goes to all; Per Moile. But Priſot denied it, for in Plea of Land every one may ſave or loſe his Moiety, therefore if Baſtardy be found for the one, and Releaſe againſt the other, the Demandant ſhall recover one Moiety and ſhall be barr'd of the other Moiety only, and of no more. Ibid.

(D) Allowed in what Caſes, where one ſhall be ſaid to go to the Whole.

1. IN Præcipe quod reddat the *Tenant as to Parcel ſaid*, *that he had nothing unleſs as Baron of his Feme not named in the Writ*; Judgment of the Writ, and as *to the reſt he pleaded Nontenure*; Per Birton, he has pleaded two Pleas where the one, ſcil. the Nontenure goes to all, and prayed to be diſcharged of the one; and per Cur. he ſhall anſwer to both, and ſo he did, that is to ſay, to the one Parcel that he is ſole Tenant, and the Feme has nothing, and to the reſt Tenant as the Writ ſuppoſes, Priſt &c. Br. Deux Plees, pl. 12. cites 21 E. 3. 28.

2. In Dower the *Tenant to Parcel pleaded Jointenancy*, and *to the reſt Ne unques Accouple* in lawful Matrimony; and per Wich, he ſhall not have both, becauſe the one and the laſt Plea goes to all; but Finch contra, for if he has a Joint-Feoffee it is no Reaſon that he ſhall render the entire Damages, and alſo he cannot vouch without his Companion; but Wich contra. Br. Deux Plees, pl. 7. cites 40 E. 3. 31.

3. *And* that he cannot plead *Releaſe to Part, and another Anſwer to the reſt*, for the Releaſe goes to all; Per Wich. Ibid.

4. *But* 43 E. 3. 39. it is adjudged that *a Meſne Tenant ſhall not plead one Plea which goes to all, and another Plea to the reſt.* Br. Deux Pleas, pl. 7. cites 40 E. 3. 31.

5. *But* it was ſaid 9 H. 6. that *where two are impleaded in a real Action the one may plead a Plea which goes to all for his Part, and the other another Plea to the reſt*, and each ſhall loſe or ſave his Part according to the Trial of the Plea &c. and ſee 15 E. 4. 25. a Diverſity of thoſe Matters between real Actions and perſonal. Ibid.

6. In Dower the *Tenant pleaded that the Demandant detained Evidences where he is Brother and Heir to the Baron*, and the *Demandant ſaid that ſhe detained two Deeds becauſe Eſtate was made by them to her and her Baron*, and *to the reſt that ſhe is Enſient by her Baron*; Per Cand. the laſt Plea goes to all, and yet ſhe had both. Br. Deux Plees, pl. 8. cites 41 E. 3. 11.

7. In Formedon the *Tenant pleaded Nontenure to Parcel and* that the Demandant is a *Baſtard to the reſt*, and could not have both the Pleas becauſe the laſt goes to all. Br. Deux Pleas, pl. 9. cites 43 E. 3. 29.

8. Debt

8 Debt *of 20 l. against Executors*, and *to 10 l. they pleaded Acquittance of the Plaintiff made to the Testator*, and *to the rest fully administered.* Persey said the last Plea goes to all, but after he passed over. Br. Deux Plees, pl. 35. cites 48 E. 3. 18.

9. In Ward the Defendant *pleaded Nontenure to the Body*, *and* as *to the Land, that the Ancestor did not die his Tenant*, and had the one and the other by Award, and yet the last might have been pleaded to both. Br. Deux Pleas, pl. 10. cites 7 H. 4. 12.

Br. Replication, pl. 14 cites S. C.

10. And per Hank. in Præcipe quod reddat the *Tenant pleaded to one Acre Nontenure*, and *to the rest Release of Actions real and personal, and had loth*, and yet the last goes to all; the Reason seems to be inasmuch as they are *pleaded to several Parcels.* Ibid.

11. Debt *upon an Obligation of 20 l. to pay 10 l. at two Days*, and the *Defendant for the first Day shewed Acquittance*, and *for the last Day that he has been always ready, and yet is, and brought the Money into Court*, and the *Plaintiff to the Acquittance demurred because it had no Seal, and to the other Plea said that he had not been always ready*, and was not suffered to have both by Replication because if the Condition be broken in Part it is broke in all, and therefore he was compelled to hold to the one, and so he did, scil. That he has been always ready &c. Br. Deux Pleas, pl. 11. cites 14 H. 4. 30.

12. In Ward the *Defendant as to Body said, that the Ancestor of the Infant held Land of A. who held over of the Demandant Que Estate he has in the Ward, and* as *to the Land that he and the Ancestor of the Infant held jointly, and he survived*, and it was determined that he should hold him to the Jointenancy, for this goes to all, by which he *said that W. leas'd the Ward of the Body to the Defendant, and vouched him to Warranty*, and *as to the Land pleaded Jointenancy by Fine* as above, and it was awarded that he shall have both, by reason of excusing the Damages and to put it upon the Voucher. Br. Deux Pleas, pl. 13. cites 7 H. 6. 14.

* Orig. (terre) but the other Editions are 3 s.

13. Debt *upon a Lease for 10 Years rendering Rent*, and *for Arrear of eight Years* &c. Fullthorp said *Green Acre is Parcel* of the Premisses which was assessed to * 3 s. at the Time of the Demise, *into which the Plaintiff entered three Years after the Lease, before which Entry as Parcel nothing Arrear and as to the rest he owes him nothing*, *Prist*, where *one intire Rent was reserved for all*, and the Opinion of the Court was, that the Entry into Parcel goes to all the Writ. Br. Deux Plees, pl. 14. cites 7 H. 6. 26.

14. In Wast the *Defendant pleaded to Part that the Plaintiff had an elder Brother who survived the Father and died, after whose Death no Wast done*, and *to the rest that the Plaintiff had another Coparcener in full Life not named*; Judgment of the Writ, and by some the first Plea goes to all, but by the best Opinion the last Plea goes to all clearly. Br. Deux Plees, pl. 3. cites 9 H. 6. 11.

15. *Forger de Faits of Land in four Vills* &c. the *Defendant as to three Vills said that the Plaintiff never any Thing had*, and *to the Rest conveyed Estate to himself, absque hoc that he forg'd Modo et Forma.* Per Newton this last Plea goes to all, but the Court was against him. Br. Br. Deux plees, pl. 29. cites 10 H. 6. 24.

16. *And* per Cur. if *in Præcipe quod* reddat the *Tenant pleads Release to Parcel, and Bastardy in the Demandant to the Rest* this shall not be suffer'd; For the last Plea goes there to all; note the Diversity. Ibid.

17 In *Annuity* the *Defendant pleaded Acquittance of two Years*, and *to the Rest that he offer'd to the Plaintiff a competent Benefice which was the Condition of the Grant, and he refus'd*, and because this Plea goes to all, the first Plea was ousted; For Debt shall lie of the Arrears before. Br. Deux plees, pl. 15. cites 19 H. 6. 54.

18. *In*

19. *In Trespass of a Villein in his Service being taken*, Frank and *of Frank-Estate goes to all*, without answering to the Service; Quære by others. Br. Deux plees, pl. 16. cites 22 H. 6. 30.

Br. Repleader, pl. 22. cites S. C.

20. *And in Trespass de Muliere abducta cum bonis viri*, Never his Feme is a good Plea to all, per Fulthorp, but Ascue contra; For he shall answer to the Goods also. Ibid.

21. *Trespass of Trees cut and carried away*, the *Defendant as to the Trees pleaded Gift of the Plaintiff before the Trespass*, and *to the cutting and carring away Not Guilty*; And per Littleton the last Plea goes to all, but Prisot said No, but in Trespass against two if the one pleads Release, and the other another Plea, there the Release goes to all if it be first try'd. Br. Deux plees, pl. 5 cites 33 H. 6. 12.

22 If *Baron and Feme plead Misnosmer of the Feme*, it goes to all the Writ if it be found, and yet the Baron shall plead another Plea for himself also; and so he did, quod nota, and so two Pleas; and yet the one goes to all. Br. Deux plees, pl. 6. cites 33 H. 6. 22.

Br. Misnosmer, pl. 8. cites S. C.

23. In *Dower*, the *Tenant pleaded Nontenure to Parcel*, and *to the Rest that the Demandant detain'd from him certain Evidences which concern'd the same Land*, and had both; For the last Plea goes but to this Parcel of which the Tenant takes the Tenancy. Br. Deux plees, pl. 36. cites 33 H. 6. 51.

24. *Trespass in three Acres* of Land, the *Defendant justified for the third Part by one Title*, and *in the other two Parts by another Title*, and well; For it may be that it is in Severalty, the third Part from the two Parts; For otherwise, the one Plea goes to all. Br. Deux plees, pl. 30. cites 37 H. 6. 39.

25. In *Debt upon arrears of Annuity granted pro Concilio impenso* &c. against the Successor of an Abbot, the *Defendant*; *as to the Arrears between such a Feast and such a Feast, said, that the Predecessor requir'd Counsel in such a Matter at D. and he there refus'd to give Counsel*; *and to the Arrears before, that he did not give Counsel* &c. and had both Pleas; For though the Annuity was determin'd by the Refusal, yet Debt lies of the Arrears before, and this Action is Debt, but in Action of Annuity, there the Refusal goes to all of this Nature of Action Note the Difference in Annuity, and e contra in Debt upon arrears of Annuity. Br. Annuity, pl. 28. cites 39 H. 6. 22.

Br Deux plees, pl 22. cites 39 H. 6. 21. S. C.

26. *Action of divers Trespasses*, the *Defendant to some pleaded Not Guilty*, and *to the Rest Arbitrement of all Trespasses*, and were at Issue of this, and *found for the Plaintiff*, and by some this last Plea goes to all, and by several none shall have Advantage of the last Plea but the Party, but any as Amicus Curiæ may shew to the Court that the one Plea goes to all, and the Court ex Officio shall discharge all but that; and after it was said per Cur. that it is better for the Plaintiff to release Part of his Damages and to have Judgment of the Rest; For where diverse Trespasses are, and divers Pleas pleaded, and found for the Plaintiff, and the Damages are sever'd, the Plaintiff may release his Damages for Part, and pray Judgment for the Rest; and so is sure. Br. Deux plees, pl. 23. cites 5 E. 4. 124.

Br Office, del &c. pl. 23. cites S C.

27. In *Assise by B. and S.* the *Defendant pleaded against B. that he is an Alien born*, and *against S. that he had never such Office of which the Assise is brought*, and *it was held that the last Plea goes to all against both*; For if there be no such Office, no Assise lies. Br. Deux plees, pl. 24. cites 7 E 4. 29.

28. A Man *shall not have two Pleas where the first goes to all.* Br. Deux plees, pl. 25. cites 12 E. 4. 10.

Br. Trespass, pl. 329. cites S C.

For more of Double Pleas in General, See other Proper Titles.

Dower.

What it is, and the ſeveral Sorts and Incidents.

At this Day Dower is not taken by the Profeſſors of the Common Law, either for the *Land which the Wife brings with her in Marriage* to her Husband, for then it is either called in Frank Marriage or in Marriage, *nor* for the *Portion of Money or* other *Goods* or Chattels which ſhe brings with her in Marriage, for that is called her Marriage-Portion. And yet *of antient Time Dos Mulieris*, the Dower or Dowry of the Woman was alſo applied to them; but it is now commonly taken for her *third Part* which ſhe hath *of her Husbands Lands* or Tenements. Co. Litt. 31.

1. DOWER is Propter onus Matrimonii & ad ſuſtentationem Uxoris & Educationem liberorum cum fuerint procreati, ſi Vir præmoriatur. Et hoc proprie dicitur Dos Mulieris ſecundum Conſuetudinem Anglicanam. Co. Litt. 30. b.

2 Littleton divides Dower into 5 Parts, viz. Dower by the *Common Law*. By *Cuſtom*. *Ad Oſtium Eccleſiæ*. *Ex Aſſenſu Patris*. And *De la pluis Beale*. Litt. S. 38. and S. 48.

3. Three Things *belong* to Dower, viz. *Marriage*. *Seiſin*. *Death of the Husband*. Co. Litt 31. a.

4. Concerning *Seiſin*, it is *not neceſſary* that the ſame ſhould *continue* during the Coverture; For albeit the Husband aliens the Lands and Tenements, or extinguiſhes the Rents or Commons &c. yet the Woman ſhall be endowed. Co. Litt. 32. a.

* Fol. 675.

(A) *What Woman* ſhall be endowed.

Br. Dower, pl. 36. cites 12 H. 4. 1. —— Co. Litt. 40. a. S. P. cites 12 H. 4. 2. and 7 H. 6. 11, 12.

1. **If a Man marries a** Woman of an hundred Years of Age, **yet ſhe ſhall have Dower, though by Poſſibility of Nature ſhe cannot have Iſſue.** 12 **H.** 4. 2. **b.**

Feme of the Age of ſeven Years ſhall not have Dower. Br Dower, pl. 36. cites 12 H 4. 1 —— And if *ſhe is of nine Years, and the Baron is not of ſeven* Years of Age, ſhe ſhall not have Dower; Contra *if he is ſeven at the Time of his Death*. Br Dower, pl. 88. cites Doct. and Stud. lib. 1. cap. 7. fol. 15. and Parva Na. Br. fol. 7. —— If ſhe be nine Years old at her Husband's Death, ſhe ſhall have Dower. 2 Inſt. 234. —— See (E) infra.

2. **If the Husband** dies before his Wife is of the Age of 9 Years, **ſhe ſhall not be endowed. Litt.** 8. 12 **H.** 4. 3.

3. **Rot. Parliamenti** 8 **H.** 5. **Numero** 15. **the Commons prayed, That all Manner of** Women Aliens **that ſhould be married to Engliſhmen by the Royal Licence, ſhould be endowed &c.**

(B)

(B) ANSWER.

[4] Let it be done as desired by the Petition.

This is Printed as in the Original.

1. [5.] Rot. Parliamenti, 9 H. 5. Numero . A Petition was delivered to the King in this Parliament for Beatrice, who was the Wife of Thomas, late Earl of Arundel, shewing, That whereas she was born in Portugal, and took to Husband the said Earl, who was seised in Fee, and Fee-Tail, of divers Castles, Lands &c. The Heirs and Tertenants now disturbed her of her reasonable Dower, because she was born and begotten in the said Land of Portugal, that it would please him to declare and ordain by Authority of Parliament, that she should have her Dower.

This is Printed as in the Original.

(C) ANSWER.

1. [6.] The King, of the Assent of the Lords in this Parliament, hath declared openly, and ordained in the same Parliament, as she hath desired.

2. [7.] In some Cases a Woman shall be endowed, though there is a Divorce between her and her Husband. 39 E. 3. 33. But quære.

8. In 28 Eliz in Case of one Serle, it was argued by the Justices of C. B. if the *Issues of Priests* were legitimate, and Popham Attorney says, when he was Serjeant, it was adjudged that the *Wife of a Priest* should have *Dower*. D. 185. pl. 65. Marg.

9. The Policy of the *Common Law* may make a Quoad, as in 22 El. D. 274. a *Marriage infra Annos nubiles* is *perfect* Quoad Dotem, but as to other Purposes it is only Inchoatum & Imperfectum. 6 Rep. 40. b. Mich. 3 Jac. B. R. Mildmay's Case.

10. If a Freeman took a *Nief* to Wife, she should have been endowed; but the Wife of an *Ideot*, *Non Compos*, *outlawed*, or *attainted* of Felony or Trespass, attainted of Heresy, Præmunire, or the like, shall be endowed. Co. Litt. 31. a.

11. *But* if the Husband be attainted *of Treason*, though it be for Treason done after the Title of Dower, she shall not be endowed. Co. Litt. 31. b.

12. If a *common Person* takes an *Alien to Wife*, and dies, she shall not be endowed; But if the *King marries an Alien*, she shall be endowed by the Law of the Crown. Edmond, the Brother of King E 1. married the Queen of Navarre and died, and it was resolved by all the Judges, that she should be endowed of the third Part of all the Lands whereof her Husband was seised in Fee. Co. Litt. 31. b.

13. It is necessary that the *Marriage* do *continue*, for if that be *dissolved* the Dower ceaseth, *Ubi* nullum Matrimonium ibi nulla Dos; but this is to be understood when the Husband and Wife are divorced *a vinculo Matrimonii*, as in Case of Pre-contract, Consanguinity, Affinity &c. and *not a Mensa & Thoro* only as for Adultery. Co. Litt. 32. a.

14. If a Jew born in England take to Wife a *Jew* born also in England, and the *Husband is converted to the Christian Faith*, and purchases Lands, and infeoffs another, the Wife shall not be endowed. Co. Litt. 31. b. 32. a.

15. If

15. If a *Marriage de Facto* be *voidable by Divorce in respect of Consanguinity* &c. whereby the Marriage might have been dissolved, and the Parties freed a Vinculo Matrimonii, yet if the *Husband dies before any Divorce* then for that it cannot now be avoided, this Wife in Facto shall be endowed, for this is legitimum Matrimonium; and so in a Writ of Dower the Bishop ought to certify that they were Legitimo Matrimonio copulati, according to the Words of the Writ. Co. Litt. 32. a. and says that herewith agrees 10 E. 3. 35.

16. If a Man takes a *Wife of the Age of seven Years*, and after *aliens his Land*, and after this Alienation the Wife attains to the Age of nine Years, and after the Husband dies, the Wife shall be endowed; for although she was not absolutely dowable at the Time of the Marriage, yet she was conditionally dowable, viz. If she attained to the Age of nine Years before the Death of her Husband; For so Littleton here says, so that she pass the Age of nine Years at the Death of her Husband; for by his Death the Possibility of Dower is consummate. Co. Litt 33. a

17. If the Wife be *past the Age of nine Years at the Death of her Husband* she shall be endowed, of what Age soever the Husband be, although he were but four Years old. Quia junior non potest dotem promereri neque virum sustinere, nec obstabit Mulieri potenti Minor ætas viri, wherein it is to be observed that though Consensus non Concubitus facit Matrimonium, and that a Woman cannot consent before twelve, nor a Man before fourteen, yet this inchoate and imperfect Marriage (from the which either of the Parties may disagree) after the Death of the Husband shall give Dower to the Wife, and therefore it is accounted in Law after the Death of the Husband Legitimum Matrimonium, a lawful Marriage, quoad dotem. Co. Litt. 33. a.

18. The *Wife of a Man who is banished* shall have Dower in his Life-time if she has not a Jointure; if she has a Jointure she shall enjoy it in the Life-time of her Husband. Banishment is by Abjuration or by Parliament. Jenk. 4. pl. 4. Weyland's Case.

19. If a Man take an *Alien* to Wife, and then sells his Land, and his Wife is made a *Denizen*, she shall not be endowed by Virtue of the Denization; but it is otherwise if she be *naturalized* by Act of Parliament. Co. Litt. 33. a.

(D) *Of what Things* she shall be endowed.

Br. Dower, pl. 31. cites S. C.

1. She shall not be endowed of the Goods of her Husband. 7 H. 4. 13. b. Vetus Nat. Brevium 7. b.

Br. Dower, pl. 31. cites S. C. but that the Laws of England is contrary; and that the Civil Law does not give it of the Land.

2. But by the Civil Law she shall be endowed of the Goods. 7 H. 4. 14.

3. She shall be endowed of Villeins regardant. 2 H. 6. 11. b.

S. P. and *so of Villein appendant*, and the *Writ shall be De Libero Tenemento.* Br. Dower, pl 91. cites 2 H. 6. 11. ——— She shall be indowed of a Villein, either the third Day's Work, or every third Week or Month Co. Litt. 32. a. —— Ibid 164 b. S. P. ——— Ibid. 307. a. S. P. for in him a Man may have an Estate in Fee, or Fee Tail, or for Life or Years.

4. So she shall be endowed of Villeins in Gross, for this is an Inheritance. 2 H. 6. 11. b. Vet. Nat. Br. 7. b.

5. She

5. She shall not be endowed of a Common sans Number, because then the Land would be doubly charged. Co. 11. *Rich. Godfry* 45. *Perkins*, S. 341. Det. Nat. B. R. 7. b. P. 9 Car. B. R. between * *Fewett and Drake*, per Curiam agreed in a Writ of Error upon a Judgment in Dower, but Judgment affirmed, because it shall not there be intended to be Common sans Number, but appendant.

Co. Litt. 32. a. S. P. but of a Common certain she shall be endowed. — * Cro. C. 300 pl. 3. S. C. the Demand was of Dower in a Messuage, Land, Meadow, Pasture, and of Common of Pasture, pro omnibus Averiis cum Pertinentiis in C and the Judgment being after a Verdict which finds that the Husband was seised, quod Dower &c. and by Intendment it appeared upon the Evidence that it was such a Common as went with the Land whereof she was dowable; and if it had been Common in Gross without Number the Judge before whom the Trial passed would have directed it to be found against the Defendant. ——— Jo. 315. pl. 2. Breewood v. Drake S. C. adjudged. And a Nota is added that a Precedent was shewn of 4 Jac. where a Demand was of Dower inter alia of Common Generally, and Judgment given for the Plaintiff.

6. She shall be endowed of the Office of Marshalsea de B. R. 21. E. 3. 57. b. admitted.

Fol. 6[illegible]6

Co Litt. 32. a. S. P. and so as to the Profits arising from the Custody of the Gaol of Westminster-Abbey, and says that therewith agrees reverend Antiquity. ——— Thel al Dig 67 lib. 8. cap. 5 S 2. cites Trin. 21 E. 3. 35 S P. ——— F. N. B. 8. (K) in the new Notes there (b) cites S. C.

7. The Queen shall not be endowed of the Crown. Liber Successionis. 92. b.

8. A Woman shall not be endowed of the Castles of her Husband which are de Guerra. 1 E. 1. Rot. Patentium Membrana 17. fol. 3 resolv'd as it appears by a Writ to the Steward of Ireland to reform such Endowments there. Otherwise of the Queen. 2 E. 1. Rot. Pat. M. 3. Dorso.

A Man *seised of Half an Acre of Land made a Feoffment*, and the *Feoffee made there a Castle or House*, the *Feme of the Feoffor* brought Dower and *recovered in Value* by Award, *but not the third Part* Br Dower, pl 81. cites 30 E 1. ——— Co Litt. 31 b. S P. ——— But where they are not for the necessary Defence of the Realm the Wife may be endowed thereof Co Litt 165 a at the bottom ——— 2 Inst 17. S. P. accordingly in the Exposition of the Word Castrum in the Statute of Magna Charta. cap. 7.

9. A Woman shall not be endowed de Homagiis of her Husband quæ sunt de Guerra, 1 E. 1. Rot. Pat. M. 17. resolved.

10. The Wife shall not be endowed of the capital Messuage. The Law of Scotland agrees with this. Skene Regiam Majestatem 41. b. Vers. 62.

Of the principal Mansion or capital Messuage a Woman shall be endowed, si non sit Caput Comitatus vel Baroniæ, for the Honour of the Realm. Co. Litt. 31. b.

11. Writ of Dower was maintain'd of the *Profits of a Market*. Thel. Dig. 68. Lib. 8. cap. 7. S. 2. cites Hill. 12 E. 2. Dower 157.

12. It was said that a Feme might bring Writ of Dower of *Common of Pasture* with a certain Number of Beasts. Thel. Dig. 67. Lib. 8. cap 5. S. 15. cites Trin. 4 E. 3. 146. and that so it is said by Littleton Pasch. 4 E. 4. 2. and says see 12 E. 2. Dower 161. accordingly.

F. N. B. 148. (C) S. P.

13. And of *Stallage* arising from a Fair, making the Demand de tertia Parte Stallagii avenant &c. and not of Profits arising from the Stallage &c. Thel. Dig. 68. Lib. 8. cap. 7. S. 2. cites Mich. 11 E. 3. Dower 85.

Co. Litt 32. a. S. P. — F. N. B. 8. (K) in the new Notes there (b.) cites S. C. For the Stallage is the Profits.

As of the Office of Bailiff, Parker &c. without demanding the third Part of the Office of it; which cannot be, because the Office is intire. But Quære of the Office of Tentury F. N. B. 8. (K) in the new Notes there (b.) cites S. C.

14. Dower of the *Profits of an Office* was maintain'd without demanding of the Office itself. Thel. Dig. 67. Lib. 8. cap. 5. S. 3. cites 12 E. 3. Dower 90.

15. A Man shall not have Assise of the *Farm of a Fair*; for it *is not in loco certo capiendo*, as in the Statute, and yet the Feme was thereof endow'd. Br. Assise, pl. 471. cites 14 E. 3. Fitzh. Sci. Fa. 122.

* Co. Litt. 32. a. S. P. — F. N. B. 8. (K) in the new Notes there. (b.) cites S. C.——And Ibid. cites Lib. Intrat. 234. de tertia Parte Exituum & Proficuorum de quolibet Mercato quolibet Die Martis & Unius Feriæ quolibet Anno in Festo &c

16. And Dower was maintained of the *Profits arising from a* * *Fair and from a Market*, and from the *Court of the same Market* &c. But the Demand was not of the third Part of the Fair or Market. Thel. Dig. 68. Lib. 8. cap. 7. S. 2. Mich. 15 E. 3. Dower 81.

S. P. 8 Mod. 355. Arg. cites S. C.

17. Writ of Dower lies of a *Garden*, *Croft*, or *Cottage*, by the Opinion of the Court. So Assise lies of it, but Præcipe quod reddat does not lie of it. Br. Dower, pl. 92. cites 8 H. 6. 3.

* S. P. and yet the Heir shall have it; For it is incident to the Reversion; For *the Rent is no Inheritance, and is determinable by the Death of the Lessee.* Br. Dower, pl. 89. cites M. 1 E. 6.

18. A Man *leased for* * *Life rendering Rent, and took Feme and died*, the *Feme shall not be endowed of this Rent. Contra of a Rent reserved upon a Gift in Tail*; Per June. Br. Dower, pl. 44. cites 7 H. 6. 3.

19. If A holds Lands of B. by Homage, Fealty and 10 s. Rent, and B. dies, B's Wife shall not be endowed *of the Homage and Fealty*, but shall have a *third Part of the Rent as a Rent Seck.* Kelw. 126. a. b. pl. 87. Casus incerti Temporis.

20. A Writ of Right of Dower lieth of that *Thing* which is *appendant purtenant unto the said Land which a Woman holdeth in Dower.* As of so many Loaves of Bread, of so many Flagons of Ale &c. a Day or a Week &c. which she claims to pertain to her Tenement which she holds in Dower &c. F. N. B. 8 (K) and 9 (A).

21. A Wife shall be endowed of *Advowsons*, *Villeins*, *Common of Pasor apture*, and of other *Profits or Liberties* of which her Husband had any Estate of Inheritance; which Estate the Issue betwixt them by Possibility may inherit &c. F. N. B. 148. (C).

22. Dower may be of *Rent-Corn.* Per Curiam. Ow. 32. Pasch. 7 Eliz. in an Anonimous Case.

Gouldsb. 37. pl. 11. Brook's Case. S. C. & S. P. held accordingly. —Ow. 4. Bragg v. Brooks. S. C. resolv'd clearly.

23. Dower may be of a *third Part of the Manor.* But then it *must be claimed by the Name of* the third Part of the Manor and not of certain Messuages certain Acres of Land and certain Rents, for in the last Case it is only a Demand as of a Thing in Gross, and a Recovery in such Case is not of the third Part of the Manor. Godb. 135. pl. 156. Mich. 29 Eliz. C. B. Bragg's Case.

* F. N. B. 149. (K) S. P. admitted.—F. N. B. 8. (K) in the new Notes there (b) S. P. cites 45 E. 3. Fitzh. Dower, pl. 50. and that she had thereby the Freehold of the third Part of the Mill vested in her.

† F. N. B. 150. (G) S. P. cites 1 E. 1. Dower 176. ——Ibid. 148 (C) S. P.

24. A Woman may be endow'd of the third Part of the Profits of a * *Mill*; And of the Profits of keeping a Park; And of the Profits of a *Dove-house*; and of a *Pischary*; And of the † *third Presentation* to an Advowson; So of the *Profits of Courts*, Fines and Heriots; And of *Tithes.* Co. Litt. 32. a.

25. Wives

25. Wives shall be endowed of *Tithes* or other *Ecclesiastical Duties that came to the Crown by the Statute* 27 *H.* 8. 31 H. 8. cap. 13. 37 H. 8. 4. and 1 E. 6. cap. 14. Co. Litt. 159. a.

26. Of *Franchises Parcel of an Honour* Dower may be assigned, and they may be Parcel and appendant to the Honour though they are not belonging to a Manor which is of an inferior Nature. Cro. J. 622. pl. 12. Mich. 18 Jac. B. R. in Case of Howard v. Cavendish.

26. Of an *Advowson*, whether it be *in Gross or Appendant*, the Feme is dowable; Per Cur. Cro. J. 621. in pl. 12. Mich. 18 Jac. B. R.

27. Of a *Rent-Service*, *Rent-Charge*, and *Rent-Seck*, she shall be endowed; but of an *Annuity that charges only the Person*, and issues not out of any Lands or Tenements, she shall not be endowed. Co. Litt. 32. a.

28. *But if the Freehold* of the Rents, Common &c. *were suspended before the Coverture, and so continue* during the Coverture, she shall not be endowed of them. If after the Coverture the Husband does extinguish them by Release or otherwise, yet she shall be endowed of them, for as to her Dower they, in the Eye of the Law, have Continuance. Co. Litt. 32. a.

29. The Widow of the Lord was decreed at the Rolls to be endowed of the third Part of the *improved Values of the Copyhold*, but reversed by Ld. Keeper as to that. Chan. Cases 247. Hill. 26 & 27 Car. 2. Holland v. Blandy.

30. Dower; The Tenant pleads, that Sir Thomas Gerrard was *seised of the Messuage* now in Demand, *called B. in his Demesne as of Fee*, and being so seised, *Jac.* 1. *by his Letters Patents under the Great Seal of England, created the said Sir Thomas Gerrard Baron of B. and so the Messuage in Demand became Caput Baroniæ*, and he prays Judgment, if the Demandant ought to be endowed thereof. The Demandant demurred, and Judgment was given for her in C. B. Tenant assigns for Error, that the Demandant ought not to have Dower of this Messuage, being Caput Baroniæ; That it would tend to the Dishonour of the Dignity, to have the capital Messuage divided and dismembered, but it would be more for the Honour of the Realm that it be kept intire; and for Authority cited Co. Litt. 31. b. Fitzh. Dower 180. Bract. lib. 2. 170 b. Pasch. 4 H. 3. Rot. 7. But Serjeant Wright and Mr. Northy contra, of which Opinion was the whole Court; For these Authorities must be intended of Feodal Baronies, of which there are none at this Day except Arundel; and this Privilege was allowed to them, because they ought upon Necessity to defend the Realm, to which they are bound by Tenure; For the King at the Creation of the Barony gave to the Baron Lands and Rents, to hold of him by the Defence of the Realm; But then this cannot be a Feodal Barony, for it was in the Seisin of the Gerrards before, and therefore was not given to the Gerrards by the King at the Creation of the Barony, to hold of him; and Rokeby J. said, that this was the reason of the Judgment in C. B. Ld. Raym. Rep. 72. Hill. 7 W. 3. C. B. Gerrard v. Gerrard.

1 Salk. 253. pl. 3. S. C. and Judgment affirm'd in Error in B. R. per tot. Cur.——Skinn 592. pl. 6. Lady Gerrard's Case, S. C. and Judgment affirmed, per tot. Cur.——5 Mod. 64. Ld. Gerard's Case, S. C and Judgment affirmed in B R.——Comb. 352. S. C. and Judgment affirmed in B R.——3 Lev. 401. S C. and Judgment affirmed in B. R. upon which Error was brought in Domo Procernm, (which Levins says was the Thing designed at first) but afterwards the Parties agreed, as the Reporter says he heard, without having the Judgment of the House of Peers.

31. Dower does not lie of a *Tenement*, it being a Word of an uncertain Signification, and therefore the Sheriff cannot give Seisin of it; And so a Judgment was reversed. 2 Ld. Raym. Rep. 1384. Pasch. 11 Geo. B. R. Kerry v. Kent.

8 Mod. 355 Kent v. Kerry, S C. held accordingly, and so a Judgment reversed

(E) Dower ad Ostium Ecclesiæ.

Of what Things he may endow her.

[And How.]

1. A MAN cannot endow his Wife ad Ostium Ecclesiæ of his Capital House having other Lands sufficient for her Dower.

2. With this agrees the Law of Scotland. Skene Leges Burgorum, cap. 3.

3. In Ejectione Custodiæ by the best Opinion, and in a Manner per tot. Cur. that if a Man *endows his Feme at the Church-Door of H. in the County of E. of Land in the County of L.* this is a good Assignment of the Dower, though it was in another County than where the Land lies, and *without Deed*, but contra of Assignment of Dower Ex assensu Patris, this shall be by Deed; For otherwise the Franktenement of the Father cannot pass, and Assent does not lie in Averment but in Specialty, and *in both these Dowers Franktenement passes without Livery of Seisin*; Quod Nota. Br. Dower, pl. 7. cites 40 E. 3. 43.

4. If a Man *marries a Woman in a Chamber*, Dowment *ad Ostium Cameræ* is not good. F. N. B. 150. (M).

5. *The youngest Son* cannot assign Dower Ex assensu Patris, because he is not Heir apparent. F. N. B. 150. (E.)

6. *None may endow his Feme ad Ostium Ecclesiæ unless he be of full Age at the Time* &c. and then *she may enter after the Death of her Husband*, and in this Case Franktenement passes without Livery; but if the Baron was within Age at the Time of Dower, the Heir may enter and oust the Feme, and *contra* where one within Age endows his Feme *Ex assensu Patris, the Father then of full Age*; this is a good Dowment. Br. Dower, pl. 80. cites Litt. fol. 8, 9.

If a Man seised in Fee Simple, being within Age, endows his Wife at the Monastery or Church Door, and dies, and his Wife enters, in this Case the Heir of the Husband may oust her. Litt. S. 47.

7. It seems that Dowers made Ex assensu Patris, or Ad Ostium Ecclesiæ, are good, though the Wife be *within nine Years of Age*; For Consensus tollit Errorem. Co. Litt. 37. a.

8. Dowment ad Ostium Ecclesiæ *is where a Man of full Age seised in Fee-Simple*, who shall be married to a Woman, and when he *comes to the Church-Door* to be married, there, after Affiance and Troth plighted between them, he *endows the Woman of his own Land, or of the Half, or other Lesser Part* thereof, *and there openly does declare the Quantity* and Certainty of the Land which she shall have for her Dower, in this Case the Wife, after the Death of her Husband, may enter into the said Quantity of Land, of which her Husband endowed her, without other Assignment of any. Litt. S. 39.

9. Dower is ever after Marriage solemnized, and therefore this Dower is *good without Deed*; because he cannot make a Deed to his Wife; For *no Assignment of Dower Ad Ostium Ecclesiæ can be made before Marriage*; for that before Marriage the Woman is not intitled to have Dower. Co. Litt 34 a.

10. An

10. An Affignment of Dower either Ad *Oftium Ecclefiæ*, or *Ex Affenfu Patris* may be made *of more than a third Part*. But it was the ancient Law, That no greater Affignment could be made in thofe Cafes but of a third Part, but lefs he might, as appears in Glanvill. Co. Litt 36. a.

F. N. B. 150. (M) S. P.

11 Dower *Ad Oftium Caftri* five *Mefuagii* is not good; But ought to be made Ad Oftium Ecclefiæ; Non enim Valet facta *in Lecto mortali*, vel in *Camera*, vel alibi ubi Clandeftina fuere Conjugia. For the Law requires that this and like Matters be done *publickly and folemnly*. Co. Litt. 34 a.

12. If *Tenant in Tail endows his Wife Ad Oftium Ecclefiæ*, this fhall little or nothing at all avail the Wife, becaufe after the Deceafe of her Husband, the Iffue in Tail may enter upon her Poffeffion, and fo may he in the Reverfion, if there be no Iffue in Tail then alive. Litt. S. 46.

The Reafon of this is for that Tenant in Tail is reftrained by the faid Statute of 13 E. 1. de donis Conditionalibus. Co. Litt. 38. a.

(F) Of what Eftate fhe fhall be endow'd.

1. **If A. feifed in Fee of Lands,** Covenants to ftand feifed thereof to the Ufe of himfelf and his Heirs, till C. his middle Son takes a Wife, and after to the Ufe of C. and his Heirs, **and after A. dies, by which** it defcends to B. the Elder Son of A. who has a Wife and dies, **and after** C. takes a Wife, **it feems the Wife of B. the Elder Son fhall not be endow'd of the faid Eftate of her Husband;** **becaufe** his Eftate is ended by an exprefs Limitation, **and therefore the Eftate of the Wife being deriv'd out of it this cannot continue longer than the original Eftate. P.** 10 **Ja. B. between** *Flavill and Ventrice*, **dubitatur upon a Special Verdict; For upon Argument the Court was divided, Scilicet, Crawley and Vernon that fhe fhall not be endow'd, and Hutton and Heath e contra. Intratur. Trin.** 8 **Car. Rot.** 1343.

S. C. cited by Twifden J. Vent. 377 and faid that the fame Point came afterwards in Queftion in **Tape's** Cafe of Norfolk, and it was adjudged to be the ancient Ufe.—2 Sid. 66. cites S C.——If a Feoffment be made to the Ufe of J. S. and his Heirs until J. D. has done fuch a Thing, and then to the Ufe of J. D. and his Heirs, and afterwards the Thing is done, and J. S. dies, his Wife fhall be endow'd; Per Anderfon. Le. 168. in pl. 233. Mich. 31 & 32 Eliz. C. B.

2. If *Land* is *granted to a Man and his Heirs for the Life of J. S.* his Wife after his Death fhall not be endow'd; Arg. Bulft. 135. cites 22 E. 3. fol. 19. pl. 6

3. In Dower it was agreed that where the *Baron before the Coverture acknowledges by Fine come ceo &c.* and the *Conufee grants and renders to the Baron for Life*, the *Remainder to W. in Tail*, the *Remainder to the Baron in Fee*, and *he takes Feme the now Demandant and dies*; and becaufe the Fee is only expendant, and not executed in his Life by Reafon of the *mefne Remainder*, therefore fhe is not dowable. *Br.* Dower, pl. 6. cites 40 E. 3. 15.

4. Memorandum that in *Feoffments to make Eftate over or to re-infeoff the Feoffer*, this fhall be made *to a Man Sole*, or to a Chaplain who has no Feme; For it it be to a Man who has a Feme, and fhe furvives, fhe will or may have *Dower*. Br. Affurances, pl. 3.

F. N B. 150. (C) S. P.

5. If there be *Lord, Mesne and Tenant*, and the Tenant holds of the Mesne by Fealty and 3 s. Rent, and the Mesne takes a Wife, and the *Tenant brings a Writ of Mesne against the Mesne and forejudges him*, and the Mesne dies, the *Wife of that Mesne shall have Dower* of the Rent by which the Tenant held, and shall not be Attendant unto the Tenant; causa patet. Perk. S. 432.

6. If there be *Lord and Tenant by Fealty and* 12 *d.* and the *Tenant leases the Terancy for Life* unto a Stranger, and the Lord takes a Wife, and the *Tenant dies without Heir*, and afterwards the *Lord dies before the Lessee for Life*, the *Lord's Wife shall not have Dower of the Tenancy*; *but* she shall be endowed *of the Rent of the Seigniory* &c. Perk. S. 339.

7. If *Grantee of a Rent charge in Fee takes a Wife*, and the *Grantor leases the Land* out of which the Rent is issuing *unto a Stranger for Life*; And the *Grantee of the Rent purchases the Reversion* of the same Land, and the *Tenant for Life atturns*, and the *Grantee of the Rent dies, living the Tenant for Life*, his *Wife shall be endowed of the Rent but not of the Land*, because the Freehold and Inheritance were not in the Husband Simul & Semel during the Coverture &c. Perk. S. 340.

8. If a Man make a *Gift in Tail reserving Rent to him and his Heirs*, and afterwards the *Donor has a Wife*, and the *Tenant in Tail dies without Issue*, the Wife of the Donor shall not be endowed of the Rent, because the *Rent is extinct*, for it was reserved upon the Estate Tail, which is ended. F. N. B. 149. (G).

The Determination of the Estate of the Baron is by the

9. *But* although that the *Tenant in Tail dies without Issue*, yet his Wife shall be endowed, because *the Land continues, and is not determined as the Rent is*. F. N. B. 149. (G).

Act of God, and the Feme shall be endow'd. Br. Dower, pl. 86. cites Old Nat. Bre. fol. 144. —— Co. Litt. 31. b. S. P.——3 Rep. 84. b. S. P. in a Nota by the Reporter, and cites 24 E. 3. 28. b.—— 10 Rep. 96. a. S. C. cited per Cur.——Perk S 317. S. P. cites Mich. 44 E. 3. 31.

Of an *Estate Tail* in Lands *determined* a Woman shall be endowed in the like Manner and Form as a Man shall be Tenant by the Curtesy, mutatis mutandis. Co. Litt. 31. b.

S C, cited by Holt Ch. J. in delivering the Opinion of the Court. 7 Mod. 24. Trin. 1 Ann. B. R.

10. *Tenant in Tail bargain'd and sold Land to H. and his Heirs.* H. has an Estate descendable and determinable upon the Death of the Tenant in Tail, and his *Wife shall be endowed determinable on the Death of Tenant in Tail.* 10 Rep. 96. a. 98. a. Mich. 10 Jac. resolv'd in Seymour's Case.

(G) *Of*

(G) *Of what Estates* the Wife shall have Dower.

1. IF a Man leases for Life rendring Rent, his Wife shall not be endow'd of this Rent; For this is but an Estate for Life in the Rent though it descends to the Heir. 7 H. 6. 3. b. 17 E. 3. 12. 28 Ass. 3 adjudg'd.

S. P. per Thorp J. For *it is only incident to the Reversion for Term of Life, and by the Incidency the Heir shall have it, but* the Father nor the Heir *shall not have Estate of Inheritance in it.* Br. Dower, pl. 60. cites 26 Ass. 38.

2. If Lessee to him and the Heirs of his Body, or to him and his Heirs for the Life of J. S. dies, his Wife shall not be endow'd, because this is but an Estate for Life. 18 E. 3. 44. b. 22 E. 19. b.

3. If Lessee for Life leases for the Life of another, his Wife shall not be endowed; for he gains this Fee in an Instant. 3 H. 4. 6.

So if *Tenant for Life makes a Feoffment in Fee*, and dies, the Feme of him shall not have Dower; For though the Baron gave Fee Simple by Alienation, yet he never was seised in Fee so as she might have Dower; quod non negatur. Br. Dower, pl. 30. cites S. C.

4. If the Baron and another are jointly seised in Fee, and the Baron makes Feoffment of his Moiety his Wife shall not be endowed of this, for the Baron had an Estate dowable, Scilicet, a sole Estate but for an Instant. 14 H. 4. 13. b.

Co. Litt. 31. b. S. P. —— F. N. B. 150. (K) S. P. cites 34 E. 1. Dower 179. —— Jenk. 105. pl. 1. S. P.

5. If Tenant in special Tail takes a second Wife that is not dowable of the Tail and after makes Feoffment in Fee, and dies, his Wife shall not be endowed because he gains the Fee but in an Instant. Co. 8 *Whit.* 43. b. will prove this; For there it is that if the Baron be within Age at the Feoffment * his collateral Heir shall not avoid it, because he is not inheritable of the Right, for such Right so gained does not descend.

* Fol. 677.

Husband and Wife *Tenants in special Tail, had Issue a Son*, the *Wife died*, then the *Husband made a Feoffment to the Use of himself for Life, Remainder to the Use of his Son in Tail, with a Letter of Attorney to make Livery*, but *before that was made he married a second Wife, and then Livery was made* according to the Uses in the Feoffment, then the Husband died; and the Question was, Whether this second Wife was dowable; and adjudged that she was not, because before the Feoffment made, the Husband was such a Tenant in special Tail, that the Issue by his second Wife could not inherit, and by the Feoffment before, and Livery after the Coverture, he did not gain any new Estate or Seisin of which the Wife might be endowed; for what was done by that Feoffment was immediately drawn out again by Virtue of the special Entail. Cro. J. 615. pl. 5. Pasch. 18 Jac. in Scacc. Amcots v. Catherick.

6. If there be Lessee for Life the Reversion to the Husband in Fee, and the Lessee leases the Land to the Husband for the Life of the Husband, and after the Husband dies, and the Lessee dies the Wife shall not be endowed thereof; because there was a Possibility of a Reversion during the Coverture as to the Freehold. 1 E. 3. 16. per Cond.

7. If the Baron be Tenant in special Tail the Remainder to his own right Heirs, and takes a second Wife, and then becomes Tenant after Possibility, and dies, his Wife shall be endowed. 46 E. 3. 24. b. 22 E. 3. 3.

t. If

If the *first* Feme dies without Issue the second Feme shall be endowed; for the *Remainder in Tail vests in the Baron*, by reason that the Baron was only Tenant for Life in Effect after the Death of his Feme without Issue. Br. Dower, pl. 25. cites 50 E. 3. 4.

8. So if the Remainder had been limited to him in general Tail. 50 E. 3. 5. adjudg'd. 7 H. 4. 25. b.

9. The Husband ought to have a Fee or Tail and Freehold in Possession, otherwise the Wife is not dowable. 46 E. 3. 16.

10. If the Baron hath an Estate for Life, Remainder to B. in Tail, Remainder to the right Heirs of the Baron, and dies during the Life of B. the Wife shall not be endowed; for it is not a Fee in Possession. 40 E. 3. 15. b. 46 E. 3. 16. b.

So where the Estate was to the Baron for Life, Remainder to first Son in Tail, and so to the second, Remainder to the Heirs of the Body of the Baron, it was resolved that the Estate Tail was not executed for the Possibility of the Mesne Estate that might interpose, and therefore it was always disjoined during the Life of the Baron, so that of that Estate his Wife could not be endowed. Cro. E. 315. 316. pl. 10. Hill. 36 Eliz. B. R. Cordal's Case.

11. But if Tenant for Life surrenders to the Remainder-man in Tail or Fee his Wife shall be endowed; for the Estates are united. 44 E. 3. 31. b.

12. The same Law if the Tenant for Life grants his Estate upon Condition, if the Condition be not broke. 44 E. 3. 31. b. 45 E. 3. 13. b. adjudg'd.

13. If Lessee for Life leases the Land to the Lessor and the Heirs of his Body for the Life of the Lessee, and after the Lessor dies, living the Lessee, the Wife of the Lessor shall be endow'd, for he had the Fee and Freehold in him. 18 E. 3. 45. adjudg'd.

14. If the Husband hath a Fee and Freehold defeasible yet his Wife shall be endow'd till it is defeated. 45 E. 3. 13. b.

S. P. As if Tenant in Tail bargains and sells by Deed indented and inrolled to another and his Heirs, the Wife of the Bargainee shall be endowed as long as the Tenant in Tail lives; Resolved. 10 Rep. 96. a. Mich. 10 Jac. B. R. Seymour's Case. ——— See (H) pl. 1. S. C.

See (H) pl. 2. S. C.

15. If Baron and Feme Lessees for Life surrenders to him in Reversion, this is defeasible by the Feme after the Death of the Baron, yet in the mean Time if he in the Reversion dies his Wife shall be endowed. 45 E. 3. 13. b.

16. If the Grandfather dies seised, and the Son endows the Grandmother who dies, yet the Wife of the Father shall not be endowed. 45 E. 3. 32. For by Relation the Father had but the Reversion. 43 E. 3. 13. 18 E. 3. 44. b. M. 11 E. 1. B. Rot. 46. adjudged, Dos de Dote peti non debet.

The Wife of the Father shall not be indowed of the third Part. F.N.B. 149 (H) ——— If there be a Grandfather, Father and Son, and Grandfather is seised of three Acres of Land in Fee, and takes Wife and dies, this Land descends to the Father, who dies either before or after Entry, now is the Wife of the Father dowable. The Father dies, and the Wife of the Grandfather is endowed of one Acre and dies, the Wife of the Father shall be endowed of the two Acres Residue; for the Dower of the Grandfather is Paramount the Title of the Wife of the Father and the Seisin of the Father, which descended to him, (be it in Law or actual) is defeated, and now upon the Matter, the Father had but a Reversion expectant upon a Freehold, and in that Case Dos de Dote peti non debet; though the Wife of the Grandfather dies living the Father's Wife; but there is a Diversity between a Descent and a Purchase. Co. Litt. 31. a. ——— 4 Rep. 122. a. b. S. P. cites 5 E. 3. tit. Voucher, 249 the Case of Paris v. Paris, S. P. and is the Case whence this is taken. ——— Perk. S 315. S. P. because a Woman shall not be endowed of a Reversion expectant upon a Freehold, and the Possession of the Freehold by the Endowment is vested in the Grandmother by a Title before the Title of the Father unto the Freehold; but if the Grandfather had enfeoffed the Father of the same Land during the Marriage betwixt the Father and his Wife, in that Case, after the Death of the Grandmother, the Wife of the Father should have Dower of the same Land of which the Grandmother was endowed, because the Possession of the Father which gave Title to his Wife to have Dower was in the Life of the Grandfather, at which Time the Plaintiff could not demand the Dower, so that by the Endowment of the Grandmother the

the Poffeffion of the Father is not avoided, for the Grandmother had Right unto the Poffeffion but from the Time of the Death of the Grandfather &c ——— Co. Litt 31. a. b. S. P. ——— 4 Rep. 122 a. b cites 5 E. 3. tit. Voucher 249 Paris v. Paris, S. P. & S. C.

17. There is another Diverfity, As *where the Wife of the Father is first endowed, and where the Wife of the Grandfather*; For in the fame Cafe, after the Deceafe of his Grandfather and Father, the Son enters and endows his Mother of a third Part, againft whom the Grandmother recovers a third Part and dies. The Mother fhall enter again into the Land recovered by the Grandmother, becaufe fhe had in it an Eftate for Term of her Life, and the Eftate for the Life of the Grandmother is lefs in the Eye of the Law, as to her, than her own Life. Co. Litt. 31. b.

4 Rep. 122. a. b. cites Paris v Paris. 5 E. 3. tit. Voucher 249. S. P.

18. *The Heir took Feme* and entered, *and endowed his Mother*, and after *aliened the Reverfion*, and then *the Tenant in Dower died*, and after *the Heir who endowed her died*, and yet the Feme of the Heir was not endowed of this Land allotted in Dower, and fo fee that the *Endowment* cuts off and *deftroy the Seifin of the Heir*; Quod Nota. Br. Defcent, pl. 19. cites 19 E. 2.

19. T. was feifed and had *Iffue Robert the Eldeft, and Richard the Youngeft*, and died, and *Robert entered* and took Feme, *and had Iffue Alice*. The Feme died, and he *took another Feme and died, the Feme privement enfeint with a Son*, and the *Lord feifed the Ward* of the Land, and *of Alice*, for the Nonage of Alice, and leafed the Ward to T who *endowed the Feme* of Robert, and after the *Feme is delivered of W. a Son*, by which the *Lord re-feifed the Ward of W.* and *W. lived 10 Years, and died without Iffue*, by which H. the Plaintiff entered as Heir of Richard the youngeft Son of J. and Alice oufted him, and he brought Affife, and prayed the Difcretion of the Juftices; and becaufe W. to whom Alice was of half Blood was feifed, it was awarded that Henry fhould recover; And fo note that the *Seifin of the Guardian* makes the Heir of the Infant of the intire Blood to be Heir, and the Sifter of half Blood was barred of the Land, but by the Opinion of the Court, the *Dower* of the Feme *fhall revert to* Alice, becaufe W. was not feifed of it; Quære. Br. Defcent, pl. 19 cites 8 Aff. 6.

20. If the *Iffue* be *remitted to a fpecial Tail*, the Feme of the Father, who is not his Mother, fhall not be endowed. 2 Roll Remitter (K) pl 4. cites 44 E. 3. 26. b.

21. In Dower; *Baron and Feme Tenants in Tail had Iffue two Sons*, and the *Baron died*. The *Feme leafed to the eldeft Son for Years, and after releafed to him and his Heirs with Warranty*; He *took Feme and died without Iffue*, and after *the Mother died*, and the youngeft Son entered, and the Feme of the eldeft Son brought Writ of *Dower*, and recovered by Judgment, and therefore it feems that a Releafe with Warranty is a Difcontinuance; neverthelefs, this Judgment was contrary to the Opinion of feveral. Br. Difcont. de Poffeffion, pl. 7. cites 24 E. 3. 28.

S. P. but Brook fays, *it feems that the Releafe with Warranty of the Tenant in Tail is only a Grant of his Eftate*, and though fhe gave Fee, yet the *younger Son is remitted to the Tail*, which is elder than the Title of the Feme now Demandant. Br. Dower, pl. 50. cites S. C.

22. If *two exchange, and* afterwards *one aliens*, and the other vouches him being impleaded, he fhall recover in Value the Land given in Exchange, and fo it fhall relate before the Recovery. 2 Roll Voucher (R. b) pl. 4. cites Perk. S. and fays the *Feme of the Alienee* fhall not be endowed.

Perk. S. 309. cites 4 E. 3. 52. Trin. 15 E. 3. Dower 128. ——— A Woman fhall not be endowed both of the Land given in *Exchange*, and of the Land taken in Exchange, yet the Husband was feifed of both; but fhe may have her Election and be endowed of which fhe will. Co Litt. 31 b

23. In Dower; the *Tenant said that B. Baron of the Demandant, was seised &c. and infeoffed W. who regave to the Baron and his first Feme, and to the Heirs of their two Bodies, who had Issue this Tenant, and the first Feme died*, and the *Baron took the Demandant to Feme and died*; Judgment if Dower; The *Feme said, that before B. her Baron had any thing, C. was seised &c. and gave to the Father of the said B. in Tail, and* that the *Father of B. died, and so is the Tenant remitted as Heir to the first Tail, which is general Tail*, of which she is dowable, and yet because her *Baron during the Coverture had nothing but by the second Tail*, of which she is not dowable, therefore the Opinion of the Court was against her. Br. Dower, pl. 18. cites 40 E. 3. 24.

24. And there it is said, that if *Donee in Tail takes Feme*, and *dies without Issue*, so that the *Land reverts*, yet the Feme shall be endowed. Br. Dower, pl. 18. cites 40 E. 3. 24

25. And it was said in the Case supra, that *the Heir in Tail may claim in by the one Tail or the other.* Br. Dower, pl. 18. cites 40 E. 3. 24.

26. In Dower, the *Tenant said, that the Land was given to the Baron of the Demandant, and to his first Feme in Tail*, the *Remainder to W. in Tail*, the *Remainder to the Baron in Fee*, and the *first Feme died without Issue*, and the *Baron died, living him in Remainder in Tail*; Judgment &c. and a good Plea; by which the Demandant averred, that her Baron survived him in Remainder, who died without Issue, and so seisie que Dower la poit. Br. Dower, pl. 19. cites 46 E. 3. 16.

Br. Estoppel, pl. 30. cites S. C.

27. *Quod ei deforceat*; the Case was, that *a Man was seised in General Tail by Fine*, and *made Feoffment, and retook in special Tail to him and his first Feme*, and *had Issue.* The *Feme died*, and he *took another Feme and died*; The *King seised by Tenure in Capite*, and *endowed the Feme*; The *Issue came and shewed the special Tail, and had Scire Facias* against the Feme, *and recovered* against him *by Default*, and *she took another Baron*, and *she and the second Baron brought Quod ei deforceat* against the Heir, and *he pleaded the special Tail*, and *she would have remitted the Heir by the Elder Tail, and so concluded him to say but her Baron was always seised in General Tail*; & non allocatur; For by Thorp clearly, the *Baron was not remitted*, and then he was not seised of such Estate of which the Feme may be endowed; For of such special Estate his Issue is not inheritable, nor his Feme dowable, by which she averred Continuance of Possession by the first Tail, and so to Issue; Quod Nota. Br. Dower, pl. 9. cites 41 E. 3. 30.

28. In Dower it was *found by Verdict that W. infeoffed R. upon Condition of Payment and Nonpayment of the Part of W. by one Day*, and *W. died*, and his *Feme took another Baron*, and *the second Baron tendered the Money to R. and he received it and died*, and the *Feme of R. brought Dower and recovered*; For he who paid was not privy to the Condition. Br. Dower, pl. 11. cites 42 E. 3. 1.

29. Scire Facias to execute a Fine was *sued by the Heir of S.* because the *Fine was levied to A. for Life*, the *Remainder to J. in Tail*, the *Remainder to S. in Fee*, and that *all are dead, and J.* [*is dead*] *without Issue*, and the Tenant said that *A. surrendered his Estate to J. and after S. died, and J.* [*died*] *without Issue*, and that *A. entered as Brother and Heir to S.* whose Estate he has; Judgment if Execution; And the other said that A. by his Entry after the Death of S. had only his first Estate for Life, which is a great Error, for it is a Surrender, and then *after the Deaths of J. and S.—A. is in in Fee, and* then *the Fine executed of the Fee*, and never shall be executed again; and per Finch, because the *Estate for Life merged in the Seisin of J. add he in in Tail*, and not for Life of A. the Feme of J. shall be endowed. Br. Sci. Fa. pl. 21. cites 42 E. 3. 9.

30. Dower *of the Seisin of N. her Baron against the Heir of her Baron*, who *shewed how the Land was intailed by Fine to his Father Baron of the Demandant and his Feme Mother of the Tenant in special Tail*, and that after his *Father and Mother discontinued the Tail by Fine to a Stranger, and retook Estate by Grant and Render in general Tail, and had Issue the Tenant*, and the *first Feme, Mother of the Tenant died*, and the *Baron took the Demandant to Feme*, and after died, and so he is in by the one Tail and the other, and adjudged in his Elder Right by *Remitter*; Judgment si Actio; And the Opinion of the Court was clearly that the Feme shall be barred; Quod Nota; By which she passed over to the other Answer. Br. Dower, pl. 14. cites 44 E. 3. 26.

31. A Man *leased to A. for Life*, the *Remainder to B. in Fee*, and after the *Tenant for Life leased to the said B. for* Term of *B's Life*, and *B. died*, and his Feme was barred of Dower, and so see that B. was not seised in Fee, nor it was not a Surrender; for if A. survived B. then A. shall re-have the Land. Br. Estates, pl. 67. cites H. 13 R. 2.

Br. Forfeiture de Terres, pl. 91. cites S. C.

32. Dower of the Dowment of J. M. late her Baron; The *Tenant said that the Land was tailed in Remainder by Fine to J. M. his Father, Baron of the Demandant, and to his Heirs of the Body of E. his first Feme begotten, and that J. M. and E. had Issue this Tenant, and E. died, and J. M. married the said Demandant*, and died; Judgment if Dower; and by the best Opinion she shall not have Dower. Br. Dower, pl. 36. cites 12 H. 4. 1.

33. The Feme shall not be endow'd of Lands or Tenements which her Baron *held Jointly* with another at the Time of his Death. But where he held in Common it is otherwise. Litt. S. 45.

The Reason of the Diversity is, For that the Jointenant which survives claims the Land by the Feoffment and by Survivorship, which is above the Title of Dower, and may plead the Feoffment made to himself without naming of his Companion that died But Tenants in Common have several Freeholds and Inheritances, and their Moieties shall descend to their several Heirs, and therefore their Wives shall be endowed. Co. Litt. 37. b.

34. *Where the Estate which the Husband has during the Marriage is ended* there the Wife shall lose her Dower. As if Tenant in Tail discontinues in Fee, and afterwards takes a Wife and disseises the Discontinuee, or the Discontinuee does infeoff him, and afterwards the Tenant in Tail dies seised, his Heir is remitted, and the Wife shall lose her Dower, because the Heir is in of another Estate of Inheritance than the Husband had during the Coverture. F. N. B. 149. (F).

35. If a *Man has Title of Action to recover any Land*, and afterwards he *enters and disseises the Tenant* of the Land *and dies seised*, and his *Heir enters*, the *Heir is remitted* unto the Title which his Ancestor had, and the Husband's Wife shall lose her Dower; for that Estate which the Husband had is determined, for that was an Estate in Fee by Wrong, and the Heir has the Estate in Fee which his Ancestor had by Right. F. N. B. 149. (F).

36. If there be *two Jointenants* of certain Lands *in Fee* and the *one aliens* that which belongs to him to another in Fee, who takes a Wife and after dies. In this Case the Wife for her Dower shall have the third Part of the Moiety which her Husband purchased to hold in Common, (as her Part amounts) with the Heir of her Husband, and with the other Jointenants which did not Alien. For that in this Case her Dower cannot be assigned by Metes and Bounds. Litt. S. 44.

37. A. devis'd Lands to *B. and the Heirs of his Body*, and adds, *Item I will that after B's Death my Land shall remain to C. the Son of B.* B. died, and adjudg'd that the Wife of B. shall have Dower; For that B. had an Estate Tail. Mo. 593. pl. 801. Hill. 35 Eliz. Atkins v. Atkins.

Cro. E. 245 pl. 9. S. C. and a former Judgment affirm'd.

38. *A.*

38. *A. Lessee for Life, the Remainder to B. in Fee. A. surrenders upon Condition to B. and enters for the Condition broken.* B. dies, and his Wife brought Dower against A. and Issue is join'd upon *Ne unques Seisie que Dower &c.* That shall be found against A Noy. 66. Pasch. 37 Eliz. Ormond and his Wife.

And. 192. in pl. 227. S. P —— Le. 16. Cham v. Dover, pl. 19 Pasch. 26 Eliz. B. R. Copyholder in by the Custom is paramount the Title of Dower, and the Seisin of the Lord, so that she shall not be endow'd though he keeps the Lands in his Hands for a Time after the Marriage, and then grants them again by Copy. Per Wray Ch. J. —— Per Doderidge J. 2 Bulst. 337. S. P. and per Coke Ch. J Ibid.

39. There is no Tenancy in Dower of a *Copyhold* but by an Especial *Custom.* Arg. Cro E. 391. pl. 14. Pasch. 37 Eliz. B. R. in Case of Clun v. Pease and Turner.

2 And. 147. in Corbet's Case. S. P — But before the Statute she was not dowable of Land convey'd to Uses. 4 Rep. 1 b. —— No Dower or Tenancy by the Curtesy of an Use. Arg. Hard 492. cites Perk 69. 89. Lane. 104. Doctor and Stud. 98.

40. *Since* the Statute 27 *H.* 8. the Feme shall have Dower of an *Use.* 2 And. 75. Mich. 39 & 40 Eliz. in Case of Cromwell v. Andrews.

For the Law requires *Sole Seisin* to entitle the Wife to Dower. Jenk 105. pl. 1. —— And the Sole Seisin which was in the Jointenant that made the Feoffment was in Law *only for an Infant.* Jenk. 105. pl. 1. —— Co. Litt. 31. b.

41. If there be two *Jointenants in Fee,* and *one makes a Feoffment* in Fee, his Wife shall not be endow'd. Co. Litt. 31. b.

For the Seisin of the Conusee was *Seisin for an Infant* only. Jenk. 105. pl. 1.

42. *So* if the *Conusee of a Fine* does *grant and render* the Land *to the Conusor,* the Wife of the Conusee shall not be endow'd. Co. Litt. 31. b.

But if the Donee in Tail dies without Issue the Wife of the Donor shall not be endow'd of the Rent because it is extinct, the State Tail, on which it was reserv'd, being ended; But the Donee's Wife shall be endow'd; For the Land continues and is not determin'd as the Rent is. F. N. B. 149. (G) —— The Donee's Wife shall be endow'd. Perk S. 317.

43. *But* if the Husband makes a *Gift in Tail, reserving a Rent* to him and to his Heirs, and after the Donor takes Wife and dies, the Wife shall be endowed of this *Rent, because* it is a Rent *in Fee,* and by Possibility may continue for ever. Co. Litt. 32. a

But had he limited the Use *to himself for his Life,* by which Means he could not limit any Remainder over in such Case the Wife should not be endowed. Arg. Godb 442. cites 35 Eliz. 2 Rep. 52 Blithman's Case. —— But in this same Case, and for the same Reason it was adjudged, that such Wife should be endow'd. And. 291. Blytheman v. Blithman. —— 2 Rep. 52. cites S. C. accordingly. —— Cro. E 279. pl. 8. S. C & S. P. resolved accordingly. —— Mo. 345. S. C. as adjudg'd accordingly. —— Yelv 51. S. C. and S. P. agreed by all the Justices. —— Noy. 46 Heigham v. Bedingfield. S. P. agreed.

44. Tenant in Tail, in *Consideration of Marriage intended between A. his Son, and M. Daughter of B. covenanted to stand seised* to the Use of himself &c. till the Marriage, and after to himself for Life, and then to the Use of A and M. and the Heirs of their Bodies, and suffered a Recovery to the same Uses. The Father dies. A. dies without Issue. If after such Covenant the Father had married, his Wife would have been endowed; But if the Consideration had been *for the establishing the Land in his Name and Blood,* then an Use had been raised, and it would have been otherwise. Brownl. 193. Mich. 2 Jac. Freshwater v. Rois.

45. No

45. No Dower shall be of *Lands bargained and sold* if the Husband *dies before Inrolment.* Ow. 150. Pasch. 5 Jac. in the Court of Wards, Sir Henry Dimmock's Case.

So if a Man *after Bargain and Sale by him takes Wife and dies*, and afterwards the Deed is *inrolled* within six Months, the Wife shall not have Dower. Cro. C. 569. l. 6. Hill. 15 Car. B. R. Parker v. Bleeke.

46. If A. *bargains and sells* Lands to B. and his Heirs by Deed indented and inrolled, with *Proviso* if such Act be done, that the Bargain and Sale shall *be void*, and afterwards A. takes Wife, and after the Proviso is broken *A. dies before Entry*, and adjudged that the Wife shall not be endowed; For though the Estate of the Bargainee vests by the Statute of 27 H 8. by Execution of the Estate of the Land to the Use raised by the Bargain and Sale, yet inasmuch as the Baron did not re-enter, he had not any Estate in the Land whereof the Feme may be endowed; cited per Cur. as so adjudged. 6 Rep. 34. a. Trin. 7 Jac. B. R. in Fitz-Williams's Case.

47. *A. Tenant in Tail, Remainder to B. in Tail. A. bargains and sells the Lands to J. S. by Deed indented and enroll'd.* J. S. has an Estate descendible to him and his Heirs determinable on the Death of A. and his Wife shall be indow'd; but such *Dower shall be determinable by the Death of A.* Resolv'd. 10 Rep. 96. a. Mich. 10 Jac. Seymor's Case.

48. The *Dutchy of Cornwall* by an Act of Parliament made the 11 E. 3. is established to the King's Eldest Son, habendum sibi & ipsius & Hæredum suorum Regum Angliæ filiis Primogenitis in Regno Angliæ Hæreditario Successuris: Resolved by all the Judges of England, that this is an Estate of Fee-Simple in the Prince, and his Wife is Dowable of it by Force of this Act. But such a Charter granted by the King to a Subject is a void Grant. Jenk. 280. pl. 5.

49. *Tenant in Tail makes Lease for Years, and* then *releases to Lessee and his Heirs.* The Wife of this Lessee is Dowable of this Estate, and this Dower shall continue till the Entry of the Issue in Tail. Jenk. 274. pl. 96.

So if he makes a *Feoffment or Bargain and Sale* for the Tenant in Tail has more than an Estate for Life in him, he has an Inheritance, and consequently such Bargainee has a *descendible Estate*, and does not determine by the Death of Tenant in Tail but only by the Entry of the Issue. 11 Mod 20. Trin. B. R. in Case of Machil v. Clerk.

50. If *Tenant for Life makes a Lease* by or without Deed *to him in the Remainder or Reversion in Tail or in Fee, for the Term of the Life of him in the Reversion or Remainder*, and after he in the *Remainder takes Wife and dies*, his Wife shall not be endowed, for Tenant for Life shall enjoy the Land again, for a Forfeiture it cannot be, for he in the Remainder was Party, and a Surrender it cannot be, for his whole Estate was not given. Co. Litt. 42. a.

51. J S. *Tenant in Fee Simple by Indenture inrolled, bargained, and sold* the Lands *to B. for* 120 *l. in Consideration that B. shall redemise to him and his Wife for their Lives, rendering a Pepper-Corn, and with a Condition that if J. S. paid the* 120 *l. at the End of* 20 *Years, then the Bargain and Sale to be void; B. redemised it* accordingly and died; *B.'s Wife brought a Writ of Dower* and held good, because by the Bargain and Sale the Land was vested in her Husband, and thereby the Wife intitled to Dower; and when he redemises it according to the Agreement, yet those to whom the Redemise was made shall hold it subject to Dower; and it was his Folly not to join another with the Bargainee as is the antient Course on Mortgages; and when she is dowable by Act or Rule in Law a Court of Equity shall not bar her to claim her Dower; for it is against the Rule of Law, where no Fraud or Covin

S. C. cited Show. Parl. Cases, 72 — A Bill was to be relieved against the Defendant's Dower, her Husband being only a *Trustee*; and it appearing tha the Husband was but a

Trustee, the Defendant was barred of her Dower contrary to the Opinion of Nash v. Preston, 1 Cro. 191. and so it was said is the constant Custom of the Court now. 2 Freem. Rep 43. pl. 48. Mich. 1678. Noel v. Jevon.

is a Court of Equity will not relieve; and this was certified by Jones and Crooke J. upon a Conference with the other Justices at Serjeant's Inn to the Chancery that the Wife of B. was to have Dower, and that a Court of Equity ought not to preclude her thereof. Cro. C. 190. pl. 11. Pasch. 6 Car. Nash v. Preston.

52. If *Rent* be granted *to A. and his Heirs* to commence *after the Death of B.* and Grantee dies before B. yet his Wife shall be endowed. Arg. 2. Sid. 110. Mich. 1658.

53. No Dower out of an Estate in *Trust*. Bill dismissed. 16 Car. 2. fol. 749. Chan. Rep. 254. 2 Colt v. Colt.

S. C. cited by the Master of the Rolls, who said it was 15 Car. 2. fol. 794. and that the Trust was created by the Husband. 2 Wms.'s Rep. 640. Hill. 1732. in Case of Sutton v. Sutton, and said that where a Trust of Inheritance is *created by the Husband himself*, he took it to be settled that the Wife shall not have Dower, even against the Heir, nor against a Devisee, the Cases in Reason being the same. Ibid 640. ——— If a Man before Marriage conveys an Estate to Trustees and their Heirs, so as to put the legal Estate out of him though the *Trust is limited to him and his Heirs*, the Wife shall not be endowed of this Estate. Chan. Prec. 336. Pasch. 1712. Bottomly v. Fairfax. ——— S. C. cited and approved by the Master of the Rolls. 2 Wms.'s Rep. 640, 641. Hill 1732. in the Case of Sutton v. Sutton. ——— S. C. cited by Ld. C. Talbot, Cases in Equ in Ld. Talbot's Time 139. Mich. 9 Geo. 2. and says that if a Woman should be endowed of a Trust, the received Practice of inserting to bar Dower would be of no Signification. ——— The *Wife of Cesty que Trust* is not intitled to Dower; per Ld. Talbot. 3 Wms.'s Rep. 229 pl. 53. Hill. 1733. Chaplin v. Chaplin. ——— No Man will say that ever any Woman was endow'd in Equity of a Trust-Estate. Arg. Parl. Cases 72. in Case of the Countess of Radnor v Vandebendy. ——— Per Ld. Sommers, Chan. Prec. 65. S. C.

54. The Husband *purchased* Lands of Tenant for Life, and *took a collateral Security of him for a Conveyance of the Fee* by his Son and Heir, the Remainder-man in Fee, when of Age, but the Husband died before such Conveyance was made; the Wife is not intitled to Dower. Fin. Rep. 368. Trin. 30 Car. 2. Exton v. St. John.

55. In Dower against the Heir of her Husband, the Tenant pleaded, that *A. was seised and devised the Tenements to the Husband and to two more equally to be divided*, and so demands Judgment of the Writ, supposing that she could not sue *Dower before Partition* against Tenants in common; but upon Demurrer adjudged that the Writ well lies. 3 Lev. 84. Mich. 34 Car. 2. C. B. Sutton v. Rolfe.

56. After a Decree for a personal Duty a *Sequestration* issues, and then the Defendant marries and dies; this shall not bind the Feme who comes in for her Dower; Per North K. Vern. 118. pl. 106. Hill. 1682. Anon.

Ibid. 166. S. P. cited as in the Case of Rockley v. Burdett.

57. Estate to *A. for Life*, Remainder to *B. and his Heirs for the Life of A.* Remainder to the *Heirs of the Body of A.* Remainder over. The Wife of A. shall not be endowed, for the Estate for Life of A. *does not merge*. Adjudged suddenly on the first Argument, though it was urged that the Remainder to B. was only for preserving the Remainders during A.'s Life against any Forfeiture, but that in the mean Time the Estate was executed in A. 3 Lev. 437. Hill. 7 W. 3. C. B. Duncomb v. Duncomb.

58. A. Tenant for Life, *Remainder for Years*, Remainder to A. in Tail. A's Wife shall be endowed, otherwise if the *Remainder* had been *for Life*. 1 Salk. 254. Hill. 9 W. 3. C. B. Bates's Case.

Lutw. 719. S. C. accordingly.— Ld. Raym. Rep. 326. 327 Bates v. Bates, S. C. adjudged accordingly; but had the intervening Term been an Estate for Life it had been otherwise according to Perk. 336. the only Authority in the Books for that Purpose.

59. A.

59. A. *devised Lands to his Executors till Debts paid, Remainder to B. in Tail*, B. marries and dies before the Debts paid. Per Cur. The Estate in the Executors is only a † Chattel Interest, and will not hinder B.'s Wife of Dower, and that Interest determines at Law when the Trust is satisfied; but her Dower cannot *commence in Possession*, nor Damages be recovered for detaining it, but from the Time of the Debts being paid. 2 Vern. 403. pl. 373. Mich. 1700. Hilchins v. Hilchins.

2 Freem. Rep. 311. Hitchins v. Hitchins, S. C. and a satisfied Mortgage being kept on Foot and set up to keep the Widow out of Possession was decreed to be set aside and not to stand in her Way; and the Court thought the Case of Radnor v. Vandebendie a hard Case. —— Chan. Prec. 133. S. C.

† 9 Mod. 152. in Case of Charles v. Andrews.

60. The Question was, If *Assignees of Commissioners of Bankrupt by taking an Assignment of a Mortgage Term prior to the Title of Dower* shall protect their Estate from Dower?

It was insisted that Creditors and Assignees of Commissioners of Bankrupt stand only in the Place of the Bankrupt, and since such an Assignment to the Bankrupt himself or his Heir would not protect the Estate from Title of Dower in the Hands of the Heir, neither will it protect the Estate in the Hands of the Creditors of the Bankrupt or the Assignee of the Commissioners, and this differs the present Case from the Case of Lady Radnor and Vandebendy in Dom. Proc. where it was held that such a prior Term should protect the Estate from Dower in the Hands of a Purchaser, ——— Nota Differentiam. Decree that the Plaintiff be let into her Dower, keeping down the Interest of a third Part of the Mortgage. M.S. Rep. 156. Pasch. 10 Geo. Canc. Squire v. Compton.

61. All *Estates Tail* are Estates of Inheritance, to which Dower is incident, and must be within the Statute De Donis. 3 Wms.'s Rep. 263. Pasch. 1734. Low v. Burron

62. A Limitation *of Estate pur auter Vie to A. and the Heirs of his Body* makes no Estate Tail in A. and there can be no Dower of it, it being no Inheritance but only a descendible Freehold. 3 Wms.'s Rep. 263. pl. 65. Pasch. 1734. in Case of Low v. Burron.

63. If a *Rent de Novo* be granted *in Tail without any Remainder over*, and Tenant in Tail takes Wife and dies without Issue the Wife shall not be endowed, because the Thing out of which the Dower is to arise is not in Being; Secus if the Rent were granted in Tail, *Remainder over*. 3 Wms.'s Rep. 230. Hill. 1733. in Case of Chaplin v. Chaplin.

For though the Objection is, that there can be no Remainder of that whereof there is no Reversion, yet the Intent of the Party gives the Rent de Novo first a Being for the Whole, and then the lesser Estates are carved out of it. By Holt Ch. J. 3 Wms's Rep. 230. at the Bottom of the Page in a Note of the Reporter cites Salk. 577. Weeks v. Peach.

49. An Estate was conveyed *to J. S. and his Heirs, to the Use of him and his Heirs in Trust, to permit A. and B. to receive the Rents and Profits during their Lives, and the Life of the Survivor of them*, with Power to A. to charge it with 400 l. and subject to such Power *J. S. to stand seised to the Use of the Survivor of them. A. died* in 1713. *B.* died in 1723, and by his Will *devised this Estate to C. and his Heirs, who long before had taken M. to Wife.* C mortgaged the Estate. The Question was, If M. would upon the Death of C. be intitled to Dower so as to affect the Mortgagee? Ld. C. Talbot decreed that M. would not be intitled to Dower of this Trust Estate. Cases in Equ. in Ld. Talbot's Time 138. Mich. 1735. 9 Geo. 2 Attorney-General v. Scott.

(G. 2) Of what Seifin.

1. IN *Affife J. N. was feifed in Fee, and had Iffue two Sons, R. and T. and died. R. entered and had Iffue a Daughter*, and *his Feme died*, and *he took another Feme and died, fhe privement enfeint with a Son.* The *Daughter of R. entered*, and the *Lord feifed the Ward, and endowed the Mother of R who was the Feme of J. N. the Grandfather.* The *Son of the fecond Feme of R. is born*, and the *Lord feifes the Ward of him*, and *he dies without Iffue within Age*, and the *Son of T. the Uncle entered upon the Daughter of R into two Parts*, and *fhe oufted him*, and *he recovered the two Parts by Affife*; and fo fee that by the *Seifin of the Guardian* by the Ward of the Son, the two Parts fhall go to the Heir of this Son, and not to the Daughter of R who was of the half Blood; but the Opinion of the Court was, that the *Dower fhall go to the Daughter of R.* for this is in Reverfion, and fhe may claim it as Heir of her Father or Grandfather; *For the Tenant in Dower is in by her Baron, and not by him who endowed her*, and the *Daughter of the eldeft Son is Heir to the Grandfather.* Br. Dower, pl. 87. cites 8 Aff. 6

2. In Affife, the *Tenant of the King died feifed of Lands held of the King* &c. and *the Heir was in Ward*, and the *Feme fued for Dower, and Writ iffued to the Sheriff of N. to deliver her* 10 *Marks per Annum for Dower in Land and Rent*, and *he delivered to her* 5 *Marks Land, and* 5 *Marks Rent iffuing out of the Land of which fhe was dowable*, and *fhe was feifed and diffeifed of the Rent*, and *brought Affife and recovered*; For it is a good Endowment, and yet her *Baron was never feifed of the Rent.* Br. Dower, pl. 61. cites 26 Aff. 41.

3. *The fame* Law *of fuch Affignment of the Heir if the Feme accepts it.* Br. Dower, pl. 61. cites 26 Aff. 41.

4. *Contra* it is faid elfewhere, *if* it was *affigned out of Land of which the Feme is not dowable.* Br. Dower, pl. 61. cites 26 Aff. 41.

5. *Dower* was brought by a Feme, and it does not appear what the Iffue was; But it feems that *the Iffue* was *Ne unques feifie que Dower la poiet*; the *Jury faid, that W. borrowed* 40 *l. of R. Baron of the Demandant, which W infeoffed R. upon Condition, that if he repaid the* 40 *l. by fuch a Day that he fhould re-enter, and at the Day W. did not pay but died, and the Feme of W. married B. and by Accord between R. Baron of the Plaintiff, and B. and his Feme, B. paid the Money to R. by which B. and his Feme had the Land, and this Feme Demandant demanded Dower*, and prayed the Difcretion of the Juftices &c. by which the Demandant recovered her Dower; the Reafon feems to be, inafmuch as by the Nonpayment at the Day the Baron of the Demandant was feifed Simpliciter and without Condition, and then the Acceptance by R. after cannot prejudice his Feme of her Dower. Br. Verdict, pl. 85. cites 42 E. 3. 1.

6. In Dower, the *Tenant faid, that the Baron of the Demandant had nothing but by Diffeifin made to him*; Judgment fi Actio; and the *Feme faid, that the Father of her Baron had two Sons, and leafed the Land to the Eldeft and his Feme for their Lives, and the Youngeft took the Demandant to Feme, and the eldeft Son died, and his Feme took the Tenant to Baron, and the Father of the two Sons died, and the Reverfion defcended to her Baron, and after the Feme of the eldeft Son died, and the Tenant held himfelf in, and our Baron oufted him, and prayed Seifin* &c. Quære if fhe ought not to *traverfe the Seifin alleged in the Baron*, and it feems that

the

ſhe ſhould; For if the Baron of the Demandant had not entered after the Death of the Feme of the eldeſt Son, ſhe ſhould not have Dower; For the Baron of the Feme of the eldeſt Son had Franktenement in Jure Uxoris, which is not defeated without Entry, as it ſeems; Quære; and Quære if there ſhall not be Seiſin in him without Entry. Br. Dower, pl. 29. cites 2 H. 4 22.

7. In Dower, the *Baron purchaſed Rent*, and *died before the Day of Payment*, yet the Feme ſhall be endowed. Br. Dower, pl. 35. cites 11 H. 4. 88.

8. If a Man *grants a Rent to J. S. in Fee*, and he *dies before Seiſin of it*, the Feme ſhall be endowed; Per Heidon; Quod non negatur. Br. Dower, pl. 71. cites 5 E. 4. 2.

9. A Feme ſhall be endowed of *Seiſin* and Poſſeſſion *in Law* without Seiſin in Fact; As where the Father of the Baron died ſeiſed, and Baron after died before Entry; Quod Nota; For otherwiſe it is of Tenant by the Curteſy, and the reaſon ſeems to be, *inaſmuch as the Baron may enter in Jure Uxoris, but* the *Feme cannot compel her Baron to enter into his own Land.* Br. Dower, pl. 75. cites 21 E. 4. 60.

F. N. B. 149. (D) S. P. and in the new Edition cites 7 E. 3. 66. 21 E. 3. 31. and 5 H. 7. 103. and ibid. Marg. cites 5 H. 7. 5 and 21 E. 3. 21. —— Perk. S. 457 and 464. S. P.

10. In Dower, where there were *Grandfather, Father, and Son*, and the *Grandfather held of the King*, The *Father took Feme*. The *Grandfather died*. The *Father had Iſſue and died before Office found, and before any Entry*; and after an *Office was found for the King, that the Grandfather was ſeiſed and died ſeiſed, and held of the King, and that he had Iſſue, who had Iſſue him who now is Heir and within Age*, by which the *King ſeiſed and committed the Ward durante minore ætate*, and the *Feme of the Father, Son of the Grandfather, brought Writ of Dower againſt the Committee*, and the Committee demurred in Law upon the Matter. Br. Dower, pl. 66. cites 1 H. 7. 17.

11. *But* in Anno 4 H. 7. 1. the Caſe is put, that the *Father entered and died before any Office*, and therefore by all the Juſtices the Feme is dowable. Br. Dower, pl. 66.

12. Where a *Stranger abates* upon Tenant of the King, and the *Heir has a Feme and does not enter*, the Feme ſhall not have Dower upon this Poſſeſſion, per Wood; and he vouch'd 21 E. 4. 60. which Fiſher and Davers agreed; For after Patent made to the Committee, the Committee takes the Profits, and not the King, though Livery be ſued out of the King's Hands. Br. Dower, pl. 66. cites 1 H. 7. 17.

13. *But* per Huſſey, if the *Tenant of the King dies ſeiſed*, and *his Heir has Feme*, and after *Office is found for the King*, there is no Doubt but the *Feme ſhall be endowed for the Poſſeſſion in Fact which was before in her Baron by his Entry before the Office*; *For* it was agreed per tot. Cur. that the *Heir by his Entry is no Intruder* before Office be found for the King. Br. Dower, pl. 66. cites 1 H. 7. 17.

14 *And* if a *Rent deſcends to the Baron, who dies before the Day of Payment*, yet the Feme ſhall be endowed. Br. Dower, pl. 66. cites 1 H. 7. 17.

15. *For* ſuch *Seiſin upon which Præcipe quod reddat lies is as ſufficient to have Dower* as thoſe which are Seiſins in Law, of which Aſſiſe lies not; For ſuch Seiſin of which Aſſiſe lies, is not always requiſite where Dowment ſhall be, but Seiſin in Law ſuffices. Br. Dower, pl. 66. cites 1 H. 7. 17.

16. *And* per Brian, where the *King has Ward*, and the *Ward dies within Age*, his *Heir has a Feme*, and the *Baron dies before it comes to him*, there the Feme ſhall not have Dower. Br. Dower, pl. 66. cites 1 H. 7. 17.

17. Where the *Heir of the King's Tenant has a Feme*, and *Office is found for the King, and after the Heir enters and intrudes*, and *dies*, yet the Feme shall have Dower by reason of the Possession which he had before the Office; Per Davers; For by him the *Statute de Prærogativa* 13. *quod nullum accrescat ei liberum Tenementum is intended where Office is found, and after he takes Feme, intrudes and dies*; but divers good Students denied it. But Brian and Hussey agreed with Davers. Br. Dower, pl. 66. cites 1 H. 7. 17.

18. *And if he had not entered, yet she had been dowable*; for there was *Seisin in Law in the Baron, and he was not an Intruder*, because Office was not found for the King, and it lies as well against the Committee of the King as against another Guardian. Br. Dower, pl. 66. cites 4 H. 7. 1.

19. Of an *Instantaneous Seisin* gotten by Disseisin she may be endow'd. See Jo. 317. cites 34 Eliz. C. B. Mathew Taylor's Case.

Of a Seisin for an Instant a Woman shall *not* be endow'd *as* if *Cestuy que Use after* the Statute of 1 *R.* 3. *and before* the Statute of 27 *H.* 8. had *made a Feoffment* in Fee his Wife should not be endow'd. Co Litt. 31. b. —— Of an Instantaneous Seisin *by Fine and Render* no Dower shall be. Cited per Tanfield J. as adjudged. Cro J. 615. —— Co. Litt. 31. b. S. P. —— *Baron and Feme Tenants in Special Tail* The Feme dies leaving Issue. The Baron makes Feoffment to the Use of himself for Life and after to B. his Son in Tail, and *marries a second Wife* and then makes Livery. Resolved that she is not dowable, for before the Feoffment she was not, he being such Tenant in Tail that the Issue by her could not inherit, and the Instantaneous Seisin by the Livery will not intitle her. Cro. J. 615. pl. 5. Pasch. 18 Jac. in Scacc. Amcots v. Catherich.

20. *Father Tenant for Life*, the *Remainder to his Son in Tail*, the *Remainder to the right Heirs of the Father*. After the Father and Son at a certain Time were *attainted of Felony, and executed likewise* at one Time, the Son not having any Issue of his Body. If now the Father shall be said to be seised of an Estate in Fee, that Dower &c. was the Matter. And there because it was proved by Witnesses that *the Father moved his Feet after the Death of the Son*; It was found by the Jury Seisie que Dower &c. And upon that the Wife of the Father had Judgment to recover. Note after Error was brought, and the Error assigned in the Process. See Trin. 38 Eliz. Rot. 876. Noy. 64. Broughton v. Randal.

Cro. E. 502, 503 S. C. upon a Different Point, but in a Note added at the End it is stated thus, viz. The Title of the Feme to recover Dower was, That the Father and were Jointenants to them and the Heirs of the Son; and they were both hang'd in one Cart; but because the Son (as was deposed by Witnesses) surviv'd, as appear'd by some Tokens, viz. his shaking his Legs, his Feme thereupon demanded Dower, and upon Issue Ne Unques Seisie que Dower this Issue was found for the Demandant. —— Mo. 528. pl. 698. S. C. but S. P. does not appear.

21. Dower may be of a *Possession in Law*. Jo. 361. Trin. 11 Car. B. R. in Case of Reeve v. Malster.

A Woman shall be endowed of a Seisin in Law, as *where Lands* and Tenements *descend to the Husband before Entry* he has but a Seisin in Law, and yet the Wife shall be endow'd, albeit it be not reduc'd to an actual Possession; for it lies not in the Power of the Wife to bring it to be an actual Seisin, as the Husband may do of his Wife's Land, when he is to be Tenant by Curtesy. Co. Litt. 31 a. —— Litt. S. 448. S. P.

(G. 3) Out

(G. 3) In what Cafes Dower may be Out of Dower.

1. IN Dower a Cuftom was pleaded that *if the Baron aliens the Land, and expends the Monies between him and his Feme*, that fhe fhall be barr'd of Dower, and adjudg'd a good Cuftom. Br. Cuftoms, pl. 78. cites 3 E. 3.

So if fhe receives Part of the Money for which the Land was fold. Br. Cuftoms, pl. 53. cites 20 E. 3. and Fitzh Prefcription. 30.

2. *Feme of the Father is endowed*, and the *Grand-mother brought Writ of Dower againft her* and *fhe vouch'd the Heir by Reverfion*, and the *Demandant recover'd againft the Tenant, and fhe over againft the Heir, the third Part of the two Parts refidue*, and *not in Value*, and well. *And* if the *Feme of the Grandfather dies*, the *Feme of the Father may enter*; For the Grandmother was Attendant to him by Tender; and from hence it feems that the Heir may enter then into the fecond Dower; For fhe fhall not have both. Br. Dower, pl. 79. cites M. 5 E. 3. and Fitzh. Voucher 249.

Dower of *20 Acres of Land belonging to T. B. her Baron*, the *Tenant faid that P. B. Father of T. B. her Baron was feifed of the Premiffes among other Lands and Tenements and died, and T. B affign'd to her the Land in demand in Dower, in Allowance of all the Lands of which her Baron was feifed; and fo was fhe in of elder Dower to her referved*; Judgment &c. The *Demandant faid that the fame P B was feifed of the Manor of B. and 20 Acres of which Dower is demanded and died, and the Tenant enter'd into the Manor of B. and enfeoffed the faid T. B. before the Affignment of Dower made by T. B. to the Tenant by which the 20 Acres were not Parcel of the Manor, and that P B. was never feifed of other Land, but of the Manor and of 20 Acres, and prayed Dower*. Cand. faid that now it appears that the Demandant ought to have demanded but only the third Part of the two Parts of the Land of which Dower is demanded. Per Godred, you are in of all the Land which belonged to your Baron, which is againft common Right, and therefore we ought to have the third Part of the Whole. And fo the Queftion is becaufe the Tenant is dowable againft common Right of the Whole, if the Demandant fhall have the third Part of the Whole, or the third Part of two Parts only; and adjornatur. Br. Dower, pl. 52. cites 4 H. 6. 25.

3. Where *Heir takes Feme and enters and endows his Mother*, and *aliens the Reverfion*, and the *Mother dies*, and after the *Heir dies* the *Feme of the Heir fhall not have Dower of the Land of which the Mother was endow'd*. For the Seifin of the Heir who was her Baron was determed by the Endowment, and the Feme in by her Baron and not by the Heir; For if the Heir had charged fhe fhould hold difcharged, quod nota. Br. Seifin, pl. 18. cites 8 Aff. 6.

4. In Dower, the *Tenant in Dower leafed her Eftate to the Heir, rendring Rent for Term of his Life*, and the *Heir died*, and *his Feme was endowed by Award*; For this is a Surrender notwithftanding the eldeft Endowment, and fo the Heir in in Fee, though the firft Tenant in Dower who leafed, was alive. Br. Dower, pl. 17. cites 45 E. 3. 13.

5. If a Man makes a *Feoffment with Warranty* and dies, and the *Feme of the Feoffor brings Writ of Dower againft the Feme of the Feoffee*, and *fhe vouches the Heir of the Feoffor*, and *pending the Action the Feme of the Feoffee brings Writ of Dower of the whole Land and not of two Parts, fhe* cannot recover Dower till the firft Dower be determined. Br. Dower, pl. 80. cites Litt. fol. 11.

6. The Cuftom of a Manor was for the Widow to be *endowed of a Moiety* of the Copyholds of which her Husband died feifed; the Hufband died, and his Wife was endow'd of 100 l. per Ann. and 100 l. per Ann. defcended to his Heir, who afterwards died, leaving a Widow. This fecond Widow fhall be endow'd of a *Moiety of the Moiety*,

Lev. 154. S. C but S P. does not appear. —Sid. 76. pl. 9. S. C.

but S. P. does not appear.—— 2 Sid 1. S. C & S. P. but no Resolution. ——— Ibid 9. S. C. and it was held by Glyn Ch. J. that the second Widow was intitled to a Moiety. ——— Keb. 356. pl. 46. S. C. & S. P. per tot. Cur. præter Mallet.

Moiety, and so shall have 50 l. per Ann. Adjudged. Raym. 58. Mich 14 Car. 2. B. R. Baker v. Berisford.

Co. Litt. 31. a. b.

7. *The Rule* of Dos de Dote peti non debet *is thus to be understood*, Where the Grandfather dies seised of three Acres, and the Father enters and endows the Grandfather's Wife of one Acre and dies, the Father's Wife shall be endow'd only of the third Part of the other two Acres; For inasmuch as the Grandfater died seised there was no Mesne Seisin in Judgment of Law betwixt him and his Wife. But if the Father had claimed the said three Acres by Purchase from the Grandfather, his Wife should after the Death of the Grandfather's Wife be endowed of the third Part of that Acre whereof the Grandfather's Wife was endow'd; Or in the first Case, if the Son after the Death of the Grandfather and Father had endow'd his Mother first, and then the Grandmother had recovered a third Part against her, the Mother after her Death might have entred again; For her Estate in the Part so recovered was defeated by the Grandmother's Life. Hawk. Co. Litt. 44.

(H) Of what Estates *for a collateral Respect* she shall be endow'd.

See (G) pl. 14. S. C. and the Notes there.

1. If the Baron had a Fee and Freehold though it be defeasible, yet his Wife shall be endow'd till it is defeated. 45 E. 3. 13. b.

(G) pl. 15. S. C.

2. As if the Baron and Feme Lessees for Life surrender to him in Reversion this is defeasible by the Feme; yet in the mean Time if he in Reversion dies, his Wife shall be endow'd. 45 E. 3. 13. b. 18 E. 3. 45.

3. If a Disseisor dies seised, and after the Disseisee abates, the Wife of the Disseisor shall have Dower against him, so long as the Descent is in Force. 17 E. 3. 24. admitted by the Issue.

4. If A. endows his Wife Ad Ostium Ecclesiæ, and after makes a Feoffment of the Land to B. who makes a Feoffment thereof to C. the Wife of B. shall be endow'd against C. till the Wife of A. recovers her Dower. Temp. E. 1. 66. b. admitted.

5. But in this Case after the Endowment of the Wife of B. if the Wife of A. brings a Writ of Dower against the Wife of B. and she vouches C. to * Warranty, this Endowment of the Wife of A. ad Ostium Ecclesiæ shall be a good Counter-plea of the Warranty, quia Dos de Dote peti non debet. Temp. E. 1. 66. b. adjudg'd.

* Fol. 678.

6. If A. seised of the Manor of D. takes B. to Wife, and after aliens to C. who takes E. to Wife, and after aliens to F. and dies, and after E. is endowed, and after B. is assigned Dower of a third Part of the Manor, and she brings a Precipe thereof against the Wife of C. scilicet, E. who vouches to warranty F. who counterpleads it by this Matter, and says that the Wife of C. cannot be endowed eo quod non potest habere Dotem de Dote, et sic per Considerationem Curiæ Adjudicatum fuit, quod esset inconveniens, ideo F. sit quietus de Warrantia et B. recuperet seisinam et Defendens in Misericordia. M. 11. E. 4. B. Rot. 46.

7. If a Woman recovers Dower of a Reversion expectant upon a Lease for Years upon which a Rent is reserved, she shall have a third Part of the Reversion, and the Rent presently as incident to the Reversion, and the Execution shall not cease till the Lease expires; for the Sheriff shall put her in Execution of the Freehold, and the Termor shall continue his Term. Tr. 7 Ja. per Curiam. P. 8. Ja. B. per Curiam. Hill. 10 Ja. B. per Curiam.

S. P. And she shall have the third Part of the Reversion by Metes and Bounds. Co. Litt. 32. a. ——

Where a Man *seised in Fee leased for Years rendering Rent, and after takes a Feme and dies*, the Feme shall have Dower, but shall not have Execution during the Term of Years; for the Rent is incident to the Reversion, and is no Inheritance, but is determinable by the Death of the Lessee, and therefore she cannot be endowed of the Rent. Br. Dower, pl. 80. cites M. 1 E. 6 —— In some Cases of Lands and Tenements which are deviseable, and which the Heir of the Husband shall inherit, yet the Wife shall not be endowed, As If the Husband make a *Lease for Life* of certain Lands, *reserving a Rent* to him and his Heirs, and he takes Wife and dies, the Wife shall not be endowed, neither of the Reversion, (albeit it is within these Words Tenements) because there was no Seisin in Deed or in Law of the Freehold, nor of the Rent, because the Husband had but a particular Estate therein and no Fee Simple. Co Litt 32. a.

But if the Husband make a *Lease for Years reserving a Rent*, and takes Wife, and the Husband dies, the Wife shall be endowed of the third Part of the Reversion by Metes and Bounds, together with the third Part of the Rent, and Execution shall not cease during the Years If the Husband make a *Gift in Tail*, reserving a Rent to him and his Heirs, and after the Donor takes a Wife and dies, the Wife shall not be endowed of this Rent, because it is a Rent in Fee, and by Possibility may continue for ever. Co. Litt 32. a.

In Dower it was agreed clearly, That if the Tenant shews, that before the Husband any Thing had, A was seised of the same Land in Fee, and let that for Years rendering Rent, and granted the Reversion to the Husband of the Plaintiff, who died seised of the said Reversion, and so demanded Judgment if the Demandant shall have Dower &c. This is no Plea in bar of Dower, but proves she had Title of Dower, but this saves the Lease for Years, and she shall have Judgment only of the Reversion, and of the Rent; and also she does save to the Tenant Damages, and the Demandant shall be endowed of the Reversion. Win. 80. Pasch. 22 Jac. C B. Anon.

8. But if no Rent be reserved upon the Lease for Years, then the Execution shall cease till the Term expires. Trin. 7 Jac. B. per Curiam.

Co. Litt. 32. a. S. P.

9. A *Rent de novo* was granted *to a Man and his Heirs*, with a *Proviso that if the Grantee died, his Heirs being within Age*, that *then the Rent should cease during his Minority*, and he dies, his Heir being within Age, and the Wife of the Grantee brought a Writ of Dower against the Terretenant, and held it lay, and that the Demandant should have *Execution against the Heir when he came of full Age*. 1 Rep. 87. a. in a Nota of the Reporter cites 5 E. 2.

Fitzh. Dower, pl. 143 cites Pasch. 5 E. 2 where there were Differences of Opinions, and therefore bid the Parties sue a Bill in Parliament, which they did, where it was ordered that the Demandant should recover her Dower against the Grantor, viz. Tertiam Partem prædicti Redditus percipiend' according to the Form of the said Grant, when the Heir shall come to his full Age; and so the Question was determined —— Jenk. 4 pl. 6. S. C. resolved in Parliament —— Vent 96. Mich. 22 Car 2. B. R. per Cur. S. P. Obiter, she shall have Judgment but Cesset Executio.

10. Where *Father and Son* are; the *Father dies*, the *Son takes Feme and enters, and endows his Mother, and* after *grants the Reversion*, and the *Mother dies*, and the *Son dies*, the Feme cannot have Dower; And Brook says it seems to be good Law; for it is said elsewhere that where the Heir enters and endows his Mother, and she dies, and J. N. abates, he shall not have Assise but Mortdancestor or Intrusion; for the *first Possession is defeated by the Dower*. Br. Dower, pl. 87. cites 19 E. 2.

11. If a *Man leases Land for Term of* 10 *Years upon Condition that if Lessee pays* 100 *l. at the End of the Term, that he shall have Fee*, and if not, that he shall have but a Term; if he pays 100 l. at the End of the Term he by this has Fee for all the Term, and the Feme shall be endowed; Quære inde; for this Word Tunc has no Relation to

 give

give Fee Nisi de Tempore Solutionis, as it seems. Br. Dower, pl. 45. cites 7 H. 6. 11.

12. If Lands *are given to the Baron and Feme and to the Heirs of their two Bodies, or to their Heirs*, and after the *Baron dies*, now if the *Feme* will waive and *refuse the Joint-Estate* she may bring Writ of Dower, and by this, in Judgment of Law, the Baron shall be said sole seised Ab Initio; for otherwise she cannot be endowed, and yet in Truth the Baron and Feme were Jointenants during the Coverture. 3 Rep. 27. b. per Cur. Mich. 33 & 34 Eliz. B. R. in Case of Butler v. Baker.

13. If *a Man gives in Tail to Baron and Feme*, and after grants *the Reversion* of those Lands to *J. S.* and then the *Baron dies*, and the *Feme waives*, and disagrees to the Estate Tail, and claims her Dower; Now as to her there is a Nullity of Estate Ab Initio, and to such Intent the Law holds it as an Estate made to the Baron only; Per Cur. 3 Rep. 28. b. Mich. 33 & 34 Eliz. in Case of Butler v. Baker.

14. In a Writ of Dower the Tenant pleads Ne unques Seisie que Dower, and in Truth the Husband of the Demandant had an *Estate by Disseisin which was avoided by the Entry of the Disseisee*; and who had a Title Paramount; It was agreed clearly that this is no Title by which she may have Dower. Win. 77. Pasch. 22 Jac. C. B. Berkshire (Countess of) v. Sir Peter Vanlore.

15. If there are *two Jointenants in Fee*, and *one of them makes a Feoffment in Fee*, his Wife shall not be endowed. Co. Litt. 31. b.

So if the *Conusee of a Fine grant and render to the Conusee* &c. the Wife of the Conusee cannot be endowed. Co. Litt. 31. a

16. Tenant in Dower shall not have *Execution of a Reversion after a Term on which no Rent was reserved*; for in such Case it would be in vain to have Execution before the Term be ended; Per tot. Cur. and Judgment accordingly. Comyns's Rep. 185. Mich. 8 Ann. C. B. Bodmyn (Lady) v. Child (Sir Richard)

(I) Of what Estate for a Collateral Respect she shall be endowed.

For *Collateral Qualities.*

[Conditions &c.]

1. If a Man makes a Feoffment to the Husband upon Condition that he shall enfeoff his Wife and Son, and he makes a Feoffment accordingly and dies, the Wife shall be endowed of this; For the Feoffment to her by her Husband was void, but it appears the Intent of the first Feoffor was that she should have an Estate in the Land, and inasmuch as she could not have the Estate according to his Intention, she shall have the Estate which the Law gives her. 28 Ass. 4. Curia. Brooke Dower 62.

Br. Dower, pl. 62. cites S. C. and states it as here in pl. 1. and says that per Cur. the Feme recovered, quod nota; and that it seems the Feoffment is void as to the Wife, and good only as to the Son, and therefore she is dowable against him; and so it appears in Littleton in his [tit.] Estates upon Condition. [But] nothing more is at that Plea in Brooke.

2. So

2. So it seems if a Feoffment be made to a Husband upon Condition to infeoff J. S. and he does it accordingly and dies, the Wife shall be endowed; For his Intent does not appear to exclude the Wife of her Dower; and if this had appeared, yet it seems it would not have stood with Law. It seems as if this was the Reason of the Case in 28 Aff. 4. Brooke Dower 62.

3. In Dower the *Tenant said that Tenant by the Curtesy granted his Estate to him in Reversion, (who was Baron to the Feme now Demandant) rendering Rent, and for Default of Payment to re-enter*; he in *Reversion married the Demandant*, and *for the Rent-Arrear the Tenant by the Curtesy entered*; he in *Reversion died*, and his Feme was barred of Dower by the Re-entry; for Surrender may well be upon Condition. Br. Dower, pl. 74. cites 14 E 4. 6.

4. If a Man be *Tenant in Fee Tail general*, and makes a *Feoffment in Fee*, and *takes back an Estate to him and his Wife, and to the Heirs of their two Bodies*, and they *have Issue*, and the Wife dies, and the *Husband takes another Wife* and dies, the Wife shall not be endowed; For during the Coverture he was seised of an Estate Tail special, and yet the Issue, which the second Wife may have, by Possibility may inherit. Co. Litt. 31. b.

5. The same Law it is, if he had *taken back an Estate in Fee-Simple*, and after had taken Wife, and had Issue by her, yet she shall not be endowed; For that the Fee-Simple is vanished by the *Remitter*, and her Issue has the Land by Force of the Intail; But in that Case the Tenant cannot plead that the Husband was never seised of such an Estate, whereof the Demandant might be endowed, but he must plead the special Matter. Co. Litt. 31. b.

(K) At what *Time* she shall be endowed.

1. If the Husband enters into Religion, though it is a Civil Death, inasmuch as he is dead as to the World, for his Heirs shall have his Land, and a Writ of Mortdancestor, yet his Wife shall not be endowed during his natural Life, because he entered into Religion with her Consent, otherwise she might deraign him; and so by her own Assent she in a Manner vows Chastity as well as her Husband. 32 E. 1. Dower 176.

Perk. S. 307 S. P. the French Edition, cites Mich. 31 E. 1. Dower 176. — F. N. B. 150. (F) S. P. —— Co. Litt. 33. b. —— Co. Litt. 132. b. S. P. —— Jenk. 4. pl. 4. S. P.

2. The Death of Baron was suggested, because *of his Absence seven Years*, and upon circumstantial Proof, (none being offered to the contrary) she recovered. D. 185. a. pl. 65. Pasch. 2 Eliz. Thorn v. Rolf.

And. 20. pl. 42. S. C. —Mo. 14, 15. pl. 35. S. C. but the Point of Absence is not particularly mentioned in either And. or Mo. —— Bendl. 89. pl. 131. S. C. & S. P. and she recovered her Dower.

3. Proof by 4 of the Death of Baron, and at the Essoign Day Proof by 12 de Vita Viri, all agreeing in the same Points. *Qui melius probat, melius habet*. D. 185. a. pl. 65. Pasch. 2 Eliz. in Case of Thorn v. Rolf, cites Cui in Vita, Mich. 2 E. 2.

Fitzh. Trial, pl. 46. cites S C. — Winch. 82. Over v. Tucker, Pasch 22 Jac. C B. S. P.

(L) By

Fol 679.

(L) By what Act or Thing a Woman may *delay herself* of her Dower.

Detainment of Charters, or of the Heir.

What Charters or Heir.

Perk. S. 355, 356 S. P. ——— The Charters ought to concern the Land whereof Dower is demanded, and not other Lands descended to the Heir. 9 Rep. 17. a. the first Resolution in Bedingfield's Case.

1. Detaining of Charters concerning the same Land of which she demands Dower, is a good Plea in Delay of her Dower. 14 H. 4. 13. b. 14 H. 6. 4. 21 E. 3. 8. b.

2. [So] detaining of a Fine concerning the Land &c. is a good Plea in Delay of Dower, though the Fine may be had again in the Treasury. 1 E. 3 12. b.

Hob. 199. S. P. admitted, per Cur ——— See (M) pl. 2. and the Notes there.

3. Detaining the Heir is a good Plea in Delay of Dower brought against the Guardian in Chivalry. 17 E. 3. 58. b.

Co. Litt 39 a. S P. and so of Eloigning the Body of the Ward; because his Marriage appertains to him; And if the Heir comes in as Vouchee he shall plead the same Plea; But he shall not plead Detainment of Charters, because such as concern the Inheritance of the Heir belong not to the Guardian.

4. [So] if a Woman be endowed Ad Ostium Ecclesiæ, and after the Death of the Baron she brings a Writ of Dower against the Guardian in Chivalry of the Heir of her Husband, it is a good Plea in Delay of this Dower, that the Demandant detains the Heir from him. 11 H. 3. Rot. 6. inter Idoneam *Burdett and Willielmum Burdett*, admitted per Issue, and agreed by Plea. 11 H. 3 Dower 187. the same Case, as it seems, but in *Burdett's Case* it is not expressed what Dower this was, but she claims it as Land of which she was nominatim dotata by her Husband.

5. The same in a Writ of Dower Ex assensu Patris, or Matris 11 H. 3. Dower 186.

The Plea of Detainment of Charters is *not good for more Lands than the Charters concern.* D. 230. a. pl. 52. Trin. 6 Eliz. Anon. cites 22 H. 6.

6. In Dower, the *Tenant said that the Demandant detained from him certain Charters concerning his Franktenement, and in Case she would deliver them, he is ready to render Dower, and at all Times has been ready*; And it was agreed, that this *Detainer is no Plea, but of Charters concerning the Inheritance, and not of Land purchased*; And so it seems there, that *if it concerns the Inheritance, though it be other Land than of which the Dower is demanded*, yet it is a good Plea; and there the Defendant was *compelled to shew what Charters she detained.* Br. Dower, pl. 47. cites 22 H. 6. 16.

S. C. cited per Cur. 9 Rep 17. b. 18. a. that upon Delivery of the Charters she

7. Dower *of four Acres*; As *to one Acre the Tenant vouched to Warranty*, and as *to the rest that the Demandant detained Evidences from him concerning the same Land*, and *shewed one specially, by which T. infeoffed J. W. and R. his Father, habend' to them and to the Heirs of R. and if she would deliver them, he is ready to render Dower*; Pool said his Plea goes

goes to all; for if she detains Charters which concern any Part of the Land in Demand, it is a good Bar to the whole Dower, and the *Detinue shall be of Land descended to the Tenant, and not of the Land purchased*; Per Newton, the Plea does not go to all. Br. Dower, pl. 48. cites 22 H. 6. 42.

8. In Dower, the *Tenant said that the Demandant detained certain Charters concerning this Land &c. and if she will render &c. then ready to render Dower &c.* The *Demandant produced* the Deed, and prayed Dower, and the Deed was read, so that the Court perceived it was the same Deed, by which the Demandant recovered. Br. Dower, pl. 53. cites 9 E. 4. 47.

9. Dower against the *Heir*, who *said that the Demandant detained from him a Bag sealed, with certain Evidences concerning the same Land*, and *if she will deliver it &c. he is ready to render Dower*, and a good Plea, per tot. Cur. except Englefield, *without shewing the Certainty of the Evidences*; *Quære if it had not been in a Bag sealed.* Br. Dower, pl. 1. cites 18 H. 8. 1.

10. In Dower, if the Tenant pleads that the Demandant detains Evidence, the *Demandant delivering in the Evidence may have Judgment immediately*; But if she *denies the Detainer* of the Evidence, *and that be found against her, she shall lose her Dower*; Per Cur. Obiter. Hob. 199. Mich. 15 Jac. in Case of Brickhead v. York (Archbishop.)

11. *So* in the Case of Dower brought against *a Guardian in Chivalry who pleads the Detainer of the Heir his Ward.* Ibid.

shall have her Judgment immediately.

(M) Detinue of *Charters*. [Or *Heir*.]

Who may plead it. [And How.]

1. If a Wife be with Child, the Heir for the Time being cannot plead Detinue of Charters; For she may keep them for the Infant. 41 E. 3. 11. b.

In Dower, the *Tenant said that she detained certain Evidences concerning his Inheritance, and declared what, and that he has been at all Times ready to render Dower if she had delivered them.* The *Feme, as to two of the Deeds, intitled herself by Gift to her and her Baron, and to the rest, where the Tenant intitles himself as Brother and Heir of the Baron, she said that she is enseint by her Baron, and keeps the Deeds to the Use of the same Infant who shall be Heir*, if God give him Birth; Judgment &c. and *Issue was taken that she was not enseint the Day of his Death*, and *not if* she was *enseint by her Baron the Day &c.* Br. Dower, pl. 8. cites S. C. ——— Br. Issues joines, pl 6. cites S. C. & S. P. accordingly.

2. In a Writ of Dower against the Guardian in Chivalry, he may plead in Delay of Dower, that the Plaintiff detains the Heir from him. 17 E. 3. 58. b. admitted.

S. P. but he shall shew his Name, viz. J. Son and Heir of W. T. Br. Dower, pl 47. cites 22 H 6. 16. —— S. P. and shall shew whether Male or Female, or otherwise Eloignment by the Demandant is no Plea Br. Dower, pl 67. cites 2 H. 7 6. ——— S. P. But he cannot plead Detainment of Charters; For he cannot conclude his Plea thus, viz. " And if " the Demandant will deliver to him the Charters &c " For the Charters which concern the Inheritance of the Heir shall not be delivered to the Guardian. 9 Rep. 19. resolved in Bedingfield's Case, and cites it so adjudged in 1. E. 3. 49. a.

S. C. cited per Cur. 9 Rep. 18. b. in Bedingfield's Case.

3. In a Writ of Dower, if the Tenant vouches the Heir in Ward, the Guardian may plead in Delay of Dower, that she detains the Heir from him, though the Guardian could not have rendered to her Dower before this Time; For he may render it now. 17 E. 3. 58. b. Curia.

4. A Man having *a Charter which concerns four Acres of Socage Land,* he *devised three to his youngest Son, and four to his Wife for Life,* the *Remainder to a Stranger,* and died. The *Wife* entered in the Acre, and *happened upon the Charter,* and brought a Dower of three Acres against the youngest Son, who pleaded Detinue of Charters in Bar, and that *if she would deliver, he was ready to render Dower*; But in the Conclusion he said, *yet ready to render,* leaving out the Condition, *if* &c. which is a Confession, and adjudged for the Complainant. D. 230. pl. 52. Trin. 6 Eliz. Anon.

A Feoffee cannot plead Detainment of Charters; agreed per Cur. Cro. E 367. pl. 2. Hill 37 Eliz. B. R. in Case of Stokes v. Annesby.

5. No *Stranger,* though he is Tenant of the Land, and has the Evidences conveyed to him, can in a Writ of Dower plead Detainment of Charters, but this Plea lies only in Privity, viz. for the Heir of the Baron. 9 Rep. 18. a. Hill. 28 Eliz. the third Resolution in Bedingfield's Case.

6. Detainment of Charters is not pleadable by *Tenant by Receipt,* who has a Reversion after Tenant for Life, because he cannot render her Demand, and is a Stranger, and therefore Seisin was awarded to the Demandant. 9 Rep. 18. b. 19. a. per Cur. cites 8 E. 3. 55. a. [pl. 3.]

7. The *Heir in several Cases stands in the Degree of a Stranger,* and shall not have this Plea. 9 Rep. 18. a. Hill. 28 Eliz. in Bedingfield's Case.

8. *As* if the Heir hath the Lands *by Purchase.* 9 Rep. 18. a.

9. If the *Heir* has *delivered the Charters to the Woman,* he shall not plead the Detainment of them, for he has them with his Consent. 9 Rep. 18. a.

10. So if the *Heir* is *not immediately vouched* by the Tenant, but the Tenant vouches one who vouches the Heir. 9 Rep. 18. a.

11. So if the *Heir coming in as Vouchee, has no Land in the same County.* 9 Rep. 18. a.

(N) [Detinue of Charters in Bar of Dower.]

How to be *pleaded.*

1. If Detinue of Charters is pleaded in Delay of Dower, he that pleads it ought to allege what Charters they are so certainly as in a Declaration of Detinue for them. 14 H. 6. 4. 1 E. 3. 12. b.

Dower *against the Heir,* who *said that he was ready to render Dower if she would render to him certain Charters concerning his Inheritance, which she detained from him;* Per Cur. you *shall shew what in certain,* and this is reasonable, *by reason of the Verdict to the Jury, and that it appear to the Court to whom they belong*; For if they belong to the Defendant by Purchase, and not by Inheritance, he is put to Writ of Detinue; but if they are in a *Box sealed* &c. he shall not declare in certain. Br. Dower, pl. 67. cites 2 H. 7. 6. ——— 9 Rep. 18. a. S. P. resolved in Bedingfield's Case, so that a certain Issue may be taken, and cites 22 H. 6. 16. a 2 H. 7. 6 a. 14 H. 6. 4 a. and 18 H. 8. 1. a.

The

The Certainty of the Charters *ought to be alleged, unless* they are *in a Chest, Box, or Bag sealed* &c. D. 230 a. pl. 52. Trin. 6 Eliz.

2. Dower *against two Femes, who said that the Feme Demandant was Feme of their Father, and that all the Land of the Baron descended to them as Heir* &c. *and Partition was made between them, so that certain Land was allotted to the one, and certain to the other, and for the one he said, that the Demandant detained a certain Box full of Muniments touching the Inheritance of the Feme Tenant, and if she will deliver the Box she is ready to render Dower, and at all Times has been*, and demanded Judgment if she may demand Dower before the Delivery of the Box; And *for the other Daughter* it was *said, that the Demandant detained the same Box and two Indentures, and that in the one it is contained, that A. infeoffed the Father of this Feme of the Tenements to her assigned in Partition, and in the other Indenture it is contained, as the Father of the Tenant granted to B. a Rent-Charge, that if the Father performed certain Conditions, that the Rent should cease, and that the Box and those Indentures came to the Hands of the Demandant after the Death of her Husband*, and demanded Judgment if before the Delivery of those she may demand Dower; And the *Demandant as to the Box said that she is ready, and at all Times has been*; by which, as to this it was adjudged, that the Demandant recover Dower, and no Party amerced; and so as to her who first pleaded the Detinue of the Box, and to the other she *said, that as to the first Indenture she never took it*, and the other e contra; and *as to the other Indenture she said that she had delivered it to the other Parcener*; And it was awarded that she deliver the Box to her who rendered the Dower for her Part, and *as to the Delivery to the one Parcener of the Indenture which concerned the Purparty of the other, she demurred* &c. et adjornatur, therefore quære. Br. Dower, pl. 41. cites 21 E. 3. 8.

3. In Dower, the *Tenant said that Actio non*; For *his Father was possessed of a Chest and Charters, and of two Fines in Special, and divers other Charters which concerned the Land which is descended to him from his Father, which come to the Demandant, and he is, and at all Times has been, ready to render Dower in Case she would deliver the Chest and Charters*; And the *Demandant said, as to all the Charters except the two Fines, she has been always ready to deliver them, and offered them to the Court, and to the two Fines, that they came not to her Hands*; Per Martin J. *where the Chest is open, you ought to declare every Charter specially*, and the same in Detinue of a Chest open with Charters, quod Curia concessit, quod nota bene. Br. Dower, pl. 57. cites 14 H. 6. 4.

4. He that pleads Detainment of Charters ought to plead *that he has been always ready to render Dower, and yet is* if the Demandant would deliver to him the Charters. 9 Rep. 18. a. 19. b. Hill. 28 Eliz. in Bedingfield's Case.

5. *Detainer of Charters* is no Plea after Imparlance; for per Cur. He that pleads this Plea must plead that from the Time of the Death of his Ancestor *paratus fuit & adhuc paratus existit* to assign her Dower if she would deliver the Charters. 1 Salk. 252. pl. 2. Pasch. 3 W. & M. in B. R. Burden v. Burden.

Cumb 183. S. C. —— Show 271. and Judgment affirm'd in B R. —— Comb. 183. S. C. the Plea goes only in Abatement, and Judgment affirmed Nisi &c.

(O) *What*

(O) *What Act of the Baron* may *bar* the Wife of her Dower.

1. IF Land be mortgaged to the Baron, and the Condition is broke, and afterwards upon the Agreement the Mortgagor hath the Lands again by Payment, yet the Wife of the Mortgagee shall be endowed after the Heir of the Baron hath recovered, and so it seems before; but this is a Quære. 41 E. 3. 1. b.

Co. Litt. 32. a. S P. —— But otherwise if she were naturalized by Act of Parliament. Ibid.

2. If a Man *takes an Alien to Wife, and afterwards he aliens his Lands*, and afterwards *she is made a Denizen*, she shall not be endowed; for she was absolutely disabled by the Law, and by her Birth not capable of Dower, but her Capacity and Ability began only by her Denization. 13 Rep. 23. Hill. 27 Eliz. in Chancery in Menavill's Case.

Co. Litt. 33. a S. P.

3. If a Man seised seised of Lands in Fee *takes a Wife of eight Years of Age, and aliens his Lands*, and afterwards the *Wife attains to the Age of nine Years*, and afterwards the Husband dies, the Wife shall be endowed; For although at the Time of the Alienation the Wife was not dowable, yet for as much as the Marriage, and Seisin in Fee, was before the Alienation, and the Title of Dower is not consummate until the Death of her Husband, so as now there was Marriage, Seisin in Fee, Age of nine Years during the Coverture, and the Death of the Husband, for that Cause she shall be endowed, ; for it is not requisite that the Marriage, Seisin, and Age, concur together all at one Time, but it is sufficient if they happen during Coverture. 13 Rep. 22, 23. Hill. 27 Eliz. in Chancery in Menavill's Case.

4. Though the *Husband aliens* the Lands or Tenements, or extinguishes the Rents or Commons &c. yet the Woman shall be endowed. Co. Litt. 32. a.

Fol. 680.

(P) *What Act of the Feme will bar* her of her Dower.

Elopement.

* Br. Dower pl. 12. cites S. C —— Co. Litt. 32. a. b. S. P. — F. N B. 150. (H) S. P. ——

† This seems misprinted for 34.

1. IF she elopes from her Husband with another Man, and continues in Adultery with him without being reconciled to her Husband before the Death of her Husband, she shall lose her Dower. * 43 E. 3. 19. 19 E. 4. 30. Perkins S. 354. 47 E. 3. 27. Vide Statutum Roberti Primi, cap. 13. apud Scotos according. Westm. 2. cap. † 38. according.

Co. Litt. 32. a. b. S. P. — 2 Inst. 436. S. P.

2. The same Law if she elopes with the Adulterer and is not reconciled, though she does not stay with the Adulterer. Perkins S. 354.

Co. Litt. 32. a. b. S. P.

3. The same Law if she be reconciled to her Husband by the Coertion of Holy Church. Perkins S. 354. and not of her Good-will.

4. So

4. So if the Wife elopes with her good Will, and stays with the Adulterer against her Will, she shall lose her Dower. Perkins S. 354.

F. N. B. 150. (H) if she remains with the Adulterer she shall lose her Dower; but if she remains in Adultery upon the Husband's Lands or Tenements she shall have Dower; because the same is not an Elopement. ——— Co. Litt. 32. b. ——— 2 Inst 436. S. P. and so if afterwards the Adulterer turns her away, yet she shall be said morata cum Adultero within this Act.

5. So if she be ravished and stays with the Adulterer during the Life of the Husband willingly without Reconcilement, she shall lose her Dower. 43 E. 3. 19. b.

See the Notes at pl. 17.

6. But if the Wife be ravished and stays with the Adulterer against her Will she shall not lose her Dower. 43 E. 3. 19. b.

Br. Dower, pl. 12 cites S. C. ——— Perk. S. 354. S. P. ——— See tit. Rape, pl. 4. and the Notes.

7. So if after Elopement the Wife be reconciled to her Husband of his Free Will without Coertion of Holy Church, she shall have Dower. Perkins S. 354. D. 1, 2. Ma. 107. 23.

See pl. 18. and the Notes there.

8. If a Man grants his Wife with her Goods to another, by Force of which the Wife lives with the Grantee afterwards all the Life of her Husband, this shall lose her Dower, because she lived in Adultery with the Grantee notwithstanding the Grant of the Baron. 30 E. 1. Libro Parliamentorum Fol. 96. *Willielmus Paynell* and *Margery* his Wife's Case. Adjudged in Parliament.

S. C. cited 2 Inst. 435, 436. with the Deed at Large de Verbo in Verbum which Ld. Coke says he cites for the Strangeness thereof.

9. If the Friends of the Husband esloin him from his Wife, so that the Wife does not know what is become of him, and the Friends of the Husband publish that the Husband is dead, and after they procure the Wife to release all Marriages and Interests, which she can have in him as her Husband, and after the Wife by the Perswasion of the Friends of the Husband marries with another that dies, and she takes another Husband, to whom Notice is given that the first is living, but no Notice was given thereof to the Wife, though the Wife lives in Adultery, and though the Husband was not out of the Realm or beyond Sea, so that the Wife ought to take Notice that he was living, yet inasmuch as she non reliquit Virum Sponte, as the Statute says, but by the Perswasion of the Friends of the Husband that he was dead, and it does not appear that she ever knew that he was living, this is not any such Elopement as to bar her of her Dower. Mich. 12 Ja. between *Green* and *Harvy*. Per Curiam.

10. If the Wife elopes from her Husband, and after lives with her Husband Years and Days till the Death of her Husband, with the Good-will and Assent of the Husband without Coertion of Holy Church, this shall not bar her of her Dower, though it is not averr'd that she was reconcil'd to her Husband. 19 E. 3. Elopement 94.

To prove a Reconcilement it was given in Evidence that they lay together several Nights in several Places after the Departure and Separation, and demean'd themselves as Husband and Wife. It was objected that they never dwelt together in the same House, but liv'd asunder; and that she continued in Adultery with one or another all along during her Husband's Life, sed non Allocatur; For there might be several Elopements and several Reconciliations, and the Tenant at his Peril ought to take Issue upon one. D. 106. b. 107. pl. 22, 23. Haworth v. Lady Powis

But though she does cohabit and is reconciled, yet if it be by the Coercion of the Church she shall loose her Dower. 2 Inst. 436.

But if a Man seised of two Manors in Fee, taketh a Wife, and when the Husband is dwelling at one Manor, the Wife goes unto the other Manor, and when she is there she liveth in Adultery, it is said that by doing so she shall not lose her Dower, because it cannot be intended a running away from her Husband, when the Law cannot intend that she can dwell upon the Manor of her Husband without the Agreement of her Husband, tamen quære. Perk. S 355.

11. **If a Woman** elopes into another County, and lives in Adultery in a Manor that is of the joint Purchase of the Baron and Feme, without being reconcil'd, **yet this shall not bar her of her Dower, because the Baron is to see that none such live within his Land.** 8 **E. 2. Dower** 153. **adjudged.**

If the Wife doth elope from her Husband's House of Habitation, and commit Adultery in any other the Lands or Manors of her Husband, this without the free Reconciliation of her Husband is within the Purview of this Statute. 2 Inst 436.

It was said by Daniel that an *Elopement* is not Bar of Dower *Ad Ostium Ecclesiæ*. Noy. 108.

2 Inst. 436. S. P. Contra. though Ld. Coke says, it has been held otherwise.

12. **The** same **Law, though the** Wife lives in an House of the free Tenant of the Manor. 8 **E. 2. Dower** 153. **adjudged.**

Noy. 108. * Fol. 681. Trin. 2 Jac. C. B Powell v. Weeks resolv'd e Contra. because it is not † a vinculo Matrimonii. ——— Godb. 145. pl. 182. 2 Jac. C. B. adjudg'd that she shall have her Dower. Lady Stowell's Case and seems to be S. C.

13. **If the Wife be** divorced for Adultery, (**which does not dissolve the Bond of Marriage by the Canon Law, nor of our Church in this * Realm, but is only** a Mensa & Thoro) † **yet this shall bar her of her Dower.**

Co. Litt. 33. b. contra.

14. **With this agrees the Law of** Scotland. Skene Regiam Majestatem 43. **b. Vers.** 5.

15. **With this agrees the Civil Law.** Reynolds of Divorces 86.

16. **So the Canon Law is according.** Reynolds of Divorces 86.

If she goes willingly with or to the Adulterer, this is a Departure and a Tarrying, though she remains not continually with the Adulterer she shall *lose her Dower*. Co. Litt. 32. b in Principio.

17. 13 *E.* 1. *W.* 2. *cap.* 34. *If a Woman willingly leaves her Husband, and goes away and continues with her Advowterer, she shall be barred for ever of Action to demand her Dower;*

In this Case of Elopement, and remaining with the Adulterer &c. the Wife could not be barred of her Dower by the Common Law, though a Divorce were sued and had for the said Adultery. 2 Inst 435

Although the Words of this Branch be in the Conjunctive, yet if the Woman be taken away not Sponte, but against her Will, and after consents and remains with the Adulterer without being reconciled &c. she shall lose her Dower; for the cause of the Bar of her Dower is not the Manner of the going away, but the remaining with the Adulterer in Adultery without Reconciliation, that is the Bar of the Dower. 2 Inst 435.

If the Wife goes away with the Husband's Agreement, and consent with A. B. if after A. B. commit Adultery with her, and she remains with him without Reconciliation, she shall be barred of her Dower by this Branch; 2 Inst 435

But the Husband may give Licence to a Man to carry his Wife to his House, and this shall be a good Bar in Action brought de Muliere abducta cum bonis viri. 2 Inst. 436.

18. *Unless her Husband willingly, and without Coercion of the Church, reconciles her and suffers her to dwell with him.*

Note, that Cohabitation is not sufficient without Reconciliation made by the Husband Sponte, so as Cohabitation only in the same House with the Husband avails her not; a Fortiori though she remain with the Avowterer in any of the Lands or Manors of her Husband, yet she shall be barred of her Dower by this Branch, without the Husband's free Reconciliation, although it has been otherwise holden; and the Reason that they yielded is, because it is no Elopement; whereas it appears before that the Words of Reliquerit & Abierit are not of the Substance of the Bar of Dower, but the Adultery, and the remaining with the Adulterer, as is abovesaid; and although she and the Adulterer remain within any of the Lands or Manors of the Husband, yet (the Words being Si uxor sponte Reliquerit & Abierit) she has left

left and gone from her Husband in that Case, which is a Personal Offence; See the first Part of the Institutes, Sect. 36. for bars of Dower, whereunto you may add a Case in Tr. 9 E. 2. Fol. 65. in libro meo, That if a Woman say she is conceived with Child by her Husband whilst he lived, and in Truth is not, whereby the next Heir is disturbed, she shall lose her Dower, if she acknowledge the same before the Justices. 2 Inst. 436.

19. In Dower Defendant pleaded Elopement in the Wife; Wife *replied* that her Husband had *bargained and sold her* to the Adulterer; and held bad. 12 Mod. 232. Mich. 10 W. 3. Coot v. Berty.

20. *Articles to settle Lands in Jointure*, are in Nature of an actual Jointure, which is not forfeited by an Elopement like Dower. 3 Wms's Rep. 276. Pasch. 1734. in Case of Sidney against Sidney.

(P. 2) Barr'd or not. By Act of After-Husband.

1. A Wife is intitled to Dower of the Lands of her first Husband; her *second Husband accepts for* this *Dower less than her third Part*; after the Death of this second Husband *she may waive* it, and have her full third Part. Jenk. 79. pl. 56.

(P. 3) Delayed or suspended. In what Cases.

1. IN Dower *Rent* was granted by Fine, *with Condition that when any Heir is within Age the Rent shall cease during the Nonage*, and the *Feme recovered Dower during Nonage, & Cesset executio till the full Age of the Heir*, nota. Br. Judgment, pl. 41. cites 24 E. 3. 61.

2. In Dower it was agreed per Cur. that where the *Tenant vouches the Heir in Ward of the King in the same County, where the Writ is brought*, the Demandant *shall not recover till the Warranty be determined.* Br. Dower, pl. 2. cites 3 H. 6. 17.

3. The *Heir of the Husband makes a Lease* for Years of the Land *to the Wife after the Husband's Death*, now during this Lease Dower is suspended. *But not* so *if she has taken another Baron, and during the Coverture the Heir of such Baron makes to him and the Feme such Lease* for Years and second Baron dies; If she waves this Lease Dower is not suspended. Jenk. 73. pl. 38.

4. A. an *Husband seised* of Land held of the King *by Knight's Service* dies, his Heir within Age and in Ward to the King; the King by Patent *grants to the Widow* of A. *the Wardship of the Body and Land* of the Heir during his Minority; this Patent suspends the Widow's Dower during the Nonage, for her Dower and such a Patent are inconsistent. Jenk. 73. pl. 38.

5. A. *seised of Lands in Fee makes a Lease* for Years rendring Rent, *and takes Wife*; after the Death of A. the Wife shall have Judgment to have the third Part of this Land for her Dower, and *shall have* a *third Part of the Rent*; but cessabit executio for the Possession of the Land during the Lease. Jenk. 73. pl. 38.

6. Contra

6 *Contra if he* had *vouched* him *and prayed that he should be summoned in another County*; For there the Demandant *shall* recover immediately; quod nota Diversity. Br. Dower, pl. 2. cites 3 H. 6. 17.

7. Dower is demandable against an *Infant*, and he shall not have his Age. Cro. J. 111. pl. 8. Hill. 3 Jac. B. R. Smith v. Smith.

Roll Rep. Arg. 326. S. P. But if great *Default be in the Wife*, Age shall be allowed As if she *does not bring Action in a long Time* after the Title accrued, there if the Infant be in by Descent, after her Title accrued, *Age lies*. Arg. in Case of Harvey v. Wyatt, cites Fleta lib. 6. cap. 43. and Bract. 252. and Britt. cap. 111. fol. 217.

(Q) What *Act of the Baron* shall *bar the Feme* of her Dower.

Recoveries at the Common Law.

[And other Alienations by him.]

1. AT the Common Law if the Baron was once so seised that the Wife was entitled to Dower, if he after aliened the Land, and a Recovery was after had in a real Action upon another Possession, yet his Wife should have had Dower. 47 E. 3. 13. b. 14 H. 4. 33. admitted per Issue.

2. If a *Man recovers in Value against the Husband by a Warranty Auncestrel*; yet the Wife shall be endowed, because the same is by Force of the Warranty made, and not by Reason of Eigne Title to the Land. F. N. B. 150. (D)

3. *West. 2. cap. 4. 13 E. 1. The Wife shall be endowable as well where Land was recovered against her Husband by Default as by Covin; so that although the Land was lost by the Husband's Default, yet that shall be no good Allegation for the Tenant, but he must then proceed and shew his Right, otherwise the Wife shall recover.*

It appears by the Preamble of this Statute, that if a Recovery had been in a real Action against the Husband, and the Husband did render the Land to the Demandant, that notwithstanding this Recovery the Wife should recover her Dower. But if the Husband had lost by Default, it was a Question and a Doubt whether in that Case she should recover or no; and some Judges would give Judgment for the Woman, and some were in a contrary Opinion. Here is to be noted, that a Recovery by Reddition of the Husband, is not of so great Account in Law as a Recovery against the Husband by Default; but therein before this Act this Diversity was holden for Law, that if in a Writ of Dower the Tenant did plead the Recovery in Bar, the Demandant might reply, Que ceo fuit per Fraud, ou per Collusion, ou per gree le Baron, as Britton says, who wrote before this Statute; but if it were by Default without Covin, then the greater Opinion was that it barred the Feme. 2 Inst. 349.

But the Reddition of the Husband was holden for clear Law, as it was adjudged the Year before the making of this Act, so that the Wife was ready to maintain the Title of her Husband. 2 Inst. 349.

All this is to be understood, where he that recovers has no Right, for where he that recovered either by Reddition or Default had Right, there neither the common Law nor this Statute extended thereunto. 2 Inst. 350

If the Recovery be had by Verdict, the Feme shall not falsify in the Point tried, but she may say, that he might have pleaded a better Plea, or confess and avoid the Recovery. 2 Inst. 350.

4. In Dower the *Tenant vouched himself to save the Tail*, upon which *he entered into the Warranty, and said, that at another Time his Father brought Writ of Right against the Baron, who vouched himself to save the Tail*, upon which the *Father of the Tenant said, that the Baron had nothing of the Gift of him whom he supposed gave, and upon this*

they

they were at Issue, and found for the Father of this Tenant, then Demandant, that the Donor did not give &c. upon which the Father of this Tenant recovered Judgment. Hastings said, You have not denied the Seisin of our Baron, nor have you averred that your Father had such Title as you allege, and so recovered upon Dilatory, and prayed Dower. Parshe said, Your Baron and his Heirs shall be bound by the Recovery, and put to Attaint. And *by the Common Law every Recovery binds the Feme unless it was upon Render, and the Statute does not aid against any Recovery but Recovery by Default,* in which Case the Title, which was not tried against the Baron, shall be tried at the Suit of the Feme; but Recovery by Action, tried against the Baron, is not aided by any Law, and prayed that she be barred; and adjornatur. But by the Book Parkins fol. 73, 74. the Feme may falsify Recovery had against her Baron by Action tried. But Brook says, this is not Law in the same Point which was tried &c. And the like was held Mich. 47 E. 3. fol. 13. that the *Recovery against the Baron by Action tried remained at the Common Law,* and therefore the Feme shall not falsify. And by 36 H. 6. Fitzh. Faux. Recov. 15. *a Feme may falsify Recovery by Action tried against her Baron in another Point, but not in the Point* which was *tried.* Br. Dower, pl. 24. cites 49 E. 3. 23.

5. Where *Land is recovered against the Feme Tenant in Dower upon Plea, which does not disaffirm the Possession of the Baron,* as where she *pleads that nothing passed by the Deed in Scire Facias upon Fine against him who pleaded a Feoffment of her Baron by Deed, which passed against him,* by which the other recovered against him; in this Case the Feme is not restored to the Writ of Dower; but this Matter pleaded in Writ of Dower is a good Bar. Br. Dower, pl. 26. cites 50 E. 3. 7.

Br. Restore &c. pl. 50. cites S. C.

6. *And* per Wiche, where the *Baron loses by Dilatory, as* upon *Non-tenure* or *Misnosmer of the Vill* &c. she may falsify in Writ of Dower. Br. Dower, pl. 26. cites 50 E. 3. 7.

S. P. For this does not disaffirm the Possession of the Baron; but *contra* it seems *upon Recovery upon Dilatory against the Feme herself being in Dower*; Note a Diversity. Br. Restore &c. pl. 1. cites S. C.

7. The *Husband levied a Fine* of his Land and died. The *Wife within five Years after his Death brought Writ of Dower, but did not pursue her Writ till six Years were past.* Manwood and Harper J. held this to be no Bar; but Dyer e contra. 3 Le. 50. pl. 71. Trin. 15 Eliz. C. B. Anon.

Dal. 107. pl. 58. Crave v. Broughton, S. C. held accordingly. —— Mo. 53. pl. 154. Pasch. 5 Eliz. Anon. S. P. Dyer thought that she was barred because she had Title at the Time of the Fine levied by the Intermarriage, though it could not be executed till after the Death of the Baron; And the Reporter says, that a Precedent was shewn Anno 6 H. 8. where all the Matter was pleaded. —— Dal. 52. pl 21. S C. in totidem Verbis —— D. 224. a. pl. 28. Damport v. Wright, S P. and seems to be S. C. —— Ibid. Marg. says it was so adjudged Mich. 31 & 32 Eliz. C. B. and that it was also agreed Pasch. 34 Eliz per Cur. —— She is barred by Fine and Nonclaim in five Years after her Husband's Death. 2 Rep. 93. a cites it as adjudged 4 H. 8. —— S P. Arg. 2 Roll Rep. 69 cites 15 Eliz. Paine's Case. —— S. P. if she be of full Age, sound Memory, out of Prison, and within the four Seas. Gouldsb. 148. pl. 71. Hill. 43 Eliz. Anon —— And bringing a Writ of Dower within the five Years is no Bar to such Fine unless the Return of the Writ be pleaded. 2 Le. 221. pl. 296. Hill. 30 Eliz. C. B. Fitzhugh's Case. —— If she brings a Writ within the five Years *against one not Tenant* of the Land, that is not any *Claim* within the Statute, but if she bring a Writ *against four that are Tenants,* and *two die,* and she brings a Writ against the others by *Journeys Accounts* this is a good Claim within the Statute, though the second Writ was after the Time limited; Per Hobert Ch. J. Win. 66. Anne Summer's Case. —— But Quære here if the *two that died were not Tenants.* Ibid.

8. 4 & 5 *W. & M.* 16. *This Act shall not extend to bar any Widow of any Mortgagor from her Dower, who did not legally join with her Husband in such Mortgage, or otherwise lawfully exclude herself.*

(Q. 2) Barred. By Acts of Baron and Feme.

1. IN Dower the *Tenant said, that he himself levied a Fine to the Feme, now Demandant, and to her Baron come ceo que* &c. *and that the same Feme and her Baron granted and rendered it again to the Tenant with Warranty of the Feme*, and the *Feme said, that she had nothing but as Feme*, and therefore was admitted no Bar; quod *miror*, by Reason of the Render and Warranty of the Feme himself, tit. Dower in Fitzh. 160. and 165. M. 19 E. 2. and 145. M. 6. E. 2. Fine upon Conusance de Droit come ceo que &c. by the Baron and Feme; quod mirum! For this is a Gift by Collusion. But *otherwise* it is *of a Fine sur Release*; For the *Title of the Feme does not take Place till the Baron is dead*, and so a Release of later Time, and therefore there she may confess and avoid the Fine. Br. Dower, pl. 77. cites 13 E. 2.

2. *Jointure* was made after the Coverture, the *Husband and Wife levied a Fine Sur Conusance de Droit* &c. *of the Jointure*, it seems clear, if it be *as that which the Conusee had of the Gift of the Husband*, that is no Bar in Dower; and the Election is not given to the Wife till after the Death of the Husband, according to the Stat. 27 H. 8. c. 10. D. 358. b. pl. 49. Trin. 19 Eliz. Anon.

3. Feme barred of her Dower by joining in a * *common Recovery* with with her Baron. Pl. C. 115. 20 Eliz. Eare v. Snow.

* S. P. Tho' she has no Recompence Plg. of Recov. 66. cites Pl. C. 514 and 2 Rep. 74. 78. and says, He has heard some learned Men question this, because she has *no Estate then in esse*, but he says with Submission, the same may be said against a Fine, and the common Recovery estops her as Party, and the Recovery disaffirms her Husband's Titles to the Lands of which she was dowable.—— So by a *Fine* though the *Uses* were *declared by the Husband only*. Ow. 6. Trin. 28 Eliz. C. B. Hamington v. Rider.

4. If *a Woman* has Title of Dower and by *Covin causes the Tenant of the Land to be disseissed by a Stranger, against whom she brings a Writ of Dower*, and the Feme recovers, yet this is void, and she is not remitted. 3 Rep. 78. a. Hill. 44 Eliz. in Canc. in Fermor's Case.

5. If *Baron and Feme levy a Fine* the Feme is barred of her Dower; Per Coke Ch. J. in a Nota says, that it is so without Question now. 10 Rep. 49. b. Mich 10 Jac. in Lampet's Case.

6 Fine levied by Feme Covert *to confirm a Lease* is no Bar of her Thirds after the *Lease satisfied* by the Profits. Chan. Rep. 132. 15 Car. 1. Naylor v. Baldwin.

7 Feme joined with her Husband in a *Fine* in order *to make a Mortgage, but which never was made.* He died, and she brought Dower, and got Judgment by Default, and the Heir could not be relieved; For though it was a Bar at Law, it was not so in Equity. Ch. Prec. 34. Mich. 1691. cites it as Danby's Case.

(Q. 3)

(Q. 3) Bar. By what Eſtate, Grant &c.

1. NOTE that the *Lady of M. was in Chancery to be endowed* of the Land of her Baron, where the Heir is in Ward of the King; and becauſe the *Ward of the Land and Body of the Heir was committed to her before by Patent of the King, in which no Exception of Dower was made*, therefore ſhe was ouſted of Dower during the Nonage. Br. Dower, pl. 27. cites 2 H. 4. 7. and 11 H. 4. accordingly, in the Caſe of the Lady Arundel, as it is ſaid there.

2. A *Man granted a Rent of* 10 *l. to a Feme percipiend' de terris ſuis pro tota dote ſua de terris ſuis, and* after *he married her, and* then *died*, and after *ſhe accepted the Rent, and then brought Writ of Dower*; Quære if the Acceptance of the Rent be a Bar in Dower, as Dowment ad Oſtium Eccleſiæ, or ex Aſſenſu Patris; For the Acceptance is Recompence. *Quære*. Br. Dower, pl. 97. cites 20 E. 4. 3.

3. *Entry* into Part of the Land *after the laſt Continuance* by the Demandant will *abate the Writ* of Dower; And it is no Juſtification to ſay that her Husband and ſhe dwelt there till his Death, and that the Heir entered, and ſhe and the Heir dwelt there together till now, and that ſhe *claimed at the Will of the Heir*, and not otherwiſe; But it was held not good for the *Quarantine*; For ſhe ſhould ſhew the Death certain, and the Time of the 40 Days, and after, by reaſon of the Opinion of the Court, ſhe waived the Plea, and traverſed the Entry. D. 76. b. pl. 32, 33. Mich. 6 E. 6. Kettleby v. Kettleby.

4. But in *Scire Facias* to have Execution of Dower recovered, ſuch Entry was no Plea. Ibid. cites 45 E. 3.

4. A *Feoffment* was made *by the Baron to the Uſe of himſelf for Life, and after to the Feme for Life for her Dower, upon Condition to perform his laſt Will.* She entered and agreed thereto, and afterwards brought Dower. It was reſolved, that an Acceptance of a Collateral Recompence was no Bar to the Feme of her Dower. 4 Rep. 1. Mich. 14 & 15 Eliz. Vernon's Caſe.

5. *Feme ſole Leſſee marries the Leſſor*, and the *Leſſor dies within the Term*, and the Wife enters, this ſhall not conclude her Dower after the Leaſe is expired; Arg. Ow. 154. per Shuttleworth, Trin. 29 Eliz. in Caſe of Goodridge v. Warburton, cites 11 H. 4.

6. A Widow recovered Dower, and upon *Writ to the Sheriff to put her in Poſſeſſion*, he *returned that he had delivered* 84 *Acres mentioned in the Writ.* She brought *Scire Facias againſt the Tenant, ſuggeſting that* 60 *Acres of the ſaid* 84 *were the Lands of a Stranger not compriſed in the Record*, and ſo intended to have a new Diviſion. The Tenant pleaded, that the other 24 Acres were Parcel of the Land recovered, and that ſhe had entered and accepted the ſame. Adjudged a good Bar by her Acceptance and *Entry into the* 24 *Acres*, though leſs in Quantity than the third Part of all in the Record. Mo. 679. pl. 928. Mich. 44 & 45 Eliz. C. B. Anon.

7. Dower *ad Oſtium Eccleſiæ, or ex Aſſenſu Patris*, being *aſſented unto*, is a Bar of Dower at the Common Law; But a Jointure was no Bar of her Dower at the Common Law. Co. Litt. 36. a. b.

8. An *Aſſignment of other Land whereof ſhe is not dowable*, or of a *Rent* iſſuing out of the ſame, is no Bar of Dower. Co. Litt. 34. b.

9. An Eſtate made by way of Jointure to the Wife *for Life, or Lives of one or many others, or* to her *for* 100 *Years, or* 1000 *Years, if ſhe live*

so long, or without such Limitation, is no Bar of her Dower, though they be expresly made in Satisfaction of her Dower. Co. Litt. 36. b.

10. If an *Estate* be made *to others in Fee-simple, or for her Life, upon Trust, so as the Estate remains in them*, albeit it be for her Benefit, and by her Consent, and by express Words to be in full Satisfaction of her Dower, yet this is no Bar of her Dower. Co. Litt. 36. b.

11. A *Devise by Will* cannot be averred to be in Satisfaction of her Dower, unless it be so *expressed* in the Will. Co. Litt. 36. b.

12. A. *purchased in his own and his Son's Name*, (who survived A.) The *Vendor was only Tenant for Life, but gave Security that his Heir should convey the Fee* when of Age. A. died before the Conveyance was executed, so that he never was seised in Fee. Decreed her Title to it to be discharged, and an *Account of the Profits* &c. she having enjoyed it 12 Years; But though she had enjoyed a Jointure for several Years of Lands *evicted* from her, yet the Court would not impeach her Title as to *other Lands*. Fin. R. 368. Trin. 30 Car. 2. Exton & al' v. St. John & al'.

13. *A Term and an old Statute was kept on Foot to protect a Purchase, and attend the Inheritance.* The Widow recovered Dower at Law, but was prevented from taking out Execution by reason of the Term and Statute whereupon she brought her Bill to be let into Possession of her Thirds. The Court inclined to relieve the Plaintiff, in regard of the equitable Circumstances of a great Portion and the Purchase at an under Value, and referred to the Master to examine, and state the Case to the Court. Vern. 356. pl. 353. Hill. 1685. Bodmyn v. Vandebendy.

Ibid. 359. Marg. is a Note, that it was afterwards dismissed, and that the Decree of Dismission was afterwards affirmed upon an Appeal to the House of Lords, and cites Cases in Parliament 69. —— 2 Chan. Cases 172. S. C. but no Decree. —— S. P. by Ld. Somers, Ch. Prec. 66. pl. 60. Mich. 1696. decreed. Radnor, (Lady) v. Rotheram, and affirmed in Dom. Proc. —— But if there had been any *Agreement to have had the Benefit of it*, it would have done it. Cited per Ld. Somers. Ch. Prec. 66. as the Case of Barker v. Fouke. —— Ch. Prec. 69. July 1671. Pheasant v. Pheasant, S. P. (though not against a Purchasor) in which the Wife had recovered at Law the third Part of a Pepper-Corn, being the Rent reserved upon the Term assigned, upon which she brought her Bill in Equity, and after several Arguments before Ld. K. Bridgmaa, and Hale, and Vaughan Ch. Justices, the Case was amicably composed, and so no Judgment was given. —— S. C. Chan. Cases 181. —— S. C. cited Vern. 358.

15. The Defendant's *Husband* had *devised* to her *several Parts of his Estate, altogether of better Value than her Dower*, and had devised that the Profits of all the Rest of his Estate for Years should be applied for Payment of Debts and Legacies, *but did not mention that he intended it in Satisfaction of her Dower.* The Defendant sued at Law and recovered at Law, though they did plead the Will, and averred that it was in Satisfaction of Dower; but the Court there was of Opinion, that no such Averment could have been admitted, unless it had been so declared in the Will. The Plaintiff being Heir at Law, preferred his Bill to be relieved, and he was relieved; for although it is not declared in the Will to be in Satisfaction of Dower, yet here is that which is tantamount; for where he appoints the Profits of all the rest of his Estate for other Purposes, it is plain he never intended she should have her Dower; and in Case she were admitted to her Dower, those Purposes would be defeated, and what appears to be the plain Intent of a Will by Construction is all one as though it had been expressed. 2 Freem. Rep. 234, 235. pl. 306. Mich. 1699. Lawrence v. Lawrence.

Ibid. in a Nota there, says, that this Cause being heard before Ld. Keeper Wright, 19 Nov 1702. he reversed the Decree. —2 Vern. 365. pl. 327. S. C. decreed accordingly by Ld. C. Sommers, and reversed by Ld. K. Wright. — Equ. Abr. 218, 219. pl. 2. S. C. accordingly, but adds, that the Decree of Reversal was affirmed in the House of Lords, 17 May, 1717.—S C cited per Cur. 9 Mod 162. Trin. 11 Geo. in Canc. as so held in the House of Lords, Anno 1717, and adds, That it is true this Court has gone so far as to confine a Widow to her Election which to take, where a Term for Years was settled on her in Jointure in Bar of her Dower, tho' no

no Chattel Intereſt can bar her Dower at Law, or within the Statute; but in regard ſhe expreſsly conſented to accept ſuch an Intereſt for her Jointure, this Court would not admit her to have Both.

14. In Ejectment, the Plaintiff made Title by *Recovery in Dower*, and produced in Evidence the Record of the Judgment, the Hab. Fac. Seiſinam &c. The *Defendant offered to prove a 99 Years Term ſubſiſting prior to this Title*, but it was diſallowed; For if he had pleaded this in Bar of the Writ of Dower, yet the Plaintiff muſt have recovered with a *Ceſſet Executio*, and the Defendant had a proper Time to have pleaded it then, and has ſlipped his Opportunity; Beſides, a Chattel Intereſt was at Common Law bound by a Recovery in a Real Action, ſo that the Demandant had an immediate Execution without Regard to the ſubſiſting Term. 1 Salk. 291. Mich. 8 Annæ, B. R. Lady Lindſey v. Lindſey.

15. *Deviſe* of Lands *durante Viduitate* is no Bar of Dower. MS. Tab. May 16th 1717. Lawrence v. Lawrence.

16. *No Chattle Intereſt* can barr Dower at Law or within the Statute but where a Term for Years was ſettled in Jointure in Bar of Dower, in regard that ſhe expreſsly conſented to accept ſuch an Intereſt for her Jointure, Chancery put her to her *Election* whether to take Dower or that Jointure, but would not admit her to have both. Per Cur. 9 Mod. 152. Trin. 11 Geo. Charles v. Andrewes.

See 2 Vern. 403. Hilchins v. Hilchins.

17. *Tenant for Life makes a Leaſe to Remainder-man for ſo many Years as the Remainder-man ſhould live.* It was adjudg'd that his Wife ſhould not be Tenant in Dower; For the Poſſibility the Tenant for Life had that the Eſtate *might revert* to him had barred her of all Right of Dower. Per Cur. 9 Mod. 151. cites 1 E. 3. 14, 15.

18. A *Feme Infant having a Jointure made to her before Marriage*, may elect to abide by it or not when of Age, unleſs after her coming of Age ſhe enters. Account was directed of the Real Eſtate, and after taking thereof ſhe to elect Jointure or Dower. MS. Rep. 14 May 1734. at the Rolls. Cray v. Willis.

(Q. 4) Bar. By what Satisfaction or Acceptance.

1. RENT *granted out of the very Land recovered* in Dower in Recompence of all the Dower may be pleaded in Bar, but not if it was granted out of other Land. D. 91. a. pl. 12. Mich. 1 Mar. Turney v. Sturges.

2. In Dower *acceptance of 20 Acres of Corn during Life* is a good Bar, and ſo of Rent, but otherwiſe of a *Horſe*, and ſuch like which does *not ariſe out of the Land*. D. 91. b. Marg. cites 6 Eliz.

Mo. 59 pl. 167. Trin. 6 Eliz. Anon. S. P.

3. If Demandant in Dower *accepted the Land aſſign'd by the Sheriff*, ſhe cannot in another Term pray a *new Execution*. Cro. E. 310. in Caſe of Hanger v. Fry.

4. If ſhe *accepts of 24 Acres for her Thirds of 84 and enters into them*, She is Barr'd as to any more. Mo. 679. pl. 928. Mich. 44 & 45 Eliz. C. B. Anon.

5. *Dower in Ireland* will be good in Bar of Dower in England. Arg. Cart. 187. Paſch. 19 Car. 2. C. B.

So Dower *in Wales* bars Dower in England. Jenk. 41. pl. 78. cites 17 E. 3. Fitzh. Voucher 112. 26 E. 3. Paſch. 3.

6. Acceptance of a *Collateral Satisfaction* for Dower is no Bar of Dower. 1 Chan. Cafes 182. by Ld. Keeper. Trin. 22 Car. 2. Pheafant v. Pheafant, and cites 4 Rep. 1. b. Vernon's Cafe.

Per Sommers C. a Collateral Satisfaction may be a good Bar *in Equity, though not pleadable at Law*, and fo decreed a Legacy of *Perfonal Eftate, and a Devife of Part of his Real Eftate by the Husband to his Wife during her Widowhood, Remainder to J. S. in Tail* to be a Bar or Satisfaction of her Dower if fhe accepted the Devife, though not declared in the Will. 2 Vern. 365. Lawrence v. Lawrence.——Revers'd per Wright K. Ibid.

7. *Nothing but a plain and exprefs Intention of the Parties* fhall bar the Right of Dower; as where a Settlement was made in Confideration of a Portion in Marriage; but it did not appear that the Parties intended it fhould be in Bar of Dower. 9 Mod. 152. cited per Cur. Trin. 11 Geo. in Canc. as fo held Anno 1717 in the Houfe of Lords. Lawrence v. Lawrence.

(Q. 5) Bar. By What Offence of the Baron.

1. IF the *Baron be outlawed in Trefpafs after Diffeifin, and after has Charter of Pardon*, his Feme fhall be endowed; Contra after Outlawry of Felony. Br. Dower, pl. 82. cites 13 E. 3. and Fitzh. Utlarie 49.

2. A Man feifed of Land fhall forfeit it by *Felony*, and by the *Attainder* of him the Feme fhall lofe her Dower. Br. Forfeiture de terres, 78. cites 21 E 3. 49.

3. If a *Man feifed in Fee commits Felony*, and after *makes a Feoffment* and *dies and after is attainted*, the Feme of him fhall be endowed againft the Feoffee; Contra againft the Lord by Efcheat. Br. Dower, pl. 80. cites Litt. fol. 9. Per Vavifor.

4. If the *Baron* be *attainted of Felony*, and *gets Charter of Pardon and* after *dies*, yet the Feme fhall not have Dower *of the Land which he had before the Pardon.* Br Efcheat, pl. 27. cites F. N B. tit. Dower.

5. *Contra if the Land which he gets after the Pardon*; For the firft Land fhall Efcheat. Br. Efcheat, pl. 27. cites F. N. B. tit. Dower.

6. *So* it feems of *Land which he purchafes, or which defcends to him Mefne between the Attainder and the Pardon.* Br. Efcheat, pl. 27. cites F. N. B. tit. Dower.

7. The Husband's being a *Felo de fe* is no Bar to the Feme of her Dower; Agreed by all the Juftices. Pl. C. 261. b. Mich. 4 & 5 Eliz. in Cafe of Hales v. Pettit, cites 3 E. 3. Fitzh. Corone 362.

8. *Stat.* 1 *E.* 6. *cap.* 12. *S.* 12. *The Wife fhall be endowed although her Husband were attainted, convicted, or outlawed for Treafon or Felony, faving the Right of others.*

The Feme of one attainted of Murder or Felony fhould not by the Common Law before the Statute 1 E 6. 12. have Dower againft the Feoffee of her Baron, though the *Feoffment was made before the Felony or Murder done*; but otherwife fince the Statute. Bendl. 56. pl. 91. Marg Mich 3 & 4 P & M. Gate v. Wifeman, cites Dal. 140 b. pl. 42. Hill. 3 P. & M the S. C. the Demandant was barred by the Opinion of all the Juftices —— Le. 3. pl. 7. S. C. cited by Manwood Ch. B. as refolved by all the Juftices of England. ———— Co. Litt. 41. a. cites S. C. refolved, and refolved there alfo that fo it was at Common Law in Cafe of Felony, but as to Felony the fame is altered by Statute. ———— Le 3. pl. 7 Mich. 25 & 26 Eliz. in the Exchequer, Mayney's Cafe, S. P. in Cafe of Treafon; and Manwood Ch. B. faid, that by reafon of this Attainder Dower cannot accrue to the Wife, for her Title begins by the Intermarriage, and ought to continue and be confummated by the Death of the Husband, which cannot be in this Cafe; for the Attainder of the Husband has interrupted it as in the Cafe of Elopement; and this Attainder is an univerfal Eftoppel, and doth not run in Privity only betwixt the Wife and him to whom the Efcheat belongs, but every Stranger may bar her of her Dower by reafon thereof;

for

for by the Attainder of her Husband the Wife is disabled to demand Dower as well as to demand his Inheritance.

But if the *Heir reverse the Attainder* by Writ of Error then the Wife shall be endowed, and though before the Treason committed the Baron had *levied a Fine*, and five Years had passed before the Reversal, yet she shall have her Dower, for during the Attainder she could not claim, and the Action and Right of Dower accrued to her after Reversal of the Attainder by reason of a Title of Record before the Fine by the Seisin in Fee and the Marriage. 13 Rep. 19 Hill. 27 Eliz. in Canc. Ninian Menvill's Case. —— Mo 639 S. C. —— S. C. cited per Coke Ch. J. as Resolved; for she had no Means of Reversal. 2 Bulst. 245.

A Man *seised of Land in general Tail takes Wife and after is attainted of Felony*, before the said Statute 1 E. 6. the Issue should have inherited, and yet the Wife should not have been endowed; for the Statute of W 2. cap. 1 relieves the Issue in Tail, but not the Wife in that Case, but at this Day, if the Husband be attainted of Felony the Wife shall be endowed, and yet the Issue shall not inherit the Lands which the Father had in Fee Simple. Co. Litt. 40. b.

It was otherwise at the Common Law. Co. Litt. 41. a. for then she should not have recovered her Dower ad Ostium Ecclesiæ, or Ex assensu Patris, any more than her reasonable Dower which the Common Law gave her. —— But this did not extend to Petty Larceny. Ibid.

9. *But note that this Clause is* altered for Treason * by 5 E. 6. *cap.* 11. *S.* 13. *and enacts, that in such Case she shall lose her Dower so long as the Attainder continues in Force.*

* This extends to Petty Treason as well as High Treason. Co. Litt. 37. a.

10. 18 *Eliz. cap.* 1. *which makes it Treason to diminish, falsify &c. the Monies of this Realm, provides that it shall not make the Wife to lose her Dower.*

11. The Wife of one attainted of *Felony* or *Trespass*, or *Heresy*, or *Præmunire* &c. shall be indowed. Co. Litt. 31. a.

12. The Wife of a Man attainted of *High Treason or Petit Treason* shall not be received to demand Dower unless it be in certain Cases specially provided for. But the Wife of a Person attainted of *Misprision of Treason, Murder, or Felony*, is dowable since our Author wrote, by the Statute in that Case made and provided, which is more favourable to the Woman than the Common Law was. Co. Litt. 392. b.

13. Tenant of a *Copyhold for Life*, in which the *Custom was that the Wife should have her Widow's Estate*, and the Husband was attaint of Felony and executed, and whether the Wife in this Case shall have the Widow's Estate, was the Question upon the Demurrer; Winch being only present seemed that she should not without a special Custom. Win. 27. Hill 19 Jac. Allen v. Brach.

14. 21 *Jac.* 1. *cap.* 26 *S.* 2. *It is Felony without Benefit of Clergy to acknowledge, or procure to be acknowledged any Fine, Recovery, Deed inrolled, Statute Recognizance, Bail or Judgment in the Name of any Person not privy or consenting thereto, howbeit this Offence shall not take away Dower.*

(Q. 6) Barred; By what Act or Offence of the Feme.

1. If *Feme, Tenant of the King, takes a Grant of the Ward of the Heir during his Nonage, and does not accept her Dower*, this is a Bar in Dower pro Tempore &c. Br. Executions, pl. 57. cites 24 E. 3. 39.

2. If

Co. Litt. 33. a. S. P.

2. If a Man be seised of Lands in Fee, and takes a Wife, and afterwards the *Feme is attainted of Felony*, and after the *Husband aliens*, and afterwards the *Feme is pardoned*, and then Husband dies, the Feme shall be endowed. 13 Rep. 23. Hill. 27 Eliz. in Canc. in Ninian Menvill's Case.

3. The Statute of 11 & 12 W. 3. [cap. 4. S. 4.] enacts, That no Papist [or Person making Profession of the Popish Religion] shall purchase any Manors, Lands, or Terms, [Hereditaments] &c. It was said by the Lord Chancellor, that in this Case a Purchasa must be made by the Act of the Party in the Way of Grant or Conveyance, or at least by Will, but in Case of one dying Intestate it is the Act of the Law. 3 Wms.'s Rep. 48, 49. Trin. 1730. in Case of Davers v. Dewes, whence the Reporter infers, that for the same Reason it should seem that a *Papist is capable of taking as Tenant* by the Curtesy or *in Dower.*

(R) What *Act in Law* will *bar* the Wife of her Dower.

Divorce.

Co. Litt. 32. a. S. P.

1. **If the Divorce be** Causa Precontractus, **the Wife shall not have Dower.** 47 **Ed.** 3. **pl.** 78.

Co. Litt. 32. a. S. P.

2. So **if it be Causa** Consanguinitatis. 47 **E.** 3. **pl.** 78.

Co. Litt. 32. a. S. P.

3. So **if it be Causa** Affinitatis. 47 **E.** 3. **pl.** 78.

4. So **if it be Causa** Frigiditatis. 47 **E.** 3. **pl.** 78.

5. But **if it be Causa** Professionis **the Wife shall be endowed.** 47 **E.** 3. **pl.** 78

But it is said, that if the Assignment of Dower *ad Ostium Ecclesiæ* be *specified*, viz. this is good.

6. If **a Woman be** endowed ad Ostium Ecclesiæ, yet si Matrimonium in Vita contrahentium **accusatum &** dissolutum sit quacunque ratione, definit esse Dos, cum deficiat Matrimonium, **& desinit Dotis Exactio. Bracton, lib.** 2. **Fol.** 92. **S.** 4. **and Lib.** 4. **Fol.** 304.

That notwithstanding any Divorce shall happen, yet she shall hold it for her Life, that Co. Litt. 32. a. ad finem.

Adjudg'd no Bar. Co. Litt. 33. b.

7. Divorce *a Mensa & Thoro* only, as for Adultery, seems to be no Bar of Dower. Co. Litt. 32. a.

(S) *In what Cases Assignment* of Dower is necessary.

1. **If a Woman** recovers Dower of Land, she cannot enter before Execution is sued. 40 **E.** 3. 22. 45 **E.** 3. 5. **b.**

2. **The** same **Law is where the Recovery is** of a Rent. 40 **E.** 3. 22. **yet there it is certain enough.**

3. In

3. In Dower, the *Tenant pleaded Recovery by himself against the Baron in Assise*, and the *Demandant said that the Baron was seised after Coverture, and infeoffed the Tenant, and after disseised him and recovered by Assise*; Judgment if Dower, and so confessed and avoided him. Br. Confess and Avoid, pl. 12. cites 14 H. 4 33.

5. If there be *Lord and a Woman Tenant by Fealty, and* 3 *s. Rent*, and *they intermarry*, and the *Lord dies*, the Wife shall have 12d. of the Rent for her Dower of the Seigniory by way of Retainer &c. without any manner of Assignment made by any Person &c. Perk. S. 417.

6. If a Man *endows his Wife ad Ostium Ecclesiæ*, he then openly declares the Quantity and Certainty of the Land which she shall have for her Dower; and in such Case the Wife, after the Death of the Husband, *may enter* into the Land of which she was endowed, *without other Assignment*. Litt. S. 39.

7. If a Woman brings a Writ of *Dower of* 6 *l. Rent-charge*, and she has Judgment to recover the third Part, although it be certain that she shall have 40 s. yet she *cannot distrain for* 40 *s. before the Sheriff deliver the same unto her*; For wheresoever the Writ demands Land, Rent, or other Things in certain, there the Demandant after the Judgment may enter or distrain before any Seisin delivered unto him by the Sheriff upon a Writ of Habere Facias Seisinam; But in *Dower*, where *the Writ demands nothing in certain*, there the Demandant after Judgment cannot enter or distrain until Execution sued, by which Execution the Sheriff is by the King's Writ to deliver a third Part in Certainty to the Demandant. Co. Litt. 34. b.

Co. Litt. 37. a. b. S. P. where the Writ of Dower is of 3 s. Rent. —Perk. S. 416. S. P. accordingly.

8. So when the *Wife of one Tenant in Common demands a third Part of a Moiety*, yet after Judgment she cannot enter until the Sheriff deliver to her the third Part, although the Delivery of the Sheriff shall reduce it to no more Certainty than it was. Co. Litt. 34. b.

Co. Litt. 37. b. S. P.

9. Where it *appears in certain what Lands* or Tenements *the Wife shall have* for her Dower, *As in Case of an Endowment Ad Ostium Ecclesiæ, or Ex Assensu Patris*, the Wife may enter without Assignment of any; But where the Certainty appears not, as to be endowed of the third Part to have in Severalty, or the Moiety, according to the Custom to hold in Severalty, Dower must be assigned to her after the Death of the Husband, because it does not appear before Assignment what Part of the Lands or Tenements she shall have for her Dower. Litt. S. 43. and Co. Litt. 37. a.

(T) *What Persons may assign* Dower of Common Right.

[And against whom a Writ of Dower lies for a Collateral Respect.]

1. AN Infant may assign Dower in Pais, because he is compellable by Writ.

2. [But] an Infant in Ward cannot assign Dower of the Land in Ward, for the Prejudice that may come to the Lord thereby. 9 H. 6. 6. b.

Before the Guardian in Chivalry enter, the Heir within Age may assign Dower, for the Guardian may waive the Wardship; But there needs neither Livery of Seisin, nor Writing to any Assignment of Dower, because it is due of Common Right. Co. Litt. 35. a.

3. Guardian in Chivalry may endow her. 9 H. 6. 6. b. 24. b.

Co Litt. 39. a S P. of the Lands and Tenements which he hath in Ward. —— Ibid. 35. a. S P —— Anno 9 H. 3. Dower 197. A *Man of the Age of* 18 *Years* took a Wife, and *by Assent of his Guardian endowed her, ad Ostium Ecclesiæ*, and it was adjudged a good Endowment, although the Husband died before the Age of 21 Years. Co Litt 34 a.

4. And a Writ of Dower lies against Guardian in Chivalry. 47 Ass. 5. per Finchden.

Co Litt. 35. b. S. P.

5. If a Husband hath a Ward in the Right of his Wife as Guardian in Chivalry, a Writ of Dower lies against the Husband, without naming the Wife. 47 Ass. 5. per Finchden.

If a Man be possessed of the Wardship of certain Land, either jointly with his Wife, or in the Right of his Wife, yet the Writ of Dower lies against the Husband only. Co. Litt. 38. b.

Fol 682.

6. A Writ of Dower does not lie against Guardian in Soccage. 29 Ass. 68.

7. A Guardian in Soccage cannot assign Dower. 29 Ass. 68. But Quære.

Co. Litt. 35. a. S. P. For no Assignment can be made but by such as have a Freehold or against whom a Writ of Dower does lie. Co. Litt. 35. a.

8. The King committed the Wardship during the Nonage of the Infant; and whether the *Committee* might assign Dower so as to bind himself, Kelw. * 112. dubitatur.

Though the King does commit the Custody of the Land to another, yet he may assign Dower to the Wife in Chancery, and she shall have a Writ to the Escheator to deliver the Land to her. F N. B. 263. (D). —— Ibid. in the new Notes there (b.) cites Kelw. 133. that it seems the Committee cannot assign Dower; but says Quære tamen, if it be not good till the Heir sues his Livery.

* This is at Fol. 133. b pl. 112. Casus incerti Temporis.

9. If a *Woman Guardian in Socage bring a Writ of Dower* against the Heir, it is *no Plea* for the Heir *to say, that she is Guardian in Socage* and may endow herself &c. Perk. S. 452.

10. *And if* a Woman Guardian in Socage bring a Writ of Dower *against the Feoffee of the Husband with Warranty*, the *Feoffee cannot* shew the

the special Matter, and *pray* that the Court would award *that she may endow herself* of the Fairest Part &c. because that the Feoffee may vouch the Heir. But the Guardian in Knights Service may so do &c. Perk. S. 453.

11. As concerning Dower at the Common Law, there must be an Assignment either *by the Sheriff by the King's Writ*, *or* else *by the Heir or Tenant of the Land by Consent* or Agreement between them. Co. Litt. 34. b.

12. An Endowment *Ex assensu Matris* is as good as Ex assensu Patris; because there is an Appearance of a constant and perpetual Heir. Co. Litt. 35. b.

13. It is held in the 2 H. 3. Dower 199. That if the *Heir apparent be within Age*, yet the Endowment *Assensu Patris is good.* Note, that Littleton in the Case of Dower Ad Ostium Ecclesiæ doth put the Husband of full Age; But here of the Dower Ex Assensu Patris he speaks generally. Co. Litt. 35. b.

14 The *Lord*, of whom the Land is held *in Chivalry*, is not possessed as a Guardian against whom a Writ of Dower lies until he enters; Of the Wardship of the Body he is possessed before Seisure, because it is Transitory. But he *is not possessed of the Lands until he enters.* Because it is permanent, and *therefore if he does not enter, the Heir within Age may assign Dower.* Co. Litt. 38. a. b.

(U) [Assignment]
Of what Things it may be.
[Or what she shall be intitled to.]

1. If the Wife recovers Dower of a Rent, she shall not have the Rent incurred before Judgment, nor after Judgment before Execution. 40 E. 3. 22.

2. If the Husband sows the Ground and dies, the Property of the Corn is in the Executors but subject to this Condition, that if the Heir assigns to her the Land sown for her Dower she shall have the Corn; For she shall be in de optima Possessione above the Title of the Executors. 2 Inst. 81.

(U. 2) In what Cases she has Election to be endowed of one Thing, or another, or of Both.

1. SOmetimes the Wife may chuse to be endowed *of one Land, or* of *other Land* &c. or of *Seigniory, or* of a *Tenancy* &c. or *of Land, or* of a *Rent-Charge, or* of a *Rent-Seck* issuing thereout &c. But in such Cases she shall not have Dower of both, if not that it be in Special Cases &c. Perk. S. 318.

2. If a Man seised of one Acre of Land in Fee takes a Wife and *exchanges* the same Acre of Land *with a Stranger,* for another Acre of Land,

Fitzh. Dower, pl. 130. Mich.

23 E. 3. S. P. by Wilby.—— F. N B 149. (N). S. P. she shall not have Dower of Both. —— Co. Litt. 31. b. S. P.

Land, and the *Exchange is executed*, and the Husband dies. Now it is at the Liberty of the Wife to have Dower of the Acre which the Husband put in exchange, or of the Acre which the Husband took in Exchange; But she shall not have Dower of both Acres. Perk. S. 319.

3. If there be *Lord and Tenant by Fealty, and* 12 d. *Rent*, and the *Lord takes a Wife and purchases the Tennacy in Fee* and dies, in this Case it shall be at the Liberty of the Wife to be *endowed of the Seigniory or of the Tenancy* &c. Perk. S. 320.

4. *So* shall it be if a Man *seised of a Rent-charge in Fee* takes a Wife, and *purchases* the *Land in Fee* whereout the Rent is issuing and dies, it shall be at the Liberty of the Wife to be endowed of the Land, or of the Rent &c. Perk. S. 320.

5. If there be *Lord and Tenant by Fealty, and the Lord takes a Wife*, and the *Tenancy escheats* unto the Lord, and he enters and dies, in this Case it shall not be at the Liberty of the Wife to have Dower of the Seigniory, or of the Tenancy; But *she shall be forced to take her Dower of the Tenancy*, and the Reason is, because that the Seigniory is determined during the Coverture, by Act of Law, and it is to no Disadvantage unto the Wife to be endowed of the Tenancy, for if she be put out of Possession of Part thereof by a more ancient Title, the Seigniory shall be revived for so much, and if all the Tenancy be recovered by a more ancient Title, then the Seigniory shall be revived in all, &c. and then she may have Dowry of the Seigniory &c. Perk. S. 321.

(X) *Assignment.*

How it is to be *made*.

An Assignment of Dower where the Husband was sole seised cannot be made of the 3d or 4th Part in Common but ought to be in Severally. Co Litt. 34. b. in Principio.

1. **If a Woman recovers Dower** of Land, of which the Tenant is sole seised, **it ought to be assigned by** Metes and Bounds. 45 **E.** 3. 5. 6.

Where the Husband was *seised in Common*, the Wife shall not be endow'd *by Metes and Bounds*. Co. Litt. 32. b.

2. **But** otherways **it is** where the Thing **recovered** is not severable. 43 **E.** 3. 15. 6.

Sty. 276. Booth v. Lambert. Trin. 1651. B.R. the S C. where a Special Verdict found that the Tenant said to the Widow thus, viz. *I do endow you of a third Part of*

3. **If** A. seised of **Lands** in Fee takes a Wife, and **after** devises it for 21 Years to B. **and dies, and after** C. his Heir assigns to the Wife the third Part of the Land for her Dower, without **setting it out by** Metes and Bounds, **and the** Wife accepts it in Satisfaction of her Dower; **tho' she was not bound to accept so in Common, without setting it out by Metes and Bounds, nor the Heir bound to assign it but by Metes and Bounds, for the Prejudice that may accrue to them to occupy it in Common, yet inasmuch as the third Part in Common is due by Law, and they both consented to accept it according to Law,** they may by their Consent waive the Assignment by Metes and Bounds, **which is only for their own**

own Advantage, and accept it as it is due by Law; and though the Lessee for Years did not agree thereto, yet the Assignment of the Tenant of the Freehold shall bind him. Trin. 1651. between *Coots and Lambert*, adjudged upon a special Verdict, Intratur So merset. H. 1649. Rot. 201.

all the Lands my Cousin J. S. your Husband died seised of. Roll Ch. J. to which Nicholas and Ask. Justices agreed, held that it may be assign'd Generally of the third Part in some Cases, and the Parties may agree against Common Right, and that here both Parties agreed to take Dower in this manner; but Jerman e contra. But per Roll Ch. J. if the *Sheriff assigns* Dower and does it not *per Metas & Bundas*, it is Error if it might have been so Assigned, and where a Feme cannot be endow'd per Metas & Bundas, she may *enter without Assignment.* Sty. 277.

4. A Rent may be reserved for Equality of Dower, if the thing Assigned be of greater Value than she ought to have. 17 E. 3. 10.

5. But this cannot enure as a Reservation, if the Wife in another Clause of the Deed makes a Grant of the Rent, without any mention in the Deed, that the Thing is of greater value. 17 E. 3. 10.

6. If the Guardian assigns Dower, reserving a Rent for equality during the Nonage of the Heir, this is not good, because this shall not go to the Heir. 17 E. 3. 10.

7. If Dower be assigned upon Condition, the Condition is void. Com. Colthirst. Benl. for she comes in by her Husband.

(A. a) pl. 1. S. P.—Co. Litt. 34 b. S. P.

8. If Dower be assigned of the Lands, excepting the Trees growing on the Land, this is a void Exception for the Cause aforesaid. Mr. Coventry at a Moot cited 44 El. B. R. between *Bullock and Finch*, to be so adjudged.

9. If Dower be assigned with a Remainder over, it is a void Remainder, because she comes in by her Husband; and when it should be a good Remainder, it would be without a particular Estate. Com. Colth. Benl.

Pl. C. 25 b. S. C. the Remainder is void tho' Livery and Seisin is made to the Feme, because the Dower has Relation to the Death of the Baron.

10. The King may assign Dower without limiting any Estate. Fitz. Natura 263. Da. 1. 46.

11. If a Woman be endowed of an Advowson, she shall be assigned the third part of the Advowson, and not only the third part of the profit, scilicet the third presentation. 17 E. 3. 38. b. Contra, 17 E. 3. 22. b.

Co. Litt. 32. a. is that she shall be endow'd of the third Presentation to an Advowson.

12. If a Woman recovers Dower of a Rectory impropriate, where there is not any Glebe, the Sheriff shall put her in possession of the third part of the Tithes generally, and not of the Tithes that issue out of any third part of Lands of the Parish in certain. Mich. 9 Jac. B. per Curiam.

Co. Litt. 32. a. says that the surest Endowment of Tythes is of the third Sheaf, because it is uncertain what Land shall be sown.——11 Rep. 25. b. Coke Ch. J. cited Pasch 5 Jac. the Countess of Oxford's Case held accordingly.

13. If a Woman be dowable of three Manors, the Sheriff may assign her one of the Manors in Lieu of all three. 12 E. 4. 2. or the Moiety of a Manor. Ancient Entries. Quare Impedit 529. 10.

S. P. per Cat. and Littleton. Br. Dower, pl. 72 cites S. C. So of three Acres; for if he assigns the third Part of every Acre it would be infinite ——— If upon a Recovery in a Writ of Dower de tribus Maneriis the Sheriff on an Hab. fac. Seisinam returns that he has rendered

rendered to the Feme one Manor, this is not good; for ſhe ſhall have the third Part of each; But if the Writ was of all Lands and Tenements, and there was Meadow and Paſture, the Sheriff may aſſign all the Meadow; Agreed by all the Juſtices. Bendlows ſaid, that if the Writ had been of all Tenements it would have been good, which Brown denied. Mo. 12. pl. 47. Trin. 4 & 5 P. & M Anon ——— Ibid. 19. pl 66 Mich 2 Eliz. Anon. S. P and ſeems to be S. C. held accordingly And if the Aſſignment be made by Conſent of the Parties, or by Aſſignment of the Heir or Tenant of the Land, then the Aſſignment of the one Manor in the Name of her Dower of all the Manors is good enough; and ſo was the Opinion of all the Juſtices.

S. P. Br. Dower, pl. 72. cites 12 E. 4. 2.

14. So if an Advowſon be appendant to one or more of the ſaid Manors, the Sheriff may aſſign one of the Manors with the Advowſon appendant in lieu of Dower. 12 E. 4.

15. If a Woman be dowable of one Manor, the Sheriff may aſſign the third Part of the Manor in common in lieu of Dower, without ſetting it out by Metes and Bounds. Ancient Entries, Quare Impedit 529. 10. and Quare impedit in Dower 1. ſo aſſigned in Chancery.

16. A Feme is *endowed of a third Part of the Manor to which Franchiſes are appendant*, ſhe ſhall not have the third Part of the *Franchiſes*; for theſe cannot be divided. Contra where ſhe has the whole Manor in Dower. Br. Dower, pl. 102. cites 3 E. 3. Itinere Derby.

17. If *on a Recovery of the third Part* in Dower the *Sheriff aſſigns a Moiety* &c. the Tenant has *Remedy* againſt the Sheriff *by Aſſiſe*, or he may have a *Scire Facias* againſt the Sheriff *to aſſign de novo*. F. N. B. 148. (l) in the new Notes there (b) cites 22 R. 2. Execution 165. and ſays, ſee 21 H. 7. 29.

18. If the *Freehold*, whereof ſhe is dowable, be *in the Poſſeſſion of divers Perſons by ſeveral Titles*, the Wife in a Writ of Dower brought againſt one of them, ſhall recover but the third Part of the Freehold which is in his Poſſeſſion; So that a Man or a Woman who hath Poſſeſſion of Parcel of the Freehold (of which the Woman is dowable) ſhall not be charged according to the Poſſeſſion of the whole Freehold of which the Woman is dowable; if he or ſhe will not. Perk. S. 423.

19. Dower *aſſigned by Sheriff per Metas* &c. *and Demandant* refuſes, yet ſhe may enter at any Time after. D. 278. b. pl. 4. Mich. 10 & 11 Eliz.

20. If Aſſignment and *Grant* of Land be made to the Feme *for Term of Years* in Recompence of her Dower, this will not bar her; becauſe of this ſhe is not Tenant in Dower, nor has ſuch Eſtate in ſuch Caſe as ſhe would have if ſhe had been indowed, viz. an abſolute Eſtate for Life. 2 And. 31. in pl. 20. Trin. 38 Eliz. Anon.

So if Feme accepts a Rent for Years in Allowance of her Dower or for the Life of him that aſſigns it, theſe Rents ſhall not bar her of her Dower, becauſe they are not ſuch-like Eſtates as ſhe ſhould have in her Dower, which the Law appoints to be an Eſtate for her Life. And 288. in pl. 296. ad finem. Paſch. 34 Eliz. ——— Hob. 153. S. P. by Hobart Ch. J. cites 7 H. 6. 34. and 33 H 6. 2.

21. The *Wife of one Jointenant* ſhall have the *third Part of a Moiety*, which her Husband purchaſed to hold in common, with the Heir of the Husband, for in this Caſe her Dower cannot be aſſigned by Metes and Bounds. Litt. S. 44.

22. Though of many *Things that be intire*, whereof no Diviſion can be made by Metes and Bounds, a Woman cannot be endowed of the Thing itſelf, yet a Woman ſhall be endowed thereof in a ſpecial and certain Manner. Co. Litt. 32. a.

23. As

23. As of a *Mill* a Woman shall not be endowed by Metes and Bounds, nor in common with the Heir, but either she may be endowed of the *third Toll-Dish*, or *de integro Molendimo per Quamlibet tertium Mensem.* Co. Litt. 32. a.

She shall have the third Part of the Profit assigned to her, and she shall have a Freehold in the third Part of the Mill &c. F. N. B 49 (K) cites Mich. 45 E. 3. ——— Perk. S. 342. S P. as to the third Part of the Profit, cites 1 H 5. 1. Mich. 45 E. 3. Dower 50. 16 Ass. 41.——— 11 Rep. 25. b. Coke Ch. J. cited Mich. 3 & 4 Eliz. Bendl. [118. 120. pl. 151.] where the Assignment was accordingly.

24. Of a *Villein*, either the third Day's Works, or every third Week or Month. Co. Litt. 32. a.

25. Of the third Part of the Profit of *Stallage*. Co. Litt. 32. a.

26. Of the third Part of the Profits of a *Fair*. Co. Litt. 32. a.

28. Of the third Part of the Profits of the Office of *Marshalsea*. Co. Litt. 32. a.

29. Of the third Part of the Profits of the *Keeping a Park*. Co. Litt. 32. a.

30. Of the third Part of the Profits of a *Dove-House*. Co. Litt. 32. a.

31. Of the third Part of the Profits of a *Piscary*, viz. Tertium Piscem, vel Jactum retis tertium. Co. Litt. 32. a.

32. Of the third Part of the *Profits of Courts* Fines, Heriots &c. Co. Litt. 32. a.

33. If the Wife be intitled to have Dower of three Acres of Marsh, every one of the Value of 12d. and the Heir by his Industry and Charge makes it good Meadow, every Acre of 10s Value, the Wife shall have her Dower according to the *improved Value*, and not according to the Value as it was in her Husband's Time; For her Title is to the Quantity of the Land, viz. one just third Part. Co. Litt. 32. a.

34. And the like Law it is if the Heir *improve the Value* of the Land *by Building*. Co. Litt. 32. a.

35. And on the other Side, if the *Value* be *impaired* in the Time of the Heir, she hall be endowed according to the Value at the Time of the Assignment, and not according to the Value as it was in the Time of her Husband. Co. Litt. 32. a.

36. There *needs neither Livery of Seisin nor Writing* to any Assignment of Dower, because it is due of Common Right. Co. Litt. 35. a.

37. Both of Dower Ad Ostium Ecclesiæ, and Ex Assensu Patris, *the Certainty must be expressed.* Co. Litt. 35. b.

38. Dower demanded of the *third Part of Tithes of Wool and Lamb* in three several Towns, and it was demanded of the Court how the Sheriff should deliver Seisin; and the Court held it the best way for the Sheriff to *deliver the third Part of the tenth Part*, and the third tenth Lamb, viz. the 30th Lamb. Brownl. 126. Mich. 9 Jac. Anon.

39. Writ of Dower *of Tithes* ought to be brought of the *third Sheaf.* Roll Rep. 63. per Coke Ch. J. Trin. 12 Jac. B. R.

40. Upon an *Habere Facias Seisinam* in Dower, the Sheriff *returned, Quod habere fecit Seisinam de tertia Parte of the Honour, Hundreds, Tenements &c. viz. De uno Tenemento sive firma in C. vocat' Weston-Farm, in Tenura J. S. and 12 other Tenements by Copy*; and it was held, that this being in an Assignment of Dower, and only the Return of the Sheriff, was certain enough, and that there needed not such precise Certainty therein as in Declarations and Indictments; Adjudged. Cro. J. 621. Mich. 18 Jac. Sir Charles Howard v. Sir William Cavendish.

Palm. 264. S. C.

41. *Commission out of Chancery* was ordered to assign Thirds for Dower. Chan. Rep. 38. 7 Car. 1. Huddlestone v. Huddlestone.

S. P. Toth. 145 cites 25 Eliz. Wild v. Wells.

42. Error

42. Error of a Judgment in Dower of the *third Part of a Mill and Kiln*, and two Acres of Land, where the Judgment was to recover Seisin of the third Part of the aforesaid Tenements *severally per Metas & Bundas*, and the Error assigned was, that it could not be per Metas & Bundas of the Mill and Kiln, for if it should, neither of the Parties could use his Part, but that the Judgment ought to be *de tertia Parte tantum*; and the Judgment was reversed. Lev. 282. Pasch. 18 Car. 2. B R. Gilpin v. Cookson.

43. Where a Writ of *Dower* was *brought against several Purchasors*, the Court directed, that the Sheriff should *charge them all proportionably*, though otherwise the Sheriff might have charged all out of one Party, and the Party could have no Remedy at Law; But *in Equity* they ought to be all equally charged; and therefore the Court gave this Direction. Freem. Rep. 227. pl. 234. Pasch 1677. Anon.

2 Chan. Cases 16c. S C.

44. Equity will relieve against a *Fraudulent and partial Assignment* of Dower by the Sheriff. Vern. 218. pl. 216. Hill. 1683. Hoby v. Hoby.

(Y) Assignment of Dower *against common Right* in lieu of Dower.

What it is.

See (X) pl. 11.

1. TO assign Dower of an Advowson is against common Right, for she ought to have the third Presentation of Common Right. 12 E. 4. 2.

This it seems is to be intended out of other Lands. See (Z) pl. 7

2. So an Assignment of Rent out of Land is against Common Right. 12 E. 4. 2.

Upon an Habere Facias Seisinam upon Recovery of Dower of three Manors, resolved the Sheriff cannot give her Seisin of one Manor, but he must give her Seisin of the third Part of every Manor; But if the Recovery be of all Lands, viz. Meadow &c. Pasture, the Sheriff may Assign her Dower in the Meadow only. Mo. 12. pl. 47 Trin. 4 & 5 Ph. & M. Anon.

3. An Assignment of all the Wood, or all the Meadow in lieu of all the Wood, Meadow, Pasture and Arable, is not against Common Right, but Common Right is the third Part of each. 12 Ed. 4. 2. 6.

4. If she be dowable of three Manors, and she accepts of the Heir one Manor in Dower Allowance of all, this is an endowment against Common Right. 18 H. 6. 27. 19 E. 3. Quare impedit 154.

5. A Feme was endow'd of the *Moiety of the Rent*, *by reason of the Custom of the Land out of which* the Rent issued. Br. Rents, pl. 20. cites 4 E. 3.

6. In Dower the *Tenant pleaded a Fine levied by the Prior of N. of the same Rent of* 20 l. *of which Dower is demanded, to J. M. and his Heirs, upon Condition, that if the Heir, or any Heir of J. M. shall be within Age at the Time of the Death of his Ancestor, that then the Grantor and his Successors shall be discharged of the Payment of the Rent during the Nonage, and said, that the Baron died, W. his*

his Son within Age; Judgment if Dower during his Nonage; For the Rent is ceased during the Nonage, and yet the Feme recover'd Dower by Award and Cesset Executio during the Nonage, and therefore Error was brought in B. R. Brook says, to what End the Writ of Error was taken? For it seems that it is a good Judgment. Br. Dower, pl. 51. cites 23 E. 3. 19.

(Z) What Person may assign it.

[Against Common Right]

1. THE Sheriff cannot assign Dower against common Right. 12 E. 4. 2. Contra 18 H. 6. 27.

2. The Heir may. 12 E. 4. 2. b. 26 Ass. 41.

3. And so the Right Tenant of the Land may. 12 E. 4. 2. b.

4. The Sheriff may assign a Rent in lieu of Dower. 20 Ass. 41.

5. If the Heir be in Ward to the King, and the Wife is to be endowed in Chancery, the Chancery may assign a Rent de novo to her out of the Land of which she is dowable, in lieu of Dower, and this shall bind the Heir. 26 Ass. 41.

6. So if a Writ be directed out of Chancery to the Escheator to deliver to the Wife ten Marks Rent, and Land in the Name of Dower, and the Escheator assigns to her five Marks Land, and five Marks Rent de novo out of other Land of which she is dowable, this shall bind the Heir. 26 Ass. 41. adjudged by all the Justices.

Dower cannot be assign'd in Chancery unless where the Heir of the King's Tenant is in Ward, and in such Case it is assign'd in Court, which is more usual, or a Writ to the Escheator to do it, cites F. N. B 263. If it had been said, that the Heir had assign'd in Obedience to the Decree it might have been good, but in such Case the Tenant had been in by the Assignment, and not by the Decree; Per Holt Ch. J. in delivering the Opinion of the Court. Ld. Raym Rep 784. Trin. 1 Ann in Case of Smith v. Angel —— 1 Salk 354 355. pl. 1. S. C. and Holt Ch. J. held it plain, that no Estate or Interest vested in the Wife by the Decree in Chancery —— 7 Mod. 43 S C —— Jenk 9. pl 17. cites 7 Ass 48. Fitzh. Dower 78. and 25. Ass 4. [but it seems misprinted and should be 26 Ass. according to Roll]

7. A Rent out of the same Land may be assigned in lieu of Dower. 7 H. 6. 34. b. 26. Ass. 41.

The Guardian in Chivalry may assign a Rent out of the Lands and Tenements which he hath in Ward in allowance of Dower, and it is good. Co. Litt. 39. a.

8. If *Tenant in Tail* assigns a Rent out of the Land in lieu of Dower, this shall bind his Issue, unless it amount to more than a third part; Per 2 Judges. And. 288. Pasch. 24 Eliz. Bickly v. Bickly.

9. Assignment of Dower made *by a Disseisor* is good, and shall not be avoided, if it be not made by Covin or Fraud, if the Woman have Right to have the Thing in Dower. Perk. S. 394.

Co Litt. 35. a. and 357. b. S P. and if it be not prejudicial to the Disseisee. —— Br. Damages, pl. 96 cites 12 Ass 20. S. P. —— S. C. cited per Cur. 2. Rep 67. a. for it is a lawful Act.

10. If a *Disseisor*, Abator, or Intruder, be of Land *by Covin of the Woman who has Right to have Dower* of the same Land, and such Disseisor, Abator, or Intruder, endow the same Woman, the Disseisee who has Right unto the Land, may avoid and defeat such Dower by his Entry into the Land &c. Perk. S 395.

Co. Litt 35. a and 357. b. S. P.

11. If J. S. be *Tenant* of Land unto which a Woman has Right to have Dower, and he is *disseised* of the same Land *by the Woman and a Stranger*, or by the Woman alone, and *afterwards she is endowed of the same Land* by one who is in the Land by her and *the other joint Disseisor*, or by one of them, such Endowment may be avoided by the Entry of the Disseisee, because she shall not take Advantage of the Wrong of which she herself was Party &c. Perk. S. 396.

Co. Litt. 35. a S. P.

12. If an *Assignment of Rent* be made unto a Woman in Allowance of Dower, which she ought to have of the same Land, *by a Disseisor*, Abator, or Intruder, the Disseisee, or he who has Right unto the Land, shall not be bound by such Assignment, notwithstanding that it be without any Covin of the Woman &c. Perk. S. 398.

13. Assignment of Dower by a *Guardian in Socage* is not good, as it seems, because a Writ of Dower does not lie against him. Perk. S. 404.

14. The same Law is of *Tenant by Elegit*, Tenant by Statute Merchant, Tenant by Statute Staple, and by Lessee for Years &c. Perk. S. 404.

15. But if made *by him who has the Freehold* it is good if it be of such a Thing as may be assigned, and of which she has Right to have Dower; And though she has not Right to have Dower thereof, yet it shall stand good, until it be defeated and avoided &c. Perk. S. 404.

Perk S. 397. S. P. —— 2 Rep. 67. a. S. P. per Cur. cites 7 H. 6. 34. 8 E. 3. 38. Fitzh. Dower 110. and 10 E. 2. Dower 139.

16. It *must be made by* him that is *Tenant of the Land*, but herein certain *Diversities* are to be observed; If two or more be *Jointenants* of Lands, the one of them may assign Dower to the Wife of a third Part in Certainty, and this shall bind his Companion, because they were compellable to do the same by Law. Co. Litt. 34. b. 35. a.

Perk S. 397. S. P.

17. *But* if one of them assign *a Rent* out of the Land to the Wife, this shall not bind his Companion, because he was not compellable by the Law thereunto. Co. Litt. 35. a.

18. If the Husband makes *several Feoffments* of several Parcels, and dies, and the *one Feoffee assigns Dower* to the Wife of Parcel of Land in Satisfaction of all the Dower which she ought to have in the Land of the other Feoffee, the other Feoffees shall take no Benefit of this Assignment, because they are Strangers thereunto and cannot plead the same. Co. Litt. 35. a.

9 Rep 18. b. in Bedingfield's Case.

19. *But* in that Case, *if the Husband dies seised of other Lands* in Fee-simple, and the same descend to his Heir, and the Heir *endows the Wife in certain of those Lands*, *in full Satisfaction* of all the Dower that she ought to have, as well in the Lands of the Feoffees as in his own Lands, this Assignment is good, and the several Feoffees shall take Advantage of it; And therefore if the Wife bring a Writ of Dower against any of them, they may vouch the Heir, and he may plead the Assignment which he himself has made in Safety of himself, lest they should recover in Value against him, so as there is a Privity in this respect between the Heir and the Feoffees, and by this Means the same may be pleaded by the Heir that made it; And so it is adjudged in our Books. Co. Litt. 35. a.

(A. a) Assignment [of] *Common Right.* *How.*

1. IF a Man assigns a Rent out of Land of which she is dowable upon Condition, in lieu of Dower, this is not good, for she ought to have it free of any Condition, as she should have the Land. Master Bridgman, at a Moot in Aula cited a Report, 27 Eliz. B. between *Wentworth and Wentworth*, to be so adjudged.

2 And. 30. pl. 20. Trin. 38 S. C. the Condition was, that if the Rent was arrear at the Day, it should cease and determine, and that then she should have her Dower; and all the Court held that it did not bar her of her Dower; For if the Assignment bars the Feme of her Dower, she ought to have such Estate in the Thing assigned as she should have in the Dower, which is an absolute Estate for her Life, and if it be not she shall not be barr'd. ——— Cro. E. 451. pl. 10. S. C. adjudged for the Demandant. ——— Noy 55. S. C. adjudged for the Demandant. ——— See (X) pl. 7. S. P.

2. A Rent out of the same Land may be assigned in lieu of Dower without Deed. 12 H. 4. 17. b. 7 H. 6. 33. b.

3. The Assignment must *be absolute*, and not conditional, or subject to any Limitations. Co. Litt. 34. b. ad finem.

(B. a) *What* Things may be assigned *in lieu of Dower.*

[And how without Deed.]

[And what Actions be for such Things.]

[And Pleadings.]

1. AN Assise lies for Rent assigned without Deed out of Land of which she is dowable, (therefore it is in lieu of Dower.) 33 H. 6. 2. b.

Br. Dower, pl. 3. cites S. C. ———

2. [But] an Assise lies not for Rent assigned without Deed out of other Land of which she is not dowable, (therefore it is void and not in lieu) 33 H. 6. 2. b. Perkins, S. 407.

Br Assise, pl 6. S. C. cited by Littleton and divers Serjeants; and it is there said that the like Matter is 7 H. 6.

3. In Dower the Defendant pleaded that he had assigned to the Wife 20 *Acres of Corn out of the Land in name of Recompence of her Dower*; and held a good Bar, as well as of Rent, or any other Profit out of the Land. Mo. 59. pl. 167. Trin. 6 Eliz. Anon.

4. The Reservation of an *Horse or Sheep* is a good Reservation of Rent, yet Assignment of an Horse or Sheep in lieu of Dower is not good. For it is not *of the Nature of the Soil.* Mo. 59. pl. 167. Trin. 6 Eliz.

5. Common

5. *Common of Pasture for two Cows* is good in Name of Recompence of Dower. Mo. 59. pl. 167. Trin. 6 Eliz. Anon.

D. 361. b. pl. 11. S. C. ruled accordingly.

6. In Dower brought by the Wife of Beamont Master of the Rolls, in the Time of E. 6. the Defendant said, that he himself before the Writ brought did *assign a Rent of 10 l. per Annum* to the Demandant, *in Recompence of her Dower*, upon which the Demandant did demur in Law; and the Cause was, because the *Tenant had not shewed what Estate he had in the Lands at the Time of the granting of the Rent*, as to say that he was seised in Fee, and granted the said Rent; *so as it might appear* to the Court upon the Plea, *that the Tenant had a lawful Power to grant such a Rent*, which was granted by the whole Court, and the Demurrer holden good. 2 Le. 10. pl. 15. Hill. 20 Eliz. C. B. Beamont v. Dean.

7. Upon an *Assignment of Part of the Lands* in Dower, the *Heir by Parol may assign a Way through the other Parts.* Adjudged 2 Roll. Rep. 475. Mich. 22 Jac. White v. Robinson.

(C. a) In what Cases a Woman shall be *twice endowed.* [Eviction.]

Br. Scire Facias, pl. 161. cites S. C.—F. N. B. 149. (M). S. P. and Ibid. in the new Notes there (c) says, See 4 E. 3. 25. 36. 50 E. 3. 7. yet there seems to be this Diversity, If a Feme be endowed by a Disseisor, she shall have the Warranty &c. But if she recovers the Lands only which are granted over by the Heir, she has lost her Warranty against the Grantee. 7 E. 3. 7. 21 E. 3. 48. 10 E. 3. Quid Juris 41.——Perk. S. 418. S. P. unless in Special Cases.

1. If a Woman be endowed, and after her Dower is evicted by an elder Title, she shall have a new Writ of Dower, and shall be endow'd of the other two Parts. 43 Ass. 32. admitted.

Br. Scire Facias, pl. 161. cites S. C

2. If a Woman brings a Writ of Dower against the Tenant of the Land, who vouches the Heir in the same County, and the Woman recovers against the Heir if he hath, and if not, against the Tenant, and the Woman sues Execution against the Heir, and after this is evicted by an elder Title, she shall have a Scire Facias upon the first Recovery against the Tenant to be endowed of the two Parts. 43 Ass. 32.

Br. Scire Facias, pl. 161. cites S. C.

3. The same Law if the first Endowment was in Chancery. 43 Ass. 32. adjudged.

4. Feme *Tenant of the King is endowed in Chancery during the Nonage of the Heir*, and after the *Heir has Livery*, and after the *Feme is evicted*, she *shall have Scire Facias to have the Land re-seised, and to be endowed of other two Parts*, and when the Heir is vouched in the same County the Feme shall recover Dower of the Land of the Heir. Br. Dower, pl. 65. cites 43 Ass. 32.

5. If a Woman after the Death of her Husband entreth and *agrees to Dower ex Assensu Patris, or ad Ostium Ecclesiæ*, she is concluded to claim any Dower by the Common Law; but if she will, she may refuse the Dower ad Ostium Ecclesiæ &c. and then she may be endow'd according to the Course of the Common Law. Litt. S. 41.

6. If a Man *seised of two Acres of Land in Fee by rightful Title, and of another Acre by Disseisin*, takes a Wife and dies, and his *Heir* enters and *assigns*

assigns the Acre which his Anceftor had by Diffeifin unto the Wife in Name of Dower, in allowance of all the Freehold which her Husband had &c. And the *Diffeifee enters into the Acre affigned* unto her and puts her out, she shall be new endowed of the third Part of the two Acres which her Husband had by rightful Title, in fuch Manner as if the other Acre had never been in the Poffeffion of her Husband &c. Perk. S. 419.

7. If *Tenant in Tail make a Difcontinuance in Fee, and the Difcontinuee taketh a Wife and hath Iffue and dieth, and* the Difcontinuee *is not feifed of any other Thing during the Coverture, of which his Wife is dowable, and his Iffue enters,* againft whom his *Mother bringeth a Writ of Dower and recovers,* and hath Execution of the third Part by Metes and Bounds, and the *Iffue in Tail bringeth a Formedon* againft the Tenant in Dower, and *fhe vouches the Iffue of the Difcontinuee, who enters into the Warranty and lofeth, and the Demandant had Execution.* Now, the Tenant in Dower fhall be new endowed of the third Part of the two Parts which remain &c. notwithftanding that his Iffue hath enfeoffed a Stranger of Part thereof or of all. For notwithftanding that the Poffeffion which her Husband had (whereof fhe is dowable) be defeafible, yet fhe fhall have Dower thereof until it be defeated &c. Perk. S 420.

8. If a Woman endowed lofes by Action tried her Dower, if fhe *prays Aid of him in Reverfion,* fhe fhall be new endowed of that which remaineth. F. N. B. 149. (M.)

9. If the *Baron aliens Parcel* of his Lands *during the Coverture and dies,* and the *Heir enters into the Refidue and allows his Mother Parcel of the Lands, which remain, in Recompence of all her Dower,* and fhe after brings Action of Dower againft the *Alienee* of other Lands, he *fhall plead this Affignment* and bar her of her Dower; But if the Executor of the Baron affigns to the Feme Parcel of the Lands alien'd in Recompence of her Dower, the Heir nor the other Feoffees of the Baron fhall not plead it; Per Dyer. Mo. 25, 26. in pl. 86. Trin. 3 Eliz. faid that it had been fo adjudg'd.

10 B. feifed of Land in Fee *takes to Wife J. and enfeoffs C. in* Fee, *who takes Alice to Wife; C. dies, Alice is endowed, B. dies,* J. recovers Dower againft Alice and dies, Alice fhall enjoy the Land again during Life. Co Litt. 42. a.

11. If fhe *is endow'd of the immediate Eftate defcended from the Baron to the Heir* and fhe is impleaded afterwards fhe fhall vouch the Heir and fhall be newly endow'd of other Lands which the Heir has; *But if* fhe is endowed by *the Alienee of the Baron or of the Heir,* and and fhe is after impleaded, fhe fhall not vouch the Alienee to be newly endow'd. 9 Rep. 17. b. Hill. 28 Eliz. per Cur. in Bedingfield's Cafe.

And this is the Reafon, that when the Feme brings Writ of Dower againft the Alienee of the Baron &c. and he vouches the Heir, the Demandant may fhew that the Heir has Lands defcended to him in the fame County (for to another County the Original does not extend) and pray that fhe may be endowed of his Eftate, and this is for the Benefit of his Voucher to be newly endow'd. Ibid. 17. b.

(D. a) *What*

(D. a) *What Charges* made by the Husband, or other, and upon what Things, the Wife shall avoid.

1. D. 8 Eliz. 251. A Man takes a Wife, having a Manor in which is a Custom, that the Lord, Supervisor, or Deputy, may demise by Copy, and devises, that two should make customary Estates for the Payment of his Debts, and dies, the two hold Courts in their own Name, and grant Copies in Reversion according to the Custom, the Wife hath one of the Copyholds assigned to her for her Dower, and per Curiam she shall avoid this Grant.

In what Cases the Feme shall have Dower of Copyhold Lands. See tit. Copyhold (E. e)

2. Co. 4. 26 El. 24. the Lord of a Copyhold Manor, within which there were many Copyholders for Life, took Wife, a Copyholder died, and the Lord granted it to another, and died, and adjudged, that the Wife should not avoid this Grant in a Writ of Dower, because the Custom was before the Title of Dower, and the said Opinion of 8 El. cited contra.

3. If the Wife accepts Dower, of the Heir against Common Right, she shall hold it subject to the Charges of her Husband. 18 H. 6. 27.

A Man seised of Lands in Fee takes a Wife, and grants a Rent-charge, and after makes a Feoffment, and takes back an Estate Tail and dies. The Wife recovers Dower against the Issue in Tail by Reddition; The Wife makes a Surmise that her Husband died seised, and prays a Writ to inquire of the Damages, and it is granted to her, in this Case she holds the Lands charged with the Rent charge, For by her Prayer she accepts herself dowable of the second Estate, For of the first Estate whereof she was dowable her Husband died not seised, and so she had concluded herself; Wherefore if the Rent charge be more to her Detriment than the Damages beneficial to her, it is good for her in that Case to make no such Prayer. Co. Litt. 33 a.

4. But otherwise it is if she be endowed against Common Right by the Sheriff. 18 H. 6. 27.

Fol. 685.

5. If the Husband grants a Rent out of four Manors, and dies, and his Wife is endowed by the Heir of one Manor in lieu of all, she shall hold it discharged. 19 E. 3. Quare impedit 154. per Thorpe.

If a Man be seised of three Manors of equal Value and Wife, and charge one of the Manors with a Rent-charge and dies, she may by the Provision of the Law take a third Part of all the Manors and hold them discharged; But if she will accept the intire Manor charged, it is holden that she shall hold it charged. Co. Litt. 173. a.

6. If A. seised in Tail of a Manor to which an Advowson is appendant grants the next Presentation to the Church of B. and after takes C. to Wife, and dies, and the Wife is endowed of this Manor with the Appurtenances, in lieu of all her Dower, and after the Church is void, quære whether she may present and avoid the Grant made before the Coverture.

7 The Dower of a Wife who was *married after a Statute or Recognizance acknowledged*, shall be extended; But if the Title of Dower precede the Statute or Recognizance, it is not liable at all to such Statute or Recognizance. Jenk. 26. pl. 69. cites 8 E. 1 Fitzh. Assise, 417.

8. W. brought a Writ of Dower against B. C. Lessee for Years by *Lease* of the Husband rendering Rent *before the Coverture*, pray'd to be

be receiv'd for his Term. The Wife recovers and had Judgment. By the Court the Lease of C. is saved by 21 *H.* 8. *cap.* 16. and the Court advised, that an *Habere Facias Seisinam* shall be awarded to the Sheriff to put the Wife in possession, with a *Proviso quod Ten' ad Termin' annor' non expellatur.* And Beamond said, that 3 Eliz. it was so said. Noy. 65. Whitley v. Best.

9. Tenant in Dower *shall not be distrain'd for a Debt due to the King by the Husband* in his Life-time in the Lands which she holds in Dower. Co. Litt. 31. a.

F.N.B. 157. (A) says there is a Writ in the Register directed to the Sheriff, that he do not distrain the Wife who holds Lands in Dower for the Debts of the Husband which he owed to the King *before the Contract of Marriage between him and his Wife,* and she may have such Writ out of the Chancery directed unto the Treasurer and Barons of the Exchequer, commanding them that they inquire thereof, and if they find the same, that they surcease and discharge the Wife.

10. The *Endowments by Metes and Bounds according to Common Right is more beneficial* to the Wife than to be *endow'd against Common Right* ; For there *she shall hold the Land charged, in respect of a Charge made after her Title of Dower.* Co. Litt. 32. b.

11. If *Baron and Feme grant a Rent-charge by Fine* out of Land, *or make a Lease for Years,* rendering Rent to the Baron and his Heirs, and afterwards the Feme recovers Dower, she shall hold the Land charg'd. 10 Rep. 49. b. Mich. 10 Jac. in Lampet's Case.

(E. a) Attendency.

1. **Tenant in Dower** of a Mesnalty shall be attendant **to the Heir for the third Part of that which the Rent is over.** 1 **H.** 4. 3.

Lord, Mesne and Tenant are, and the Tenant takes Feme and dies without Heir, and afterwards the Mesne enters into the Land and endows the Wife of the third Part; Whether the Wife shall pay to the third Part of the Services which were due between her Baron and the Mesne, or the third Part of the Services which are between the Mesne and the Lord Paramount, dubitatur Keilw. 129. a. b. pl 98. Casus incerti Temporis. Anon.

2. [But] **If a Woman be endowed of a Mesnalty, the** Heir cannot distrain the Woman for the third Part which she ought to pay him. 1 **H.** 4. 3.

3. Feme Tenant in Dower shall hold of the Heir *pro particula,* and he shall make Avowry for the Portion upon her, and it is a *good Plea for her that the Heir holds by less Services.* Br. Tenure, pl. 84. cites Fitzh. Avowry 173. 3 E. 3.

4. *And if Great Grandfather, Grandfather, Father, and Son* are, and the *Lord gives the Services to the Grandfather and his Feme in Tail,* and the *Great Grandfather attorns,* and the *Grandfather dies in the Life of the Great Grandfather,* and the *Feme has Issue,* and the *Great Grandfather dies,* and the *Issue enters and does the Services to his Mother,* and *after he and his Mother dies,* and *the Son enters and endows his Mother* ; Quære if she shall be attendant of any Services, because the Services which the Baron did are now suspended in the Tenancy by the descending of the Land held by the Great Grandfather to the Issue in Tail, who is Heir to the Great Grandfather who was Tertenant. Br. Tenures, pl. 84. cites Fitzh. Avowry 173. 3 E. 3.

5. Where

5. Where a *Man gives in Tail rendering certain Services*, and the *Donee takes Feme, and dies without Issue*, and the *Feme is endowed*, she shall render the third Part of the Services, and the Donor may avow for them, and yet the Tail is extinct. Br. Tenures, pl. 82. cites 10 E. 3. Avowry 159.

S. P. Br. Dower, pl. 64. cites 34 E. 3. 15.

6. Where *Tenant in Tail dies without Issue*, the *Donor enters*, the *Feme of the Tenant in Tail recovers Dower and has Execution*, she *shall render the third Part of the Services to the Donor*. Br. Extinguishment, pl. 31. cites 34 Ass. 15.

S. P. And yet in these Cases the Seigniory was once extinct 14 E. 2. For there is a *Diversity between the Act of the Law*, as a dying without Issue or without Heir &c. *and the Act of the Party*, as Seigniory purchased in Fee &c.

7. So where there is *Lord and Tenant*, and the *Tenant dies without Heir*, so that the *Land escheats*, and after the *Feme of the Tenant is endowed* &c. Ibid.

Br. Dower, pl 64. cites 34 E. 3. 15. & 23 E. 3.

8. *Contra where the Lord purchases the Tenancy in Fee, and the Feme of the Tenant is after endowed*, she shall not render any Thing; For the two first Cases of the Death are the Act of the Law, and the Case of the Purchase or suing Process of Forejudger in Writ of Mesne &c. are the Acts of the Party and his Folly. Ibid.

9. Where Tenant in Tail dies without Issue, and the Feme is endowed, or if Lord and Tenant are, and the Tenant dies without Heir, the Lord may enter by Escheat. And in the other Case the Donor entered, the Feme, the Tenant, or the *Feme of the Tenant* in Tail *recovers Dower, and has Execution*, she *shall hold by the third Part of the Services*; For this is the Act of God or of the Law; *Contra where the Lord purchases the Land in Fee, and she is endowed*, she shall render nothing to the Lord, for it is his own Act and Folly. Br. Tenures, pl. 33. cites 34 Ass. 15.

10. If a *Man holds by Homage and Fealty, and* 10 *s. Rent*, and *makes a Gift in Frankmarriage of the same* Land so held *with his Sister*, and after the *Donee in the fourth Degree takes Feme and has Issue and dies, and his Issue enters and endows the Mother of the Possession of his Father*, The Question wss, if the Mother shall pay the third Part of the Rent to the Heir as he pays over to the Donor? or whether she shall hold this third Part discharged during her Life? It was argued that she shall hold it discharged; But Keble was Opinion that she should pay the third Part of the Rent to the Heir. Keilw. 124. a. pl. 80. Casus incerti Temporis. Anon.

11. If there be *Lord, Mesne, and Tenant*, and the *Mesne grants to the Tenant to acquit him against the Lord and his Heirs*; the *Lord dies*, his *Wife has the Seigniory assigned to her for her Dower*, and distrains the Tenant, although the Grant was to acquit him against the Lord and his Heirs only; yet because she continued the Estate of her Husband, and the Reversion remained in the Heir, *this Grant of Acquittal did extend to the Wife*. Co. Litt. 241. a.

12. A Man makes a *Gift in Tail*, *reserving* 20 *s. Rent, and dies*, the *Donee takes Wife and dies without Issue*; the *Heir of the Donor* enters and *endows the Wife*; she is so in of the Estate of her Husband, that although the Estate Tail be spent, and the Rent reserved thereupon determined, yet after she be endowed she shall be Attendant to the Heir in respect of the said Rent; And so it is of Lord and Tenant, the Wife that is endowed shall be Attendant for the due Services, but if any Services be incroached, although the Incroachment shall bind the Heir, yet the Wife shall be contributary, but for the Services of right due. Co. Litt. 241. a.

(F. a) Ex

(F. a) Ex Assensu Patris &c.

1. AN *Infant* being *in Ward at the Age of 18 Years took Feme by Assent of his Guardian, and endowed her ad ostium Ecclesiæ*; It was adjudged a good Endowment though the *Baron died before the Age of* 21, because he * was passed the Age of 14, and that the Marriage was with Consent of his Guardian. Fitzh. Dower, pl. 197. cites Pasch. 9 H. 3.

* The Original has the Word (ne) Anglice (not) which is not Sense, and so seems to be misprinted.

2. Assignment of Dower Ex Assensu Patris, this shall be by Deed; For otherwise the Franktenement of the Father cannot pass, and Assent lies not in Averment but in Specialty, and *here Franktenement passes without Livery of Seisin*; quod nota. Br. Dower, pl. 7. cites 40 E. 3. 43.

Co Litt. 36. a. S. P. —— The *Wife ought to have a Deed of the Father or Mother, proving his Assent* and Consent, for his Freehold shall be bounden thereby, and Livery and Seisin shall not be made thereof, and the Father may well make such a Deed unto his Son's Wife &c. and yet in ancient Books such Assent and Consent has been tried by Proofs, but the Law is contrary at this Day. Perk. S. 442.

3. In the same Manner as there is Dower Ex Assensu Patris, in the same Manner and Form there is Dower † Ex Assensu Matris, mutatis mutandis. Perk. S. 441.

4. But there is no Dower *Ex Assensu Fratris nec Consanguinei*. Ibid.

5. *Such Endowments ought to be made immediately after Affiance* made betwixt them *at the Church Door, or in the Church*, if the Marriages are used to be in the Church &c. Perk. S. 442.

† Co. Litt. 35. b. S. P. Such Dower is good. —— S. P. F. N. B. 150. (L) —— The last Edition of F. N. B. 150. (L) cites 9 H. 3. Dower 19. and 18 E 2. Dower 167. Contra. But Dower 19. is neither the S. C. nor the S. P. and Dower 167. is the S. C. of 8 E. 2. and so likewise is pl. 168. but neither of them is S. P. But Dower 191 cites Trin. 9 H 3. and is that on Issue as to the Assent of the Mother &c. it was found against the Demandant, by which she was barred. But Dower 134 cites 29 E. 3. is an Inference drawn from that Case, viz. That a Man cannot endow his Feme Ex Assensu of any other than his Father; for that she shall not have Writ of Dower Ex Assensu Consanguinei.

6. And *yet* it has been holden in Ancient Books, that *where the Son is Heir apparent* unto his Father (and so he ought to be, for such Endowment made unto the Wife of the second Son is nothing worth) ‡ if he *marries against his Father's Will, and afterwards within eight Weeks* after the Marriage, the same Son *endows his Wife, with the Assent of his Father*, of the Lands and Tenements of the Father &c. it was holden that the same was a good Endowment &c. Perk. S. 443.

‡ Fitzh. Dower, pl. 199. S. P. cites Anno 2 H. 3. —— F. N. B. 150. (L) S. P.

7. Where the Endowment Ex Assensu Patris, vel Matris, is good and sufficient in Law, *the Wife* of the Son *immediately after the Death of her Husband, in the Life of the Husband's Father, may enter* into the same Lands so assigned unto her in Dower &c. Perk. S. 444.

Litt. S. 40. and Co Litt. 35. b. S. P.

8. *So* if the Son endows his Wife with the Assent of the Father, *of Lands of the Father which he held jointly in Fee with a Stranger* at the Time of his Assent &c. Perk. S. 446.

9. *So* shall it be if such Endowment be made *of Lands* or Tenements *which the Father holds for the Term of his Life*, at the Time of such Endowment. Perk. S. 446.

10. *But if* the Father had been *seised in Tail* of such Lands whereof such Endowment is made at the Time of his Assent &c. *he shall be*

bounden thereby during his Life; *But the Issue in Tail shall not* be bound thereby, nor a Woman who has Title to have Dower of the same Land before the Assent &c. As the Father's Wife which he had at the Time of the Assent, *nor any Stranger who have ancienter Title* to the same Land &c. shall be bound by such Endowment or Assent &c. Perk. S. 447.

11. If there be Father and Son, and the *Father is seised* of Land *in Fee with his Wife in the Right of his Wife*, and the *Son endows his Wife of the same Land with the Assent of the Father*, and the *Son dies, living his Father*, the Son's Wife shall not have Dower of this Land against the Father, yet the Father may make Feoffment of the same Land during the Coverture between him and his Wife, and it shall be good against him; and it has been said, that it is because that in such Case the Husband does presently dismiss himself of the Possession, but in the other Case he remains seised of the same Land during the Coverture, and in the right of his Wife; and when this Matter appears unto the Court, the Court, who is a third Person, shall oust the Son's Wife of her Dower, because otherwise the Court should do Wrong unto the Wife of the Father &c. Tamen quære, for that the Father cannot plead such Matter; but if it be in an Action in which Resceit lies, if the Wife be received upon the Default of her Husband, she may plead this Matter &c. yet notwithstanding that she is received, it seems that upon the Matter of Law the Son's Wife shall have the Dower which was assigned unto her by her Husband with the Assent of his Father &c. [during the Coverture.] Perk. S. 448.

12. *Writ* of Dower Ex Assensu Patris *lies as well against the Guardian* as against *the Tenant of the Freehold.* F. N. B. 150. (B).

13. If the Son *endows his Wife at* the Age *of seven Years* Ex *Assensu Patris*, if she before the Husband *attain to the Age of nine Years*, the Dower is good; But *otherwise it is of an original absolute Disability.* Co. Litt. 33. a.

14. *Tenant for Life of* a Carve of Land, the *Reversion to the Father in Fee.* The Son and Heir apparent endows his Wife of the Carve by the Assent of the Father. The *Tenant for Life dies. The Husband dies.* The Reversion was a Tenement in the Father, and yet this is no good Endowment Ex Assensu Patris, because the Father at the Time of the Assent had but a Reversion expectant upon a Freehold, whereof he could not have endowed his own Wife, and though Tenant for Life died, living the Husband, yet *Quod ab initio non valet tractu Temporis non convalescet.* Co. Litt. 35. a.

Perk. S. 445. S. P. cites Trin. 6 E. 3. 34 —— F. N. B. 150. (A) S. P. and the new Edition cites 4 E. 3. Dower 117. and 6 E. 3. 34. and Perk. 86. [which is the same Case as cited above.]

S. P. per Cur. 3 Rep 38. a. Hill. 34 Eliz. B. R. in Ratcliff's Case.

15. The *youngest Son*, and Heir apparent, cannot endow his Wife Ex Assensu Patris of Lands whereof the Father is seised in Fee, of the Nature of Borough English, because the Father may have another Son, and then the Husband is not Heir apparent, and it is in respect of the constant and perpetual Appearance, that the Son and Heir apparent may endow his Wife of his Father's Land. And *so* it is of Lands in *Gavelkind*, and this is the reason that Dower Ex Assensu Fratris, or Consanguinei, is not good; For that altho' he is Heir apparent at that Time, yet for the common Possibility that he may have Issue, and every Issue that the Brother or Cousin should heve afterwards shall exclude him, he is no such Heir apparent as the Law intends; So it must be such a Son and Heir apparent as *must continue an Heir apparent.* Co. Litt. 35. b.

16. Though the Freehold and Inheritance is in the Father, yet in respect of the constant and perpetual Appearance of the Heir *the Heir apparent does endow*, and the Father *does but assent*; and therefore where

where the Father did endow the Wife of his Son and Heir apparent, that Endowment was held void, because the Husband in that Case must endow, and the Father assent. Co. Litt. 35. b.

17. If a Man endows his Wife Ex Assensu Patris, and the Husband dies, the *Wife may enter, or have a Writ* of Dower, *though the Father be living*. Co. Litt. 35. a.

18. If a Wife be endowed Ex Assensu Patris, and the Husband dies, the *Wife has Election either to have her Dower at the Common Law, or Ex Assensu Patris*; If she bring a Writ of Dower at the Common Law, and count, albeit she recover not, yet she shall never after claim her Dower Ex Assensu Patris. Co. Litt. 145. a.

Fitzh. Dower, pl. 158. cites Pasch. 12 E. 2. S P.

(G. a) De la pluis beale.

1. IN Dower, the *Tenant vouched the Heir of the Baron in Ward of the Demandant for Cause of Nurture, and set forth Deed of the Ancestor of the Infant*, and he *was compelled to plead in Bar, because now the Feme may endow herself of the best Part*, because *Guardian by Nurture is always intended Socage Tenure, upon which Tenure this Endowment of the best* &c. *lies*. Br. Dower, pl. 42. cites 21 E. 3. 30.

2. *Contra* of Tenure *in Chivalry*, and therefore she was barred. Br. Dower, pl. 42. cites 2 E. 3. 30.

3. If there be *Lord, Mesne and Tenant*, and the *Tenant holds of the Mesne by* 3 *d.* and the *Mesne holds over by* 20 *d.* and the *Tenant takes a Wife*, and the *Mesne releases unto the Tenant all the Right which he has in the Tenancy* &c and the *Tenant dies*, and his *Wife is endowed* by the Heirs *of the third Part of the Tenancy, she shall be attendant* unto him *by* 1 *d. and not by the third Part of the* 20 *d.* because that she shall be endowed of the best Possession which her Husband had during the Coverture &c. Perk. S. 428.

4. If the *Husband has a Bailiwick* &c. or *a Fair*, &c. *as appendant unto his Manor* within the same Precinct, of which Manor the Husband was seised in Fee during the Coverture, and held the same in Socage, now *if the Wife be endowed of the Moiety of the Manor by the Custom, she shall have the Profit of the Moiety of the Bailiwick &c. or of the Fair as appendant* unto the Moiety of the Manor; But quære if the Bailiwick or Fair be disappendant in Fee from the Manor after the Death of the Husband, and before the Endowment, whether she shall then have the Moiety of the Profit of the Bailiwick or Fair &c. But it seems she shall have the same, because she shall be endowed of the best Possession which her Husband had during the Coverture or Marriage &c. Perk. S. 436.

5. Where *Judgment is given* in a Writ of Dower *that the Demandant shall be endowed de la pluis Beale*, she may take her Neighbours, and in their Presence endow herself by Metes and Bounds of the Fairest Part of the Tenements which she hath as Guardian in Socage, to have and to hold for Term of her Life. Litt. S. 49.

6. A *Woman Guardian in Socage bringing a Writ of Dower against Guardian by Knight's Service* (before 12 Car. 2. 24) should upon his pleading the whole Matter, have been adjudged to endow herself de pluis Beale, i. e. that is the Fairest of the Socage Land. But such Dowment could not be without Judgment; *If the Socage Land were not sufficient for her whole Dower, she should retain for Part, and recover against the Guardian in Chivalry for the other Part.* After Judgment as afore-said,

Litt. S. 48. Co. Litt. 38. a b — If Feme who has Title of Dower occupies the Land as

Guardian in Socage by her own Right, and not as Rightful Guardian, ſhe ſhall not endow herſelf de la pluis Beale; For this is in a Judgment given in the King's Court. 5 Rep 30. b. 31. a. in Coulter's Caſe.

ſaid, whether in the King's Court or the Lord's the Wife ſhould in the Preſence of her Neighbours have endowed herſelf of the beſt of the Land, which ſhe held as Guardian in Socage by Metes to hold it for Life. Hawk. Co. Litt. 55.

(H. a) By Cuſtom.

1. IN *Aſſiſe* the *Tenant ſaid, that the Land is within the Manor of D. in which is the Fee of L. where the Uſage has been Time out of Mind, that the Feme ſhall have the Whole in Dower dum ſola ſit, and if ſhe marry that ſhe ſhall forfeit it*, and admitted. Br. Cuſtoms, pl. 67. cites 25 Aſſ. 11.

F. N. B. 150. (P) S. P.

2. Vill which is not a Borough or Incorporated may have a Cuſtom that the Feme ſhall be *indow'd of the Whole*, as in Gavelkind and others. Br. Cuſtoms, pl. 72. cites 21 E. 4 53, 54.

In ſome Places ſhe ſhall have the Whole or Half dum ſola & caſta vixerit, and the like. Co. Litt. 111. a.

3. In ſome Boroughs by Cuſtom ſhe ſhall have for her Dower *all the Tenements* which were her Husband's. Litt S. 166.

Co. Litt. 33. b and 111. a. S. P. ——S. P. adjudg'd accordingly. Cro. E 825. pl. 26 Paſch. 4 Eliz. C. B. Davis v. Selby ——Le. 133. pl. 182. Hill. 30 Eliz. C B Hunt v. Gilburn. S. P adjudg'd accordingly ——Cro. E. 121. pl. 11. S. C. held accordingly.——Gouldsb. 108. pl. 13. Hum v. Auſtin. S. C.

4. The Cuſtom of Kent is that the Wife ſhall be endowed *of the Moiety of Gavelkind Land*, and ſhall loſe her Dowry if ſhe marry again; Three Juſtices held the Plea good, and that ſhe had not Election to be endowed of the third Part at the Common Law, but was tied to the Cuſtom; But Anderſon e contra. Mo. 260. pl. 408. Paſch. 30 Eliz. Anon.

5. If a Cuſtom be that a Feme ſhall be endow'd *of a Moiety of the Lands*, yet ſhe *ſhall not be endow'd of the Moiety of a Fair held on the ſame Land*; Per Newdigate J. 2 Sid. 139. Hill. 1658. B. R.

(I. a) Quarentine.

She ſhall remain there but 40 Days, of which the Day of his Death is accounted the Firſt; and *if upon her Husband's Death ſhe departs* from her Houſe, *ſhe cannot return again* within the 40 Days. 2 Inſt. 17. ——Hob. 153. per Hobart Ch. J. cites D 76. Mich. 6 E 6. [ſb. pl 32. Kettillsby v Kettillſby.] ——If the Widow be holden from her Quarentine ſhe ſhall her *Writ* de Quarentina habenda to the Sheriff, by Virtue of which Writ the Sheriff may make a *Proceſs* againſt the Defendant *returnable*

1. *Mag. Charta* 9 *H.* 3. *cap.* 7. *THE Widow ſhall have her Dower and Quarentine in the Chief Houſe if it be not a Caſtle, and if it be, a competent Houſe ſhall be provided until her Dower is aſſigned, and ſhe ſhall have in the mean Time her reaſonable Eſtovers of the Common, and ſhe ſhall have a third Part of the Lands of her Husband aſſigned for her Dower, which were his during Coverture, except ſhe was endow'd with leſs at the Church Door.*

signable within two or three Days, and may and ought, if no just Cause be shewn against it, *speedily to put her into Possession.* 2 Inst. 16, 17.

By a *Castle* in this Statute it is intended one that is *fortified* and maintained for the Defence of the Realm, and *not* a Castle *in Name* for the Habitation of the Owners; but this must be of a House whereof she is dowable. 2 Inst. 17.

2. If she *marries within the* 40 *Days* she loses her Quarantine; For then her Widowhood is past, and the Quarantine is appropriated to the Widow's Estate. 2 Inst. 17.

Co. Litt. 32. b. S. P.

3. The Word *Estovers in the Statute is taken for Sustenance.* 2 Inst. 17. and Lord Coke there says, that There is an Opinion in the Books [and in Marg. cites 19 H. 6. 14. b. and Regist. 175.] that the Widow *cannot kill any of the Oxen* of the Husband's whilst she remains in the House; but observes that the Register says, Quod interim habeat rationabilia Estoveria de Bonis eorundem Maritorum, which Lord Coke says, seems to be an Exposition of this Branch. And that in this Case it *seems to contain Meat, Drink, Garments and Habitation,* though *when restrained to Woods it signifies House-bote, Hedge-bote and Plough-bote.* 2 Inst. 17, 18.

4. Widow for 40 Days next after the Death of her Baron is by the Law allow'd her *Quarentine* to live in the House of her Baron, and to be sustain'd with Victuals there, and not for any longer Time. Per Omnes J. Jenk. 284. pl. 18.

(K. a) Against whom Dower lies.

1. IN Dower the *Tenant vouch'd,* and the *Vouchee vouch'd the Heir of the Baron* of the Demandant; the *Demandant shew'd that the Heir had Assets by Descent in the same County.* The Demandant shall not recover against the Heir but against the Tenant only; For there is no immediate Privity between the Heir and her; For she shall recover against the Heir only when the Tenant in Demesne vouches him. 9 Rep 17. b. per Cur. in Bedingfield's Case cites 18 E. 3. 36. b.

2. Writ of Dower does not lie *against a Guardian in Socage* as it lies against a Guardian *in Chivalry,* therefore the *Indowment is Disseisin*; *Quære* inde. Br. Dower, pl. 63. cites 29 Ass. 68

Co. Litt. 35. a. S. P.

3. Dower shall be brought *against the Guardian where the Infant is in Ward, and not against the Infant,* because the *Guardian has Interest.* Br. Dower, pl. 20. cites 46 E. 3. 19.

Co. Litt. 35. a. S. P.

4. In Ravishment of Ward it was agreed that Writ of Dower may be brought *against the Baron alone, where the Baron is possessed of a Ward in Jure Uxoris, and the Feme Mother of the Infant demands Dower*; For in Writ of Dower against Guardian Voucher does not lie. Br. Dower, pl. 23. cites 48 E. 3. 20.

5. *But Right of Ward* shall be against both; For there Voucher lies. Br. Dower, pl. 23. cites 48 E. 3. 20.

6. Where there were *Grandfather, Father, and Son,* and the *Grandfather held the King*; The *Father took Feme*; The *Grandfather died*; The *Father had Issue and died before Office found, and before any Entry,* and after an *Office was found for the King, that the Grandfather was seised, and died seised, and held of the King, and that he had Issue, who had Issue him who now is Heir and within Age,* by which the *King seised and committed the Ward durante minore ætate,* and the

 Feme

Time of the Father, Son of the Grandfather, brought Writ of Dower against the Committee, and the Committee demurred upon the Matter. Br. Dower, pl. 66. cites 1 H. 7. 17.

7. Writ of Dower lies against the *Committee* of a Ward, and he *may have Aid of the King*. Br. Dower, pl. 66. cites 4 H. 7. 1. per Vavisor, who vouched 15 E. 3.

8. Where the *Tenant pleads in Bar of Dower and demands Judgment si Actio*, there tho' the Action does not lie against the Committee, yet *by this Conclusion the Defendant has lost his Advantage*, and so *Quacunque Via* the Action lies well. Br. Dower, pl. 66. 1 H. 7. 17. per Brian.

9. A *Grantee of a Rent in Fee takes Wife*; The *Grantee releases to the Ter-tenant and dies*; His Wife ought to bring her Writ of Dower *against the Ter-tenant*, for he is to pay the Rent, and there is no other against whom the Writ of Dower may be brought. *So* in the Case of the *Release* of the Mesne, *or Fore-judger of the Mesne by the Ter-tenant*; Where Dower is brought by the Wife of the Mesne it ought to be against the Ter-tenant. Jenk. 4, 5. pl. 6.

10 *But where a Grantee of a Rent in Fee dies*, and his Wife is dowable, she ought to bring her Writ of Dower *against the Heir of the Grantee*, and not against the Tenant of the Land; for he (the Grantee) is the True Tenant of the Rent; in the other Cases the Rent is extinct; in this last Case it is not. Jenk. 5. pl. 6.

(L. a) Writ and Abatement.

1. *Westm.* 1 *cap.* 49. 3 *E.* 1. IN *a Writ of Dower (unde nihil habet) the Writ shall not abate by the Exception of the Tenant, that she has received her Dower of another before the Writ purchased, unless he can shew that she received Part of her Dower* * *of himself, and in the* † *same Town before the Writ purchased.*

In the Common Law, if a Woman had accepted Part of her Dower from any Person, *she could not recover the Residue unless by Writ of Right* of Dower. 2 Inst. 262. in Principio, cites Fleta Lib 4 fol ‡ 321 b.

‡ This is misprinted for (311. b) and is in Lib 4 Cap 13. S 15.

* First it must be of the same Tenant, and not of another, tho' it be in the same Town; As if the *Husband enfeoffs A of Whiteacre and B. of Blackacre, both in Dale*, and the *Wife receives Dower of A she* notwithstanding *shall have a Writ of Dower (unde nihil habet) against B.* by the express Purview of this Act, for he is not the same Tenant of whom she received her Dower. 2 Inst. 262.

2dly, If A having a Wife does *infeoff the Husband of one Acre, and the Wife of another, and both in Dale*; A. dies; The Husband assigns Dower of his Acre, yet does the Writ of Dower (unde nihil habet) lie against the Husband and Wife, for they are not the same Tenant. 2 Inst. 262.

3dly, If the *Baron* be *seised of Black-acre and White acre in Dale*, and *after the Coverture makes a Lease for Life of Black acre, and grants White-acre, and the Reversion of Black-acre to A and his Heirs*, to whom Attornment be made, and dies, the *Wife receives Dower of A of White-acre*, and after the *Lessee for Life dies*, the *Wife shall have a Writ of Dower (unde nihil habet) to be endowed of Black-acre*; For altho' it be against the same Tenant, and in the same Town, and before the Writ purchased, which are the three Points required by this Act, yet is there another Property necessarily implyed, and that is, that he be such a Tenant of both the one Land and the other at the Time of the Receipt of the Dower, as she might have had her Writ of Dower (unde nihil habet) against him, of both which she could not have in this Case, in respect the Lessee for Life was Tenant of the Freehold at that Time, and so no Default of her. 2 Inst 262.

† A Writ of Dower (unde nihil habet) *does lie in an Hamlet*, but yet if the Demandant had received Dower out of the Hamlet, and in the same Town, the Writ shall abate, otherwise it is, tho' it be in the same Parish, if it be in another Town, for the Words of the Statute be, En mesme la Ville 2 Inst. 263

2. In

2. In Writ of Dower assign'd, it is *no Plea to the Writ to say that the Demandant is seised of parcel of her Dower* of this same &c. But it is good in Common Writ of Dower. Thel. Dig. 148. Lib. 11. cap. 35. S. 2. cites Mich. 9 E. 2. Brief 813. Britton ca. 109.

3. In Dower, the *Tenant pleaded Jointenancy by Fine* with one Tho. and the *Demandant said, that after this Fine her Baron was seised and infeoffed the Tenant*, and so he is sole Tenant, and Issue taken thereupon, and found for the Demandant, by which she recover'd; But it was said, that all might be revers'd in B. R. Thel. Dig. 226. Lib. 16. cap. 7. S. 8. cites 3 E. 3. It. North. Maintenance de Brief 14.

4. *Dower in N.* and the *Tenant says that H. is a Hamlet of N.* Judgment of the Writ, this is a good Plea; [*But*] *if he brings another Writ in N.* the *Tenant shall not say that there are two N's, and none without Addition.* Br. Brief, pl. 540. cites 3 E. 3.

5. In Dower *of the third Part of a Manor* where the Tenant *pleaded Nontenure of Parcel*, the *Demandant was receiv'd to maintain that he was fully Tenant* of her Demand, *notwithstanding that Nontenure ought not to be alleg'd in Writ of Dower* &c. Thel. Dig. 226. Lib. 16. cap. 7. S. 11. cites 4 E. 3 159. Quære.

6. Where a *Feme takes a Manor in Allowance of all her Dower of the Tenements* of her Baron, the Writ of *Waste shall be brought against her as Tenant in Dower, and not as Lessee for Life*, as well by the Heir of the Baron as by a Stranger; But otherwise it is, if upon Debate had between her and him in Reversion she receives the Manor by Accord of the Lease of him in Reversion to release her Action of Dower. Thel. Dig. 170. Lib. 11. cap. 52. S. 9 cites Pasch. 4 E. 3. 138.

7. In Dower, the *Demand was as to Parcel of the Moiety, and of the third Part of the Residue*, and the Tenant would have compelled the Demandant to shew Cause why he demanded the Moiety, but before Cause shewn the Tenant *pleaded to the Residue in Abatement that she had received Parcel of her Dower*, and Issue thereupon taken, and after the *Demandant would not have shewn Cause of the other Demand*, because the Tenant had pleaded to the Writ for the Residue &c. *But she was Compell'd* by the Court to shew Cause, or to Amend her Demand. Thel. Dig. 88. Lib. 10. cap. 1. S. 11. cites Hill 7 E. 3. 308. Dower 102.

8. *In Dower unde Nihil habet* it was *pleaded* to the Writ, *that the Tenant himself had Assign'd her Dower* to the Demandant *in the same Vill of which the Demandant was seised*; The Demandant replied, *that at the Time of his Assignment, the Tenant was not seised of the Tenements of which Dower is now demanded, but one A. then held them for Term of his Life, the Reversion expectant to you*, and so these Tenements are come to you after the Death of the said A. &c. Judgment of this Writ be not good enough; upon which the Tenant was put to *answer over.* Thel. Dig. 225. Lib. 16. cap. 7. S. 3. cites Mich. 2 E. 2. Dower 124. and Hill. 12 E. 3. Dower 86.

9. In Dower by several Præcipes, the Name of one of the Tenants was left out in this Clause, unde queritur, and also in the Summons, by which it was abated against all. Thel. Dig. 94. Lib. 10. cap. 6. S. 3. cites Hill. 12 E. 3 Brief 671.

10. *But* in Dower *unde Nihil habet, Seisin of Parcel* of her Dower *in the same Vill* is a good Plea. Thel. Dig. 148. Lib. 11. cap. 35. S. 2. cites 7 E. 3. 308. Mich. 2 E. 2. Dower 124 and 12 E. 3. Dower 86.

Seisin of Parcel of her Dower in the same Vill, is no Plea in Writ of Dower by the Statute of Westm. 1 cap. 49 *without saying that it is of the Assignment of the Tenant.* Thel. Dig. 149. Lib. 11. cap. 35 S. 21. cites Hill. 12 E. 3. Dower 89 Quære.

11. It was adjudged that *in* Writ of *Waste brought against Tenant in Dower*, it suffices to name the Feme by her proper Name and Surname, *without naming her by her proper Name, with that Wife of such a one.* Thel. Dig. 50. lib. 6. cap. 2. S. 3. cites Mich. 31 E. 3. Brief 326. & Pasch. 32 E. 3. Brief 295.

12. In Dower *against a Guardian*, the *Demand was of the third Part of a Carve of Land* &c. The Tenant *pleaded that the Demandant herself is seised of the third Part of this Carve*, et non allocatur to all the Writ; because he does *not shew How* she is seised, *or of whose Assignment or otherwise* &c. by which the Tenant was put to answer to the two Parts. Thel. Dig. 149. lib. 11. cap 35. S. 12 cites Trin. 39 E. 3. 22.

13. In Dower the Demand was *of the third Part of* 40 *l. Rent.* Br. Demand, pl 47. cites 44 E. 3. 32.

14. *So of the Moiety of Rent*, and not of Sum certain. Ibid.

15. Dower was brought against the Earl of Warwick, and the *Writ was De Libero Tenemento of J. W. her Husband in Terra Gwerr in Wales*, and her *Demand was De tertia Parte Terræ Gwerr*, and so she supposes *the Land of Gwerr to be in Terra Gwerr*, and yet good by Award. Br. Demand, pl. 1. cites 47 E. 3. 6.

Br. Brief, pl. 512. cites S C. and so the Demand of the Thing in itself is good.

16. *So* of *the Manor of B. in B.* Ibid.

Br. Brief, pl. 512. cites S. C.

17. *And* where Land is *in Foresta de K. which is not of any Vill*, the Writ shall be Præcipe quod reddat &c. *in Foresta de K.* and *not De Foresta.* Ibid.

Br. Brief, pl 512. cites S. C. it shall be in Foresta, and not de Foresta.

18. Dower *if the third Part of* 10 *l.* and did not demand five Marks, and so it ought to be quod nota. Br. Demand, pl. 51. cites 11 H. 4. 83.

19. In Dower the Demandant *demanded the third Part of a Garden*; For the *Writ is general Rationabilem dotem suam quæ ei contingit de Libero Tenemento J. B. viri sui in N.* &c. Per Marten, the Demand is good, because the Writ has passed the Chancery; But note that this Term is not in the Writ, but only Libero Tenemento &c. and the Opinion of the Court was, that the Writ was good as in Assise, by which the Tenant demanded the View &c. Br. Demand, pl. 8. cites 8 H. 6. 3.

20. In *Wast* it was agreed by the Opinion of all the Court, that a Feme shall be endowed *of a Villein appendant in Grofs*, and the *Writ shall be De Libero Tenemento.* Br. Dower, pl. 91. cites 2 H. 6. 11.

21. Dower *of the Moiety by Custom* the *Writ shall be General*, and shall have special *Declaration of the Custom* for the Moiety. Br. General Brief, pl. 23.

22. In Dower the Demand was *Medietatis* 23 *Acrarum Terræ, pro eo quod the Land est de Tenura in Gavelkind, secundum Consuetudinem ad Antiquo Usitat' quod de Meditate dotari debent*, and *did not say De Tempore cujus contrar'* &c. and yet good, because the Course is so, and it seems there, that she *shall say she is Sole according to the Custom.* Br. Dower, pl. 70. cites 2 E. 4. 17.

23. Dower *against a Guardian* shall be *by Name of Guardian*; and there it is a good Plea, that he is not Guardian. Br. Dower, pl. 94. cites 9 E. 4. 31.

24. In.

24. Writ of Dower lies *against Guardian in Chivalry, without naming other Guardians who have Parcel of the Heritage of the Heir in Ward, but all* the Guardians *shall be jointly vouch'd.* Thel. Dig. 49. Lib. 5. cap. 23. S. 1. cites Mich. 16 E. 3. Brief 657.

25. Dower, and made the *Demand of two Mills.* Skrene demanded Judgment of the Writ; For where she makes Demand of two Mills *they are only two Scites of Mills and two Tofts, and have been always in the Life of the Baron,* by which the *Demand shall be of two Tofts* &c. quod non negatur. Br. Demand, pl. 5. cites 14 H. 4. 35.

26. In Dower *of the third Part of the Moiety of a Manor,* and the *Tenant demanded the View,* by which the *Demandant made her Demand of the third Part of the Manor of B. severing the other Moiety.* Pigot said, now the Demand shall be *of the third Part of all the Acres and Rent,* and yet good as above per Cur. For *where a Manor is parted between two Coparceners each has a Moiety* of the Manor; *Contra* it seems *where the one has all the Demesnes, and the other all the Services,* but as long as the one has Land and Services, and the other likewise, each has a Moiety of the Manor. Br. Demand, pl. 10. cites 9 E. 4. 5.

27. In Dower if the *Tenant makes Default by which Grand Cape issued,* the *Demandant shall make his Demand*; For no Certainty appears before the Demand made, nor in Assise before the Plaint. Contra in Præcipe quod reddat. Br. Dower, pl. 96. cites 38 H. 6. 18.

28. A Writ of Dower *unde Nihil habet lies in Case* where a Woman takes her Husband, who is sole seised of Lands or Tenements to him and his Heirs in Fee Simple, or unto him and the Heirs of his Body &c. Or if the Husband during the Marriage betwixt him and his Wife be solely seised in Fee Simple, or in Fee Tail of such Estate, that the Issue begotten betwixt him and his Wife may inherit the same, or dies seised thereof, or be thereof disseised and dies, his Wife shall have a Writ of Dower unde Nihil habet against him who is Tenant of the Freehold of the Land, or against him who is Guardian in Knight's Service of the Land. F. N. B. 147. (E).

29. Dower, the *Writ was, Præcipe A. quod reddat E. Fulliam rationabilem dotem suam de terris &c. dudum B. Fulliam quondam viri sui* &c. Exception was taken to the Writ, because it was not in this Manner; Præcipe A. *quod reddat E. Fulliam que fuit Uxor B. Fulliam* &c. For in the Beginning of the Writ, she ought to be named Uxor of her Husband &c. for that is the Name whereby she claims her Dower; And she ought to be his lawful Wife, otherwise she may not claim any Dower. And the Court held that the Writ was ill; and that the Words in the Writ B. Fulliam quandam viri sui &c. are not sufficient. Cro. J. 217. pl. 4. Hill. 6 Jac. B. R. Fulliam v. Harris.

2 Brownl. 300, 301. S. C. resolv'd to be Error. And it is said that it does not vary in Substance, but because the Form in the Register is otherwise, the Justices would not amend it.

30. For the most Part Dower *ad Ostium Ecclesiæ, & Ex Assensu Patris ensue the Nature of a Dower at the Common*; And for these the Wife may have a Writ of Dower, although they be certain, as for the third Part at the Common Law. Co. Litt. 35. b.

31. Although the *Guardian in Chivalry,* or the *Grantee of the King of a Wardship,* has but a Chattle during the Minority of the Heir, and the Woman shall recover a Freehold in her Writ of Dower, yet after the Guardian as is aforesaid has enter'd into the Land, That *Writ lies against him, and not against the Heir* who is Tenant of the Freehold, because the Law has trusted the Guardian to plead for the Heir within Age, and that is in his Custody, and also for his own particular Interest, and by this Diversity all the Books be reconciled. Co. Litt. 38. b.

32. So if the *Guardian dies the Wife shall have a Writ of Dower against his Executors*, and if there are two Executors and one of them alone takes the Profits, the Writ of Dower shall be maintain'd against him only. Co. Litt. 38. b.

32. In Dower there was *Judgment by Default*, and a *Writ of Enquiry* if the Husband died seised, and of what Estate either in Fee or Tail, *and Judgment* was given *that she recover &c. and her Damages to* 60 *l.* and a Writ of *Error brought, and the Record being removed the Widow died*; Adjudged that the Writ shall not abate by the Death of the Defendant in Error, though otherwise by the Death of the Plaintiff, and thereupon the Plaintiff in Error proceeded and assigned Errors. Yelv. 112. Mich. 5 Jac. B. R. Bromley v. Littleton.

Noy. 126. Brownlow v. Littleton, S. C. held accordingly; and cites Pasch 39 Eliz. B. R. Williams v. Williams, where in the like Case the Plaintiff brought a new Writ of Error quod Coram Vobis residet against the Executor, who brought a Sci. Fa. to have Execution of the Damages, and the Party pleads that there is Error hanging for the Damages; And per Cur. if the Plaintiff in Error has assigned Error according to the Course of the Court, then the Plea is good, but otherwise if he had not assigned Errors. For the Sci. Fa. for the Damages is to hasten him to proceed Cum Effectu in the Error.

33 Dower is brought *against a Guardian in Chivalry*, pending the Writ, the *Heir comes of full Age*. The Writ of Dower abates, for the Guardianship ended *by the Act of God*; and the Guardian has nothing of which Dower may be render'd. Jenk. 170 in Case 32.

34. A Writ of Dower *de Rectoria & omnimodis Decimis, without shewing the Particulars* is good; for the *Demand in a Writ of Dower need not be so particular as in other Writs*; for the Demandant has not the Charters so as to be enabled to make a precise Demand; and as Dower is favoured in Law, so are the Proceedings therein. Sty. 68. 92 99. Hill. 23 Car. Thyn v. Thyn.

35. A Writ of Dower will lie *De uno Crofto*; Per Roll Ch. J. Sty. 194. Hill. 1649.

36. Error assign'd to reverse a Judgment in Dower was, that the *Demand was de tertia parte decimarum Garbarum in* C. whereas the Word Garba admits of divers Constructions, and signifies any Thing bound up in Bundles, so that it is uncertain what Kind of Tithes are demanded by that Word, but adjudged that it was certain enough, for the Word Garba is taken at Common Law to be Corn bound up, and here the Demand was of the third Part of the Tithes Garbarum Granorum. Sty. 236. 238. Mich. 1650. B. R. Fairfax v. Fairfax.

37. So where it was *De Rectoria de C.* it was assign'd for Error that it should be De Rectoria *Ecclesiæ de C.* but the Court held it well enough in a Writ of Dower, in which there is *not such Certainty required* as in a Præcipe. Sty. 236. 238. Mich. 1650. Fairfax v. Fairfax.

(M. a) Proceedings and Pleadings.

1. Stat. Marlb. 12. 52 H. 3. *IN Dower (unde nihil habet) four Days shall be given in the Year, and more if conveniently may be; so that they shall have five or six Days (at least) in the Year.*

2. Writ of *Dower by one Præcipe against W. of Land in C. and by another Præcipe against R. of Land in eadem Villa. R. made Default*, and *W. said that C. is not a Vill but a Hamlet, Judgment of the Writ*, and held

held a good Plea in his Mouth, notwithstanding that the Fault was in the other Præcipe, in which the Demandant had supposed it to be a Vill. Thel. Dig. 193. Lib. 13. cap. 1. S. 1. cites Mich. 18 E. 2. Brief 829.

3. If a *Disseisor or Abator endows a Feme, she may plead it in Bar against the Heir of her Baron*; and Brook says it seems to him that it is *the same against others.* Br. Dower, pl. 59. cites 12 Ass. 20.

4. In Assise the *Tenant said, that her Baron was seised in Fee during the Espousals and died, and the Land descended to the Plaintiff within Age, and because it was held in Socage A. B. as next of Kin to the Infant entred, and we assigned Dower*; Judgment if Assise. Br. Dower, pl. 63. cites 26 Ass. 68.

5. Dower *against B Guardian of the Land, and Heir of K.* The *Defendant said, that the Father of the Infant was J. of R. Judgment of the Writ, and in Case the Writ shall be good, we are ready to render Dower*; Per Knivet, you cannot plead to the Writ and render all at one Time. The Demandant prayed Judgment, by which Seisin of the Land was awarded, and because the Demandant averred that he was not at all Times ready to render Dower, Inquest of Damages was awarded, and that the Execution cease till the Inquest shall be passed. Br. Dower, pl. 40. cites 38 E. 3. 33.

6. In Dower, the *Tenant said that the Feme had married A. and living him married B. of whose Dowment she now demands, and A. is yet alive*, & non allocatur; by which he added, *and so not accoupled in lawful Matrimony*, by which nothing was entered but Ne unques accouple &c. and Writ awarded to the Bishop to certify it; Quod Nota. Br. Dower, pl. 54. cites 39 E 3 15.

7. In Dower, the Demand was *of the third Part of a Carve of Land*; Clam. said, that *she herself is seised of the third Part of this Carve*; Judgment of thed Writ; Per Knivet J this is no Plea unless he had *said of whose Assignment, or that she recovered it*; For if it be by Disseisin, yet she hall have Dower of two Parts, by which he was compelled to answer to the two Parts. Br. Dower, pl. 55. cites 39 E. 3. 17.

8. Dower was brought by a Feme *against two by several Præcipes*, and *the one prayed Aid of the other as Coparcener*, and so it seems that *several Tenancy is a good Plea* in Dower. Contra in Assise. Br. Dower, pl. 99. cites 39 E. 3. 4.

9. In *Dower*, the *Feme justified to hold Evidences*, because she was *enseint* by her Baron, and *detain them to the Use of the Infant*, and the *Tenant tendered Issue that she was not enseint by her Baron the Day of her Baron's Death*, and the Issue was not received, but only *if she was enseint the Day of the Death of her Baron*, or not. Br. Issues joines, pl. 6. cites 41 E 3. 11.

10. A *Protection does not lie in Dower*, for this would tend to starve the Widow. The *same Law* is *in a Quod ei deforceat* brought by Tenant in Dower, where she has lost her Dower by Default. Jenk. 50. pl. 95. cites 43 E. 3. 6. by all the Counsel.

11. In Dower, the Feme confessed and avoided *a Recovery had against her Baron.* Br. Confess and Avoid, pl. 9. cites 47 E. 3. 13.

12. In Dower, the *Baron makes a Feoffment and ousts the Feoffee, and he recovers by Assise.* The *Baron dies.* The *Feme brought Dower*, and the *Feoffee pleaded the Recovery in Assise against the Baron*, and therefore she shall not falsify in this Case; by which she said, that long Time before her Baron was seised que Dower la poit, and the other e contra; and so she is dowable of the first Possession before the Recovery. Br. Dower, pl. 22. cites 47 E 3 13.

13. *Dower unde nihil habet*, the *Tenant came at the first Day and said, that he had been always ready to render* Dower, and the *Demandant averred, that oftentimes before the Writ purchased she demanded Dower*, and could not have it, and was received inasmuch as it was at the first Day; And it is said elsewhere, that this is inasmuch as the Heir is in by Title; But contra in Cosinage, Aiel, and Mortdancestor, for this is to affirm the Title and Estate of the Tenant; Note the Diversity; For there such Averment shall not be taken. Br. Tout temps prist. pl. 34. cites 2 H. 4. 7.

14. In *Dower*, the *Tenant vouched Process continued to the Sequatur*, which was *returned not served*, and the *Tenant was essoigned*, and at the Day made Default, and therefore *Petit Cape* was awarded, and yet per Hull clearly, he cannot save his Default; Quære. Br. Process, pl. 29. cites 3 H. 4. 4.

15. In Dower, the *Tenant said, that N. gave to the Baron and his first Feme for Life*, the *Remainder to this Tenant in the Tail*, the *Remainder in Fee to the right Heirs of the Baron*, and after the *first Feme died*, and *he married this Feme and died*, and this *Tenant entered as in his Remainder*, and demanded Judgment if of such Estate Dower &c. Till. said, the Plea amounted but to Ne unques Seisie que Dower la poit; But per Hank. and Thirn, he *ought to answer to the Plea* by reason of the Fee in Remainder in the Baron, which is doubtful to the Lay-Gents; But where a Man *leases to a Baron for Term of Life*, the *Reversion to the Lessor, or* the *Remainder to a Stranger*, there the Demandant may say that Seisie que Dower la poit; so a Diversity &c. For the Baron has not Fee. Br. Dower, pl. 33. cites 11 H. 4. 73.

16. Dower *of the third Part of 20 l.* [*Rent*;] Norton said, your *Baron never had any thing in the Rent but jointly with N. who is alive.* Judgment if Dower, and *was not compelled to shew whether he pleaded as Ter-tenant, or as Pernor of the Rent*; And the *Demandant said, that N. released to her Baron all his Right which he had in the Rent, and did not shew the Deed of Release*, and therefore was *counselled by the Court to plead* that *Seisie que Dower* la poit, and so she did, and *proved the Release in Evidence*; Quod Nota, and so to Issue; Quære of this Issue general. Contra of the special Matter. Br. Dower, pl. 34 cites 11 H. 4. 83.

17. In Dower; the *Baron purchased Rent*, and *died before the Day of Payment*, yet the Feme shall be endowed; and if the *Tenant pleads that Baron Ne fuit unques Seisie que Dower* la poit, *the other shall not plead special Matter, but shall say* that *Seisie que Dower* la poit, and *shall give the Matter in Evidence.* Br. Dower, pl. 35. cites 11 H. 4. 88.

Br. Confession, pl. 15. cites S. C.

18. It is no Plea in Dower *that the Tenant at another Time brought Formedon against the Baron of the Demandant, who upon Deed of Tail shewed in Pais rendered the Land in Pais, pending the Writ, by which the Tenant entered and averred the Tail*; Judgment si Actio; For Render does not bar a Stranger of a Mesne Estate, and also Fee-simple cannot be rendered without Livery of Seisin. Br. Dower, pl. 37. cites 12 H. 4. 21.

19. In Dower, the *Tenant pleaded Recovery in Assise against the Baron*, and the *Demandant said, that the Baron infeoffed him during the Coverture, and after disseised him, of which Disseisin he recovered*; and the *Tenant said, that he was seised till by the Baron disseised, upon which he recovered*, absque hoc *that the Tenant any thing had before the Recovery*, and it seems that it ought to be, Absque hoc that he any thing had *before the Disseisin.* Br. Traverse per &c. pl. 52. cites 14 H. 4. 33.

20. In Dower, the Tenant *pleads Jointenancy by Fine with B. who is not Party to the Writ.* The *Demandant avers, that after the Fine her Husband was seised in Fee* of this Land, *and thereof infeoffed the Tenant* *alone*

alone, and so he was sole Tenant. Issue was taken upon this, and found for the Demandant. The Demandant had Judgment by Advice of Parliament. This is in Favour of Dower; otherwise in other Præcipes, if there be not a Confession and Avoidance of the Joint Seisin, and an Averment of Sole Seisin on the Day of the Purchase of the Writ. 43 Ass. pl. 6. 14 H. 6. 8. 25. 17 E. 2. pl. 1. and 13. The Statute De conjunctim Feoffatis aids Jointenancy by Deed, but not by Fine; but the Law is as above. Jenk. 9. pl. 15. cites 3 E. 3.

21. Dower, and *demanded the third Part of two Mills, and of other Land*, the *Tenant demanded Judgment of the Plaint; For where she demanded of two Mills, they were only the Scite of two Mills at all Times during the Coverture, and were Tofts*, and *to the other Parcel alleged Tail in N. and conveyed Remitter to the Tenant during the Seisin of the Baron*, and *to the other Parcel that the Demandant detained from him certain Evidences concerning the same Land, and if she would render the Evidences, he is, and at all Times has been, ready to render Dower.* Br. Dower, pl. 39. cites 14 H. 4. 43.

22. In Dower, the *Tenant pleaded Recovery in Assise against the Baron*; Judgment si Actio; the *Demandant said, that the Baron was seised and espoused her, and infeoffed the Tenant, and after disseised him, and he brought Assise and recovered*, and the Baron died, and prayed Dower; The *Tenant said, that he was seised till disseised by the Baron, and after he recovered by Assise, absque hoc that the Baron was seised before the Disseisin que Dower la poit.* The Demandant said, that she was seised before que Dower la poit. Br Dower, pl. 38. cites 14 H. 4. 33.

Br Confess and Avoid; pl 12 cites S. C.

23. In Dower the *Tenant demands the View*; *after the View* had the *Writ abates for false Latin*; the Demandant *brings another Writ of Dower for the same Land* against the *same Tenant*, he *shall not have the View* in this Case; for Visus non est Necessarius, and the * Statute says, Non concedatur Visus Nisi ubi est Necessarius. By the Justices of both Benches. Jenk. 106. pl. 3. cites 3 H. 6. 34.

* West. 2. 13 E. 1. cap. 48.

24 In Dower the *Tenant said, that he was seised till by the Baron disseised, upon whom he re-entered*; Judgment &c. The *Demandant said, that before the Tenant any Thing had W. was seised and enfeoffed her Baron, by which he was seised* &c. and prayed Dower; And per Martin, it is an ill Replication; For it *may be that all this was before the Coverture*, and the Disseisin also, and then no Seisin in the Baron que Dower la poit. Br. Dower, pl. 95. cites 14 H. 6. 5. 6.

25 If it be pleaded that the Land was assigned to the Feme in Dower, she *need not say that it was by Metes and Bounds*; for it shall be intended a lawful Assignment, which is by Metes and Bounds. Br. Pleadings, pl. 145. cites 10 H. 6. 1.

26. In Dower it is no Plea *to say that the Baron had nothing but for Life*; for this *amounts to general Issue*, that Ne unques Seisie que Dower la poit; Per Cur. Br. Dower, pl. 84. cites 10 H. 6. 17.

27. *But* it is a good Plea *that the Baron had nothing but jointly in Fee with the Tenant who survived*, by reason of the Fee Simple confessed in him. Br. Dower, pl. 84. cites 10 H. 6. 17.

28. Where the *Tenant pleads a joint Estate made to the Baron and J. N. and* that the Baron died, and *J. N. survived, whose Estate he has*, the *Demandant shall not say that Seisie que Dower la poit, without shewing how* or to *traverse that J. N. nothing had of the Feoffment of the Feoffor*, per Newton; which Brook says seems to be Law. Br. Dower, pl. 48. cites 22 H. 6. 42.

29. In Dower *Tenant to Parcel said, that* 40 *Acres Parcel* &c. *are in the Vill of D. of which he was not Tenant the* Day *of the Writ purchased, nor ever after, but J. N. was Tenant*; Judgment of the Writ; *and as to six Messuages in D. the Plaintiff detained from him certain Evidences*

 concerning

concerning the same Land, and that he has been at all Times ready to render Dower in Case she would render the Evidences; Judgment &c. *and as to 20 Acres in another Vill, that N was seised and enfeoffed the Baron, and the Heir now Tenant, and the Baron died, and the Heir survived and held by Survivor*; Judgment &c. *and as to the Land in P. he demanded the View*, and was ousted of the View; and the Reason seems to be because he has pleaded to the rest, he has taken Notice; and the Plaintiff to the Part of which the Survivor was pleaded, said that the Defendant released to his Father in his Life, and so Seisie que Dower la poit prist, and it was held a good Plea; and to the Detainer of the Evidence Littleton said, this goes to all the Action; which was denied; and the Tenant was compelled to shew in certain what Evidence he detained, and so he did, viz. a Charter Special &c. Br. Dower, pl. 4. cites 33 H. 6. 51.

30. In Trespass it is not sufficient *to say that the Tenant holds in Dower of the Dowment of A. B.* but *shall say that W. was seised in Fee and took her to Feme and died, and the Issue entered and endowed her*; quod Curia concessit. And by some *she shall shew how she held by Metes and Bounds*; But per Prisot *contra*; For when it is alleged that she held in Dower, it shall be intended by Metes and Bounds. Br. Dower, pl 56. cites 37 H. 6. 38.

31. In Dower the *Tenant said, that S. was seised in Fee and enfeoffed him, and leased to the Baron to hold at Will, which Estate he continued during his Life, absque hoc that he was seised of such Estate que Dower* &c. and had *all entered* by Judgment, by Reason of the long Continuance of the Possession for doubt of the Lay Gents. Br. Dower, pl. 58. cites 39 H. 6. 9.

32. By which he *said that the Baron during the Espousals was thereof seised in Fee, and conveyed Estate to him, and that he endowed the Feme* of it viz. of *the third Part thereof, to which the Feme agreed*, and the Demandant imparled. Br. Dower, pl. 68. cites 5 E. 4. 22.

33. Dower unde nihil habet, the *Tenant said that he was seised of two Messuages and ten Acres of Land in Fee, and this assigned to the Demandant for her Dower, to which she agreed*; & non allocatur *without alleging Seisin in the Baron.* Br. Dowet, pl. 68. cites 5 E. 4. 22.

34. Dower *against a Guardian* shall be by Name of Guardian, and there it is a *good Plea that he is not Guardian.* Br. Dower, pl. 94. cites 9 E. 4. 31.

35. In *Dower* of the Moiety *of the Manor of D in D.* the *Tenant said, that two Acres, Parcel* of it, *is in S.* and is no Plea; For as the Demand is in D. she shall recover nothing but that which *is* in D. Br. Brief, pl. 216. (218.) cites 9 E. 4. 6.

36. And the same Year fol. 17. the Tenant was awarded to answer, and therefore no Plea to the Writ. Ibid.

37. In Dower the *Tenant said, that he has been at all Times ready to render Dower, and yet is* &c. and the *Demandant said, that he*, viz. *the Baron died seised, and that such a Day and Year she required the Tenant to endow her at D. and he refused* &c. the *Tenant said, that the same Day the Tenant offered the Feme to go with her to the Land, and to assign her Dower, and she refused, absque hoc that he refused*, and the Court held the Issue good upon the Refusal upon this Special Pleading. Br. Dower, pl. 73. cites 13 E. 4. 7.

38. *But* if he had *said Generally that he did not refuse*, some said that it should not be [a good] Plea, because he *does not deny the Request.* Br. Dower, pl. 73. cites 13 E. 4. 7.

Br. Waiver &c. pl. 26. cites S. C.

39. In Dower the *Tenant pleaded Ne unques Seisie que Dower* la poit; and the *Demandant said, that the Father of her Baron was seised in Fee, and died seised, and the Land descended to her Baron as Son and Heir*; this

this Feme, *Demandant, then being his Feme, and* after the *Baron, before any Entry made by him or any other, died,* and so she dowable by the Law; and note, that *she was compelled per Cur. to say that no Entry; for if any had entered she should not have Dower, for then there is Possession in Fact, which tolls the Possession in Law,* and after *she concluded, and So she dowable by the Law,* and the Justices held the Conclusion good, and so *she was not compelled to say, and So seised of such Estate que Dower la poit, but to put it to the Law and to the Judgment of the Court,* and so note, that a Feme shall be endowed of the Seisin and Possession in Law without Seisin in Fact; quod nota; For otherwise it is of Tenant by the Curtesy; and the Reason seems to be *inasmuch as the Baron may enter in Jure Uxoris, but* the *Feme cannot compel her Baron to enter into his Land;* for if he should say ut supra, and *so Seisie que Dower la poit, this Conclusion shall waive the Special Matter.* Br. Dower, pl. 75 cites 21 E. 4. 60.

40. Error was Assign'd because the *Tenant in the Writ of Dower pleaded that the Baron was not seised the Day of the Espousals, et unquam inde Postea,* which was held *a Confession of the Action* in a manner, tamen quære inde, and after because it appear'd by the Examination of the Clerk of C. B. that the *Record there was nec unquam* inde postea, therefore it was *Amended* by the Statute per Judicium, and that the Demandant recover her Dower and Damages tax'd by the Inquest 20l. according to the first Judgment. Br. Error pl. 188. cites 22 E. 4. 45.

41. In *Dower* the *Tenant said that the Baron was not seised thereof the Day of the Espousals nor ever after,* and the Jury *found that they were seised thereof the Day of the Espousals and ever after,* the Verdict has not made the Plea good, but if the Plea had been that they were not seised the Day of the Espousals and the others econtra, and it had been found that he had been seised the Day of the Espousals, this Verdict had made the Plea good. Br. Verdict. pl. 81. cites 22 E. 4. 46.

42. In Dower the *Tenant Vouches the Heir* of the Husband *in the same County;* The *Heir demands the Lien and denies it; This Issue shall be tried before the Demandant shall have Judgment in Dower.* By all the Judges in the Exchequer Camber. Jenk. 176. pl. 52. cites 4 H. 7. Fitzh. Dower 19.

43 In this Case of Dower the *Judgment* varies; If it be *found against the Heir that he has Lands in the same County* where the Writ is brought, the *Demandant in* Dower *shall have Judgment against the Heir; If* the Issue be *found for the Heir,* the *Demandant shall have Judgment against the Tenant.* Jenk. 176. pl. 52. cites 28 E. 1. Voucher 241. 17 E. 3. 47. 19 E. 2. Fitzh. Resceipt. 17. 16 E. 3. Fitzh. Variance 61. Judgment 165. 166.

44. The Process is *Summons, Grand Cape and Petit Cape* in the Common Pleas. F. N. B. 148. (D)

45. Dower, the *Defendant pleaded that the Husband of the Demandant was alive at C. in K.* The *Feme replied that her Husband died at F.* in the Parish of F. *in the said County of K.* upon which they were at Issue; on Day given to make Proofs, the Plaintiff examined her Witnesses in Court, the Defendant examined no Witnesses. Judgment was, the Plaintiff should recover her Dower. Mo. 14. pl. 35. Pasch. 2 Eliz. Thorn v. Rolfe.

D. 185 a. pl. 65. S. C. there were no Positive Proofs of his being dead but conjectural and presumptive and no Proof at all of his being alive And so the Demandant recovered —— Bendl. 56. pl. 131. S. C. and Judgment accordingly.—— And. 20. pl. 42. S. C adjudged.

46. In Dower *against several Defendants some confess'd the Action*, and *others demanded the View*. The Justices at first seem'd clear, that since they did not vary in Dilatories &c. they shall have the View. But 11 R. 2. and 46 E. 3. and 33 H. 6. being to the contrary, and 14 H. 6 6. this being an Action which is favour'd in Law, the View at length was ousted according to those Books, but the Court offered to seal a Bill of Exceptions, ad quod non fuit responsum D. 179. pl. 41. Hill. 2 Eliz. Herbert v. Vernon.

Bendl. 118. pl. 151. S. C. adjudg'd. —4 Le 201 pl 323 S.C. adjudged.

47. Dower by E M. *Tenant vouched as Lessee for Life of a Lease of the Husband with Warranty, the Heir of the Husband in Ward to the King, for Cause of Gard, and prayed Aid to the King*, and had it, and after a procedendo Judgment was given that the Demandant recover against the Tenant, and Tenant against the Heir, sed expectet Executio per Recompensatione tertiæ Partis prædict' against the Heir till he come to full Age, and till the Hands of the King be amoved. Dy. 256. pl 7. Mich. 8 and 9 Eliz. Michell v. Nethercote.

Dal. 100. pl. 31 S C. accordingly.

48. The *Demandant* after the Death of her Husband *entred into the Land in Demand, and continued the Possession of it five Years*, and afterwards the *Heir entred*, upon which *she brought Dower*. It was agreed in that Case, that the *Tenant needed not to plead Tout-temps prist after his Re-entry*, for the Time the Demandant had occupied the same, is a sufficient Recompence for the Damages. 3 Le. 52. pl. 75. Mich. 15 Eliz. C. B. Riche's Case.

49. It was adjudged, that if the *Sheriff assigned Dower* to the Wife by Writ to him directed, *and does not return the Writ*, yet the Wife is lawfully seised in Dower. Cro. E. 17. in pl. 8. cited Pasch. 25 Eliz. C. B. by Fenner to have been adjudg'd 10 Eliz. in Ashborough's Case.

50. If Dower be demanded of *Common* certain, *the Certainty must be shewed*. Godb. 21. pl. 27. Pasch. 26 Eliz. C. B.

51. In Dower, the Tenant *pleaded Quod dedit & concessit unum Annualem Redditum* &c. in Recompence of Dower, *which she accepted* &c. Per Walmsley, As this Case is pleaded there is not any Assignment of the Rent for the Dower, and therefore it is not any Bar of Dower, for it is pleaded, Quod dedit & concessit unum Annualem redditum &c. and altho' dedit & concessit are good Words in the Deed, yet when the Tenant is to plead it, he is to plead it in apt Words, viz. *Quod assignavit*; for a Gift of Rent or Land is no Bar to Dower, and to that Purpose cited a Case in the Years of Ed. 2. in the Book at large, where it was pleaded, that the Son granted Land in Dower to his Feme Ex assensu Patris, and ruled that it was not good, for it ought to have been Assignavit; For in pleading every one ought to plead according to Law, and as it is here pleaded the Feme may have a Writ of Annuity upon this Grant, which she cannot have if it were an Assignment, and the Words of the Deed being Dedit &c. the Intent of the Parties to have it a Grant does thereby appear, and the Tenant, against whom it is, has pleaded it as a Grant; and if he has Election to use it as he will, (as in many Cases a Man shall have) yet he has here made his Election to have it as a Grant, and we may not take it otherwise, and Judgment accordingly. Cro. E. 452. pl. 19. Mich. 37 and 28 Eliz. C. B. Wentworth v. Wentworth.

52. In Dower, the *Tenant appear'd upon the Grand Cape*, and *being only Lessee for Years* of the Land he *might plead Non-Tenure*, but whether now he might wage his Law of Non-Summons so as the Writ be abated was doubted, because by the Wager of Law he takes upon himself the Tenancy, and affirms himself to be Tenant according to 33 H. 6. 2. per Prisot, to which it was answered by Rhodes and Windham J. that here the Tenant being only Lessee for Years is not at any

any Mischief; For *if Judgment and Execution be had against him, he might notwithstanding afterwards enter upon the Demandant.* Le. 92. pl. 119. Mich. 29 and 30 Eliz. C B. Michel v. Hyde.

53. Dower against W. and D. *Upon the Grand Cape W. made Default. D. surmised that he is not Tenant of the Land, but that the Demandant's Husband leased to him for 50 Years*, and that this Action is brought by Covin to him lose his Term, and pray'd to be receiv'd. And per tot. Cur. *he shall be receiv'd, tho' he was Party to the Writ*, and that by the Statute of Gloucester, because he is in equal Mischief; And they held clearly, that upon the Default of W. the Demandant should not have a Judgment for a Moiety, the Cause of the Receipt trenching to the Whole; And by all but Rhodes, *if Judgment had been given upon the Default of both*, viz. *W. and D. yet the Term of D. should stand; but D. should be out of Possession, and put to his Action.* 2 Le. 163. pl. 219. Mich. 29 Eliz. C. B. Williams v. Drew.

54. A Writ of Dower was brought of Lands in the County of Northumberland. The Parish Church wherein this Land lay was at Newcastle, which is a County by itself. Per Cur. the *Proclamation of Summons* ought to be *at the Parish Church Door*, tho' *in another County* than were the Land lies, and this by the Statute, of 31 El. Cro. E 472. pl. 35. Pasch. 38 Eliz. C. B. Ragister's Case.

55. Tenant in Dower *vouched the Heir of the Husband* in the same County, *who presently entered into the Warranty, and said that he had no Assets; Judgment* was given presently *against Tenant with a Cesset Executio*; And afterwards the Issue was tried and *found that the Heir had not Assets, and the Wife had Execution.* Cited Hutt. 72. as Mich. 28 & 39 Eliz. Ashburnham v. Skinner.

Win. 88. S. C. cited as adjudged and affirmed in Error.

56. Note, If a Man be seised of certain Lands, and takes Wife, and after *aliens* the same *Land with Warranty*, and after the Feoffor and Feoffee die, and the *Wife of the Feoffor brings* an Action of *Dower against the Issue of the Feoffee, and he vouches the Heir of the Feoffor*, and *hanging the Voucher*, and undetermined, and the *Wife of the Feoffee brings* her Action of *Dower against the Heir of the Feoffee*, and *demands the third Part of that whereof her Husband was seised*, and *will not demand the third Part of these two Parts of which her Husband was seised.* It was adjudged, that she should have no Judgment until such Time as the other Plea was determined. Litt. S. 54.

57. The *Reason why Tout Temps Prist is a good Plea* in a Writ of Dower brought against the Heir to bar her of the mean Values and Damages is, *because the Heir holds by Title, and does no Wrong till a Demand be made.* But in a Writ of Aiel, Cosinage &c. where the Land and Damages are to be recovered, there such Plea is not good; for there the Tenant of the Land has no Title, but holds the Land by Wrong, aud the Feoffee of the Heir cannot at the first Day plead Tout Temps Prist, because he had not Land all the Time since the Death of the Ancestor. Co. Litt. 33. a.

58. In a Writ of Dower Unde Nihil habet, *no Protection is allowable*; because the Demandant has Nothing to live upon; but *otherwise* it is *in a Writ of Right of Dower.* Co. Litt. 131. a.

59. If one grants a *Rent-charge to a Man and his Heirs*, and dies, and his Wife brings a Writ of Dower against the Heir, and the *Heir in bar* of her Dower *claims the same to be an Annuity* and no Rent-charge, yet the Wife shall recover her Dower; For he cannot determine his Claim by Election, but by suing of a Writ of Annuity; neither can the Heir have after the Endowment an Annuity for the two Parts; for that should not be according to the Deed of Grant; for either the Whole must be a Rent-charge, or the Whole an Annuity. Co. Litt. 144. b. 145. a.

60. *Tout Temps Prist* is a good Plea in a Writ of Dower brought against the Heir to *bar her of the mean Values and Damages*, the Reason is, Because the Heir holds by Title, and does no Wrong till a Demand be made. Co. Litt. 33. a. in Principio.

61. If Dower be *brought against one who is not Tenant of the Freehold*, the Tenant before Judgment shall be received, and upon Default of the Tenant he may falsify after Judgment. Brownl. 126. Mich. 6 Jac. Anon.

62. In Dower the *Tenant after Appearance of the Jury, but before they were sworn, made Default*, and a Petit Cape was awarded; at the Day in Bank the *Tenant informed the Court that he is only Tenant for Life, and that the Reversion is in one P.* who ought to be received to save his Title, and the Court ordered him at the Return of the Petit Cape to plead his Plea. Brownl. 126. Mich. 9 Jac. Ld. Morley's Case.

63. The *Manner to make Summons* in Dower, if the *Land lies in one County and the Church in another County*; Then upon the Statute the Sheriff ought to come to the next Church, though it be in another County, and there make Proclamation. 2 Brownl. 122. Mich. 9 Jac. C. B. Anon.

64. If *Proclamation* be made by the Sheriff on the Summons, at the Door of any of the Churches where the Lands lie, it is sufficient, and need not be at the Doors of all. Brownl. 126. Hill. 13 Jac. Allen v. Walter.

65. No *Writ of Error* lies before the Value be inquired of; for till then the Judgment is not perfect. Brownl. 127. Hill. 13 Jac. Glesold v. Carr.

66 In Dower *of Lands in three Villages*, **Allen's Case** was cited 14 Jac. C. B. that a *Summons and Proclamation at the Church of one of them is good*; *and* that the Summons *must be* 14 *Days before the Return of the Writ*. But in the Case between **Gray and Rowland**, that *want of a Summons is not Error, but* that *otherwise no Grand Cape shall be awarded* by the Statute 31 Eliz. cap. 3. Noy 22. Trin. 15 Jac. Harrison v. Massam.

67. In a Writ of Dower the *Tenant demands the View*, and the *Demandant counterpleads* the View, *Quod le Tenant n'ad Entry Nisi per le Baron*; and thereupon the Tenant demurs; and it was adjudged a good Counterplea, and the Tenant ousted of his View. Hutt. 44. Hill. 18 Jac. Bridgeland v. Post, and cites 9 E. 4. fol. 6. and 2 H. 4. 24.

68. Dower, the *Tenant vouches the Heir in the same County, who entered into the Warranty, and pleaded Riens per Descent*, upon which they were at Issue, and at the Nisi Prius made *Default* at the Day in Bank; *Judgment* was given against the Tenant; It was moved that it ought to have been *conditional*, viz. against the Heir for what he had in the same County, and if he had not any Estate, then against the Tenant; But the Court held both Ways good. Cro. J 688. pl. 3. Trin. 21 Jac. B. R. Goldingham v. Somes.

Win 81. S C. adjornatur. —— Ibid 88. S C the Court seem'd of Opinion that the Judgment might be conditional, but the Judgment stood as it was. —— Hutt. 71. S. C. adjudged for the Demandant upon View of a Precedent of 38 & 39 Eliz. Rot. 1208. [or 1288. according to Cro. J.] Ashburnham v. Skinner.

69. In Dower against an Infant, he appeared by his Guardian, and *pleaded that* his Father who was *Husband* to the Demandant, was *seised of a Messuage and certain Lands in Socage*, and *devised them to the Widow for her Jointure, and full Satisfaction of Dower, and that* after the Death of his Father, *she entered* into the said Messuage and Lands, *and was seised* by Virtue of the Devise &c. The *Widow replied* by Protestation that he did not devise, and for Plea confessed the Seisin of the Husband

Husband and her Entry; but farther pleaded, *that she entered as Guardian in Socage to the Infant, and that she disagreed to accept the Land by the Devise*, and traversed the Entry and the Agreement. The Court said that this Bar was good, though it had been more pregnant to have alleged that she entred Virtute Legationis prædictæ, and so was seised; And after it was said that the Replication was good without the Traverse; For this was not expresly set down, but that was merely the Consequence of the Plea, which in Truth was not traversable. Win. 100. Mich. 22 Jac. C. B. Baker v. Baker.

70. Error in Dower where the Defendant *pleaded Ne unques Accouple in loyal Matrimony*; Upon a Writ to the *Bishop* he *certified Quod copulata fuit in vero Matrimonio sed clandestino; & quod W. & E. Thori & mensæ participatione mutuo cohabitaverunt ad mortem prædicti W.* Error was assigned, that the Certificate does not answer to the Words of the Issue, which is Quod ne unques accouple in loyal Matrimony. But resolved the Certificate was good; for vero Matrimonio (although clandestino) copulati is as good as Legitimo copulati Matrimonio, for they are all one by Intendment; and although it be Clandestino, yet it does not vitiate the Marriage; and when it is added, Thori & mensæ participatione durante Vita cohabitaverunt, that proves they continued Husband and Wife during his Life. And Judgment was affirmed. Cro. C. 351. pl. 16. Hill. 9 Car. B. R. Wickham v. Enfield.

71. A Woman brings Dower against the Tertenant of certain Land in H. in Com. Sussex ex dotatione A. viri sui defuncti; The Tenant *pleads a Feoffment of the Manor of Dale to certain Persons to the Use of the said Husband, and the Demandant for their Lives for her Jointure* &c. The Remainder to a Stranger; This Plea is sufficient without saying, that after the Husband's Death she entered and claimed it for her Jointure; These Words are superfluous in this Case; (for the said Jointure is a Bar Prima Facie to the Demandant in Dower) the *Demandant replies, that the said Husband before the said Feoffment, had conveyed the same Manor to the Use of himself in Tail, Remainder to the Demandant for Life*, Remainder to a Stranger in Tail; and that after the Death of her Husband, without Issue, she claimed the said Estate and entered, and by that was in her Remitter; the *Tenant rejoins as above, and does not traverse the Claim*, and the said Entry and Remitter to be in of the said first Estate; The Demandant had Judgment affirmed in Error. The Demandant in the Replication need not traverse the said Entry after the Death of her Husband pleaded in Bar; For it is vain and impertinent; But the Tenant in the Rejoinder ought to maintain his Bar, and traverse her Entry, and claim by the former Estate Tail, Remainder to the Demandant for Life. This first Conveyance with a Remainder ut supra she should not waive because of the Prejudice of the said Remainder. Jenk. 334. pl. 72. cites Cro. J. 489. Wood's Case.

72. And though *neither Day nor Place of Marriage was mentioned* in the Bp's. Certificate it was held not material; For it is not issuable because the Certificate of the Bp. is conclusive. Ibid.

73. The Court was moved for a Supersedeas to stay Proceedings upon the *Grand Cape* in Dower, Quia *Erronice Emanavit*, because the *Return of the Summons was not according to the Statute* 31 *Eliz. cap.* 3. which says, After Summons. 2dly, The Land lies in a Vill call'd H. and the Return is of a Proclamation of *Summons at the Parish Church of J. and it does not appear that the Land was in that Parish*; besides it was Proclamari feci secundum formam Statuti, and it is *not returned to be made on the Land*; so the Grand Cape was superseded. Mod. 197. Hill. 26 & 27 Car. 2. C. B. Furnis v. Waterhouse.

74. *Error*

74. *Error to reverse a Judgment in C. B. in a Writ of Dower unde nihil habet, because the View was not granted*; and it was alleged, that although in a Writ of Right of Dower the View is grantable, yet in Dower unde nihil habet *it never was at the Common Law*, because the Woman that had nothing to maintain her should not be delayed in the Recovery of her Right. Freem. Rep. 375. pl. 483. Mich. 1674. Astmall v. Astmall.

75. Dower unde nihil habet the *Tenant demanded the View*; The *Demandant counter-pleaded, because the Baron alienavit Tenementa prædicta to the Tenant*, & hoc &c. the Tenant demurred generally, and it was insisted for him that the Counter-plea was ill, and that it ought to have been *Feoffavit*, for by the Word *Alienavit* it does not appear what Estate he had aliened; for a Lease for Years is an Alienation; but adjudged that *Alienation implies all the whole Estate which he had*, and the Statute Ed. 2. 48. ousts the Tenant of the View of the Lands which the Husband aliened to him, or to any of his Ancestors, and so the Plea is in the very Words of the Statute, and good. 3 Lev. 220. Trin. 1 Jac. 2. C. B. Bernes & Ux' v. Rich.

76. *Tenant* in Dower *dies before Writ of Inquiry* executed; Administrator cannot bring Scira Facias for the Damages and Mesne Profits. 1 Salk. 252. pl. 1. Trin. 2 W. & M. in B. R. Mordant v. Thorold.

3 Lev. 275. S. C. Adjornatur. —— Carth. 133. S. C. adjudg'd that the Writ does not lie. —— 3 Mod. 281. S. C. And per Cur. when a Statute which gives a Remedy for mean Profits is expounded, it ought to be according to the Common Law. Now where intire Damages are to be recovered, and the Demandant dies before a Writ of Inquiry executed, the Executor cannot have any Remedy by a Scire Facias upon that Judgment, because Damages are no Duty till they are assessed. Sed adjornatur. —— 2 Show. 97. S. C. adjudg'd accordingly.

77. Detainer of Charters was pleaded *after Imparlance*, and on Demurrer Judgment was for the Plaintiff. Show. 271. Trin. 2 W. & M. Burdon v. Burdon.

78. In Dower upon *Default Grand Cape issued*, and *Demandant suggested that her Husband died seised* &c. and a *Writ of Inquiry of the Value of the Lands*, and 60 l. Damages were returned; it was moved to stay the filing this Writ of Inquiry because the Tenant had no Notice of it; but it was answered, that in real Actions Personal Notice is not to be given, but the Tenant is to take Notice, because the Writs, viz. the Summons are always executed on the Lands and not elsewhere; but per Cur. *Personal Notice ought to be given of the Writ of Inquiry, and of the Execution thereof*, for the Grand Cape is a Judgment, and thereby the Suit is determined at Common Law; the Damages for the Value of the Land is only an Addition by the Statute of Marlbridge, and therefore for want of Notice the Inquisition was discharged, and Restitution was awarded of the Damages levied. 3 Lev. 409. Hill. 6 W. 3. C. B. Perkins v. Lamb.

79. *Want of Abridgment* was assign'd in *Error*. See 10 Mod. 225. Pasch. 13 Ann. B. R. Shipley v. Shipley.

80. A *Recovery in Dower will estop* the Tenant and all claiming under him from *giving a Prior Term in Evidence*. 2 Ld. Raym. Rep. 1293. Mich. 8 Ann. B. R. Booth v. the Marques of Lindsey, & al.'

In Dower a *Plea of Lessee for Years* ought not to be receiv'd *after Plea and Judgment for the Demandant*. Comyns's Rep. 581. Trin. 11 Geo. 2. Green v. Roe

(N. a) Pleadings.

(N. a) Pleadings.

Where there must be a Profert or Monstrans of Deeds.

1. IN Dower the *Tenant vouch'd the Heir of full Age*, he shall shew Deed as it is said; *Quære*. Br. Dower, pl. 98. cites 48 E. 3. 5.

2. In *Dower* the *Tenant pleaded Jointenancy* in the Baron *with W. who Survived*, and the *Demandant pleaded a Release by W. to her Baron*, and because she did not shew the Release all the Court councell'd her to plead Seisie que Dower, and to give this Matter or Release in Evidence, and yet the Deed does not belong to her, and so she did. Br. Monstrans, pl. 37. cites 1 H. 4. 13.

3. *But* the Feme was not suffered to plead a *Release in Fee made to her Baron Tenant for Life* without shewing the Deed of Release; but she might say Seisie que Dower la poit, and give the Matter in Evidence; Per Paston, Westbury, and Rolfe. Br. Monstrans, pl. 5. cites 11 H. 4. 83.

4. A *Feme* who is *endow'd of Rent* shall not have Assise without shewing the Deed of Commencement, for this belongs to the Heir in Reversion; Per Paston, Westbury and Rolf. Br. Monstrans, pl. 5. cites 3 H. 6. 20.

5. A Feme who demands *Dower of Rent* of the Baron need not shew Deed, for the Deed of Rent belongs to the Heir; Per Strange; Quod non negatur. Br. Monstrans, pl. 49. cites 7 H. 6. 1.

6. A Feme shall have Dower of a *Rent-charge* without shewing the Deed, because the Deed does *not belong* to her; Arg. Pl. C. 46. in the Case of Wimbish v. Talbois.

(O. a) Judgment and Executions.

1. *Stat. Merton*, 20 E. 3. *cap.* 1. OF *Widows which be deforced of their Dower, or Quarentine of Lands whereof their Husbands died seised, and they recover by Plea, they that be convict of such Deforcement shall yield Damages the Value of the whole Dower to the Day that the Widows by Judgment shall have recovered Seisin, and shall be amerced at the King's Pleasure.*

The *Statute of Merton* extends to *Copyholds*, where the *Custom* is, that Women are dowable.

Co. Litt. 33. a. ——— S. P. agreed by all the Justices. Mo. 410. pl. 559. Trin. 27 Eliz. B R. in Case of Shaw v. Thompson. ——— Cro. E. 426 pl. 26. S. C. & S. P. admitted, that the Damages were well awarded in the Copyhold-Court. ——— 4 Rep. 30 b. pl. 22. S. C. resolved accordingly. ——— S. P. by Yelverton. Cro. C 43.

Ld Coke says he had read in an ancient and learned Reading upon the Statute 20 *H.* 3. *cap* 1. that it *extends only to a Writ of Dower, Unde nihil habet*, and not to a Writ of Right of Dower; For in no Writ of Right Damages are to be recovered. Co Litt. 32 b.

2. Where a *Man married infeoffed A. and died*, *J. abated* (without Covin of the Feme) *and endowed the Feme*, and *A. brought Assise against them*, and *all found ut supra*, and the *Plaintiff recovered two Parts*, and the

Br. Damages, pl 181. cites S C.

the *Feme retained the third Part in Dower*, and the *Plaintiff recovered Damages, and the third Part of the Damages was recouped.* Br. Dower, pl. 59 cites 12 Aff. 20.

Br Utlagary, pl 36. cites S. C. and M. 3 E 3.

3. Where a Feme brings Dower she shall not recover Damages, because the *Baron was outlawed in Trespass*, so that the Franktenement was void only. Br. Damages, pl. 98. cites 13 Aff. 5.

4. 4. K. was *endowed by the King in Chancery*, and among other Things *a Rent reserved by Patent to the King and his Successors upon Grant of a Fair to the Prior of B. and his Successors was assigned to her.* Upon this Assignment she brought a Scire Facias in the Exchequer, and had Judgment there to recover the Rent, the Arrearages and Damages; but on Error brought in the Exchequer Chamber the Judgment was reversed as to the Rent and Damages; because she ought not to have Judgment of the Rent being the Inheritance of the King, nor of Damages in the Scire Facias, but as to the Arrearages the Judgment was affirmed, because they were due to her, aud as to these she was privileged by her Estate for Life to sue in the Exchequer; Arg. Mo. 565. in pl. 770. cites 14 E. 3. the Countess of Kent's Case.

5. In *Dower*, the *Tenant said*, that *he has been at all Times ready to render* Dower, *and yet is*, and the *Demandant averred the contrary*, by which *she recovered Dower, and* for Damages *prayed the Inquest to inquire of the Damages*, and could not have it; For it is an Issue joined between the Parties, which shall be tried by Nisi Prius; Per Cur. Br. Enquest, pl. 79 cites 34 E. 3. and Fitzh. Enquest, pl. 79.

6. If *a Feme recovers in Dower*, she cannot distrain for the Rent, nor such like, before Execution, and the Sheriff may put her in Seisin by Grass, Turf, or Beasts of the Land, but he cannot drive them out, but shall take Seisin by them and dismiss them there. Br. Executions, pl. 108. cites 40 E. 3. 21, 22.

7. Dower *against the Tenant for Life of the Lease of the Heir of the Baron, who vouched the Heir to Warranty*; The *Demandant recovered against the Tenant, and he over in Value against the Heir.* Br. Dower, pl. 10. cites 41 E. 3. 24.

8. *But* where the *Tenant vouches the Heir to Warranty by the Deed of his Ancestor*, there the *Demandant recovered against the Vouchee, and* the *Tenant shall hold in Peace.* Contra supra upon his own Deed; Note a Diversity. Br. Dower, pl. 10. cites 41 E. 3. 24.

9. *But* it is said in the next Note there ensuing, that in Dower *against Tenant for Life of the Lease of the Baron, who vouched the Heir to Warranty*, the *Feme shall recover against the Tenant and he over in Value*, and yet in this Case the Reversion made by the Ancestor is Cause of Warranty. Br. Dower, pl. 10. cites 41 E. 3. 24.

Br. Affise, pl. 24. cites S. C.

10. In Writ of Admeasurement of Dower, if the *Tenant comes at the first Day ready* to be admeasured, the *Plaintiff shall not recover Damages*; Quod Nota. Br. Admeasurement, pl. 1. cites 42 E. 3 19.

11. Where a Feme is *newly endowed in Chancery*, there she shall not recover Damages; For those of the Chancery do not give Damages. Br. Damages, pl. 195. cites 42 Aff. 32. and 43 E. 3. 32.

Br. Damages, pl. 27. cites S. C.

12. In Dower, the *Tenant made Default after Default*, and the *Demandant averred that her Baron died seised, and prayed Writ to inquire of Damages*, and had it, and the *Sheriff returned that the Inquest returned no Damages*, and the Demandant prayed that he be amerced, because the Writ is not served; Per Thorpe, he shall not be amerced but where he returns illy of himself, and here he returned as the Jury found. Br. Dower, pl. 13. cites 44 E. 3. 3.

Br. Dower, pl. 16. cites S. C.

13. Scire Facias *against the Baron and Feme upon Recovery in Dower against them.* The *Baron appeared*, and the *Feme made Default*, and *he said that he is sole Tenant, and the Feme had nothing*; and the Opinion there

there was that he shall have the Plea well without his Feme, by which he was suffered to plead in Bar alone, *and said, that after the Recovery the Demandant entered into the Land claiming the third Part, and delivered Seisin to the Defendant, who had the two Parts by Name of all that which to him belong in Name of the third Part, rendering one Mark per Annum, and has received it and shewed Acquittance thereof*; Judgment if Execution; and the Opinion was, that it is no Plea; For he who recovers Dower cannot enter into the third Part. Br. Scire Facias, pl. 36. cites 45 E. 3. 5.

14. In *Dower*, the *Tenant came at the Summons and said that he has been at all Times ready* to render Dower, and yet is and the *Demandant said that he was not ready*, and that her Baron died seised, and the first Averment of the Demandant cannot be taken, because the Tenant came at the Summons, and *Writ to inquire of the Damages* was awarded, and found that the Baron died seised, and Damages &c. Per Tilllesley, this *is only Inquest of Office*, where it *ought to have been by Issue tried*, and therefore the Demandant shall not have Judgment upon it; Contra per Thirn. *Quære.* Br. Enquest, pl. 17. cites 11 H. 4. 40, 41.

Where the *Tenant has been at all Times ready to render* Dower, the Demandant shall not recover Damages tho' her Baron died seised; For this is not any Default in the Tenant. Br. Dower, pl. 32. cites 11 H. 4. 40.——If the *Baron dies seised* the Feme shall recover Damages. Br. Damages, pl. 52, cites 11 H. 4. 40, 41.

But per Chyan and Hill, where the *Tenant is at all times ready to render* Dower the Demandant shall not recover Damages; For no Default is in the Tenant. Ibid.

But in Cosinage the Demandant shall recover Damages, tho' the Tenant be ready to render Dower; For he *is not in by good Title*, *Contra of the Heir* in Dower. Ibid

15. In Dower *against two*, the *one said that he assigned* 6 *s.* 8 *d. Rent out of the Land to the Feme for her Life, the which she accepted* &c. and *the other said that he is, and at all Times has been, ready to render Dower*; and it was held a good Assignment, by which *she said that she did not agree to the Assignment* and per Strange, she shall recover Dower against him immediately of the Moiety, tho' the Plea of the other be not yet tried; For *this is as a Confession by the one, and a Plea in Bar by the other.* Br. Dower, pl. 46. cites 7 H. 6. 33, 34

16. Note, that where the *Tenant confesses the Action, or pleads to the Writ* in Dower, the * *Demandant shall make surmise that her Baron died seised*, and otherwise she shall lose her Damages. Br. Dower pl. 78. cites 22 H. 6. 44.

* S. P. *notwithstanding the Tenant pleaded only to the Writ*; *and in the End of the Surmise shall maintain her Writ*; For otherwise it can't appear upon Plea to the Writ whether the Baron died seised or not. Br. Dower. pl. 93. cites S. C.——Br Surmise pl. 18. cites S. C.

17. In Dower, the *Tenant said that he has been at all Times ready to render Dower, and yet is* &c. and the *Demandant said, that* he, viz. *the Baron died seised, and that such a Day and Year she required the Tenant to endow her at D. and he refused* &c. The *Tenant said, that the same Day the Tenant offer'd the Feme to go with her to the Land and to assign her Dower, and she refus'd absque hoc that he refused*, and the Court held the Issue good upon the Refusal upon this Special Pleading. Br. Dower, pl. 73. cites 13 E. 4. 7.

18. And per Brian, J. she can't have several Judgments of one and the same Thing, but one intire Judgment; For by the first Plea the Demandant may recover Dower; but the other Justices were in a clear Opinion that *she ought to have her Judgment immediately*, and H. 18 E. 3. in Dower, she had Judgment to recover her Dower *and Enquest for the Damages.* Br. Dower, pl. 73. cites 13 E. 4. 7.

19. In Dower, the *Tenant Confess'd upon the Cause* of Dower, and *did not say that he has been at all Times ready* &c. by which the *Demand-*

Br. Dower pl. 49 cites S. C.

mandant pray'd Judgment had it and after said, that her Baron died seised, and pray'd Damages and Writ of Inquiry of it, and had it notwithstanding the Averment is taken after Judgment where the Tenant cannot aver any thing, ; For it was said, that it shall be intended by his Confession that she is intitled to the Dower and Damages; For it is *included that the Tenant is Deforceor* ; *But* per tot. Cur' *if the Tenant had come at the first Day and said that he has been at all Times ready* to render &c. if the Demandant cannot aver the contrary she shall not recover any Damage. Br. Damages. pl. 79. cites 14 H. 8. 25.

20. Dower ; the *Tenant Vouched the Heir* and prayed he might be summoned in the same County, *and he was summoned and entred into the Warranty, and confessed the Dower* ; *It was moved against whom the Judgment should be.* And the Court was in great doubt, *for it did not appear that the Heir had sufficient to render Dower*, for it would be in vain, and a great Mischief to the Demandant if they give Judgment for her, when perhaps the Heir had nothing, or not sufficient to render Dower; And they commanded Precedents in this Case to be searched. Cro. E. 46. pl. 1. Pasch. 28 Eliz. C. B. Killigrew's Case.

After Judgment for the Plaintiff she may before Execution awarded aver, that her Husband was seised, and so to have Damages; Per tot. Cur Godb. 212 pl. 302. Mich. 11 Jac. C. B. Porter's Case.——Ibid. cites 14 H. 8. 95 and 26 H. 6. 44 b.

21. In Dower the Jury assess'd Damages, as in Case where the Husband died seised the which *Dying seised was not found by the Verdict* ; and Exception being taken thereto, the Court said that the Demandant might pray Judgment of the Lands and *release Damages, or she may aver that the Husband died seised, and have a Writ to inquire of the Damages*, which all the Prothonatories agreed. Le. 192. pl. 118. Mich. 29 and 30 Eliz. C. B. Butler v. Ayres.

Nov. 65. Whitley v Best. S. C. accordingly, and the Court said that the Lease of B. is saved by the 21 H. 8. cap 16.

22. In Dower the Tenant made Default after Default ; *B. prayed to be received for his Term made to him before the Coverture*, which was done ; Then the Question was, how Execution should be? It was agreed, that the *Judgment should be entred generally*, that she should recover Seisin of the Moiety of the Land (the Land being Gavelkind) and that the *Writ should be special*, that the Sheriff should not Oust the Termor, but he should come upon the Land and demand Seisin for the Feme, and thereby she to have the Moiety of the Rent, with the Reversion. Cro. E. 564. pl. 26. Pasch. 39 Eliz. C. B. Wheatley v. Best.

D 284. a. pl 33 says it is Common Experience, and the Precedents of C. B. are so —— Yelv. 112. Mich 51 Jac. B. R. that if the *Baron aliens and retakes for Life and dies*, the Feme shall have Dower, but no Damages of such dying seised ; For it was only of Franktenement.

23. She shall recover Damages *only where the Husband seised*, viz. *of the Freehold and Inheritance* ; For tho' the Husband before the Title of Dower had made a Lease for Years, reserving a Rent, she shall recover a third Part of the Reversion with a third Part of the Rent and Damages ; For the Words of the Statute are, De quibus Viri sui Obierint seisiti. Co. Litt. 32. b.

24. In some Cases where the Husband was sole seised the Wife shan't be endow'd in severalty by Metes and Bounds ; As for Example if a Man seised of Lands in Fee, took a Wife and *infeoffed eight Persons*, a Writ of Dower was brought against these eight Persons, and two confess the Action, and the other six plead in Bar and defend to Issue, the Demandant shall have Judgment to recover the third Part of the two Parts of the Land, in eight Parts to be divided, and after the Issue being found for the Demandant against the six, the

the Demandant shall have Judgment to recover against them the third Part of six Parts in eight Parts to be divided, which is worthy the Observation. Co. Litt. 32. b.

25. In a Writ of Dower *Ad Ostium Ecclesiæ*, or *Ex Assensu Patris*, she shall recover no Damages, because *she may enter*, and the Words of the Statute are, Et Dotes suas habere non possunt sine placito. Co. Litt. 32. b.

26. Some say, that the Demandant in a Writ of Dower that *delays herself* shan't recover Damages. Co. Litt. 32. b.

27. If she brings a Writ of Dower against the Heir, and the *Heir comes into Court upon Summons the first Day, and pleads*, that he has been *always ready, and yet is*, to render Dower &c. If the *Wife has* * [*not*] *requested her Dower*, she shall lose the mean Values and her Damages; But if she have requested Dower she may plead it, and Issue may be thereupon taken. Co. Litt. 32. b.

* This word (not) is omitted in the Original, and therefore seems misprinted. —But Ld. Coke says it is holden in some Books that a Request en Pais is not sufficient, but he says, that the Law, and many Books are to the Contrary, and that so are the Words of the Statute, viz. Et Dotes suas habere non possunt sine Placito. 2 Inst. 32. b. 49.

28. If the Wife has Dower *assigned* to her *in Chancery*, she shall have no Damages; For the Words of the Statute be, Et viduæ per Placitum recuperaverint &c. So it is if the Heir or his Feoffee assign Dower, and the Wife accepts it, she loses Damages. Co. Litt. 33. a.

29. The *Values and Damages* are to be recovered against the Tenant in a Writ of Dower, as it appears in a Record between **Benfield v. Rowse**, where the *Tenant as to a Parcel pleaded Nontenure*, and *for the Residue, Detainment of Charters*, upon which Pleas they were at Issue, and both Issues *found* by the Jury *against the Tenant*, and found *further that the Husband died seised* such a Day and Year, *and had Issue a Son, and that the Demandant and the Son by six Years after the Decease of the Husband together took the Profits of the Land, and after the Son* such a Day and such a Year *died without Issue, after whose Decease the Land descended to the Tenant as Uncle and Heir* to him, by Force whereof he entered and took the Profits until the purchasing of the original Writ, and found the Value of the Land by the Year, and assess Damages for the detaining of the Dower, and Costs, and upon this Verdict, after often debating, the *Demandant had Judgment to recover her Damages for all the Time from the Death of her Husband without any Defalcation.* Co. Litt. 33. a.

4 Le. 198. pl. 316. Mich. 8 & 9 Eliz. C. B. Belfield v. Rouse, S. C. adjudged for the Demandant.—Bendl. 153. pl. 215. S. C. and the Pleadings, adjudged for the Demandant, and to recover Damages from the Death of the Baron. ——— Mo 85. pl. 213 S. C. adjudged accordingly.

30. A Man seised of Lands in Fee *takes a Wife* and *grants a Rent-charge*, and after *makes a Feoffment in Fee*, and *takes back an Estate Tail and dies*, the *Wife recovers Dower against the Issue in Tail by Reddition*, the *Wife makes a Surmise that the Husband died seised*, and prayed a Writ to enquire of the Damages, and that is granted to her. In this Case she holds the Land charged with the Rent-charge, for *by her Prayer she accepts herself dowable of the second Estate*, for of the first Estate whereof she was dowable her Husband died not seised, *and so has she concluded herself*, wherefore if the Rent-charge be more to her Detriment than the Damages beneficial to her, it is good for her in that Case to make no such Prayer. Co. Litt. 33. a.

31. In a *Writ of Admeasurement* of Dower the Demandant shall recover Damages, if the *Tenant appears not the first Day, and yields to Admeasurement*, for the Issues in the mean Time. 2 Inst. 368.

32. If *Tenant in Dower* be *diſſeiſſed*, and the *Diſſeiſor makes a Feoſſment*, the Tenant in Dower *ſhall recover all her Damages againſt the Feoffee*, for ſhe is not within the Statute of Glouceſter cap. 1. by which every one ſhall anſwer for their Time. 2 Brownl. 31. Hill. 8 Jac. C. B.

33. After Judgment *for Part* the Demandant may be *Nonſuit for the Reſidue*, and yet have Execution of that Part for which he had Judgment. Godb. 166. pl. 231. Paſch. 8 Jac. C. B. Foliamb's Caſe.

34. Where a *Reverſion of Lands leaſed for Years, rendering Rent, is granted to the Husband in Fee*, who dies ſeiſed of this Reverſion, the *Widow ſhall be endowed of the Reverſion and the Rent*, but ſhall recover *no Damages* of the Tenant. Win. 8. Paſch 22 Jac. C. B. Anon.

35. A. ſeiſed of Land in Fee, makes *Leaſe for Years rendering Rent*, takes Wife and dies; The Wife ſhall have Judgment to have the third Part of this Land for her Dower, and ſhall have the third Part of this Rent, but *Ceſſabit Executio for the Poſſeſſion of the Land during the Leaſe.* Jenk. 73. pl. 38.

She ſhall have preſent Execution of the Land, and ſhall thereby have the third Part of the Reverſion, and the Rent and Execution ſhall not ceaſe; for per all the Juſtices, the Sheriff ſhall *ſerve Execution of the Land as if there was no Leaſe* for Years; for it may be that the Leaſe is void, or it may be that there is no Leaſe, and though it be pleaded the Wife cannot anſwer to it, and therefore the Execution ſhall be general; and *Leſſee may Re-enter* notwithſtanding the Recovery and the Execution of Dower; and if he be *ouſted* he ſhall have his Action. Godb. 165. pl. 231. Paſch. 8 Jac. C. B. Foliambe's Caſe.

36. Regularly where an *Husband died ſeiſed* the Wife ſhall recover her Dower, with *Damages for the whole Time after her Husband's Death*; but if he does not die ſeiſed, then after her Demand, and the Tenant's Refuſal to aſſign Dower to her, ſhe ſhall recover Damages from the Time of the Refuſal. Jenk. 45. pl. 85.

37. In Dower the Defendant *pleads Ne unque Seiſie que Dower.* It was found by the Jury that the Husband was ſeiſed, and died ſeiſed, and aſſeſs Damages to the Plaintiff generally. It was *moved in Arreſt of Judgment, that the Jurors did not enquire of the Value of the Land*, and then Ultra valorem Terræ, tax Damages, as much as is the uſual Courſe, as the Prothonotaries informed the Court, for the Statute of Merton gives Damages to the Wife, ſcil. Valorem Terræ, and the Statute of Glouc. cap. 1. gives Coſts of Suit; but the Court gave Judgment for the Plaintiff, although the Damages are given generally, and certainly intended for the Value of the Land; and there might be in the Caſe a Writ of Error. Hett. 141. Trin. 5 Car. C. B. Hawe's Caſe.

38. If *Baron makes a Feoffment to the Uſe of himſelf for Life*, Remainder *to the Son in Tail*, this is not a Dying ſeiſed in the Baron for the Feme to have Damages in Dower; Per Curiam; And ſo it was adjudged in * **Dame Egerton's Caſe.** But the Baron *ought to die ſeiſed of Eſtate Tail or Fee Simple which may deſcend to his Heir* &c. Litt. Rep. 341. Trin. 6 Car. C. B. Anon.

S. P. by Haughton J. cited to have been ruled accordingly. 3 Bulſt 278. * Hutt. 28. Hill. 16 Jac. Egerton v. Egerton, S. C. but S. P. does not appear.

39. If a *Feme* brings a Writ of Dower, and *recovers*, and the *Defendant dies*, the Feme ſhall have the *Damages againſt the Terre-tenants*; Per Glyn Ch. J. Sty. 470. Mich. 1655. Anon.

40. 16 & 17 *Car. 2. cap. 8. Execution ſhall not be ſtayed by* Writ of Error *upon any Judgment after Verdict in Dower, unleſs the Plaintiff in ſuch Writ becomes bound to the Defendant in ſuch Sum as the Court to whom the Writ is directed ſhall think fit, that if Judgment be affirmed, or the Writ diſcontinued in his Default, or he be Nonſuit he* will pay ſuch Coſts, Damages, and Sum, and Sums of Money as ſhall be awarded *upon, or after*

A Judgment was obtained in Dower, and a Writ of Error thereupon brought,

after such Judgment &c. to ascertain which a Writ of Inquiry shall issue to inquire of the Mesne Profits and Damages by Wast done after the first Judgment; upon Return whereof Judgment shall be given, and Execution awarded for them, and also for Costs of Suit. and Recognizance entered into. The Judgment was affirmed, and then the *Demandant died* intestate *before the Damages ascertained by a Writ of Inquiry.* A Sci. Fa. was brought by the Administrator, supposing that the Entering into a Recognizance to the Demandant according to the Statute vested a Duty in her, eo Instanti, and consequently the Executor or Administrator intitled, and therefore that he was regular to revive the Judgment by Sci Fa and so to proceed to a *Writ of Inquiry*, and after the Inquisition returned, and the Duty ascertained to execute the Recognizance. But it was answered, that the *taking the mean Profits* after the first Judgment *was a personal Tort and in Nature of a Trespass*, and so died with the Person, and here is no Judgment for any Damages given to the Intestate; and that as to this Matter there is no Difference betwixt a Sci. Fa. for Damages upon the *Statute of Merton*, and upon the Statute of 16 & 17 Car. 2. for *in both Cases the Judgment Quoad the Damages ought to be compleat in the Life-time of the Parties.* And the Court was of that Opinion, and Holt Ch. J. gave another Reason, viz. That the *Judgment given was in the Realty* wholly, and an Administrator cannot have Execution of any Judgment but only in the Personalty, and Judgment accordingly. Carth. 132 Mordant v. Thorold —— Per Holt, There can be no Suit on this Recognizance till there be a Judgment for these Damages, and consequently the Recognizance does not any ways alter it. *The Sci. Fa. to ascertain* the Damages *must be at the Common Law*, and the Common Law Rule is that *Actio Personalis moritur cum Persona.* Show. 97. S. C. —— 1 Salk 252. pl. 1. S. C. adjudged. —— 3 Mod 281. S. C. adjornatur. —— 3 Lev. 275. S. C. and the Court inclined to that Opinion; but advisare vult.

41. *Judgment* in Dower *by Default and a Writ of Inquiry* of Damages. A Writ of *Error was brought, and pending that Writ the Tenant in the original Action died.* The Judgment was affirmed, and Execution against the Lands, and a Scire Facias against the Heir to shew Cause why the Demandant should not have Damages; Adjudged, that *no Damages shall be recovered because the Judgment when the Tenant died was only compleat as to the Lands, and not as to the Damages, and they are distinct Judgments*; and when the Tenant died before Judgment given as to the Damages, this remains a Judgment at Common Law. Sid. 188. Pasch. 16 Car. 2. B. R. Aleway v. Roberts.

Lev. 38. Aleworth v. Roberts, S. C. states it, that pending the Writ of Error the Tenant aliened the Land and died, and the Judgment was affirmed, and the Demandant brought Sci. Fa. against the Heir and the Alienee for Damages, suggesting her Husband's dying seised, but the Court agreed that the Damages being given against the Deforceors only by the Death of the Heir, they are lost and are not a Lien on the Land which passes with it, and that the Heir, against whom the Judgment was had, was the Deforceor. —— S. C. cited Carth. 135.

42. *Scire Facias in a Recognizance* to pay Mean Profits if Judgment be affirmed does not lie for an Executor of Tenant in Dower. Show. 97. Trin. 2 W. & M. Mordant v. Thorold.

1 Salk. 252. pl. 1. S. C. & S P. resolved; but if Damages had been ascertained upon the Writ of Inquiry and Judgment, they had been vested in the Intestate as a Debt, and the Administrator as a Debt, and the Administrator should have had them; but she dying before the final Judgment, and when the Damages were due to her only by way of Satisfaction for an Injury, which is in Nature of a Trespass, and the Writ of Inquiry being in Nature of a Personal Action for them, it dies with the Person, and a Scire Facias lies not for the Executor or Administrator.

(P. a) Error.

1. IN Dower *Judgment* was given *upon Nihil dicit*, and becauſe the *Baron died ſeiſed* a *Writ of Inquiry* of Damages was awarded, by which it was *found, that the third Part of the Land which ſhe ought to have in Dower was of the Value of* 8 *l. a Year, and that eight Years elapſed from the Death of her Husband next before the Inquiſition, and aſſeſs Damages to* 8 *l.* and it appeared upon the Record, that after Judgment in the ſaid Writ of Dower the Demandant had Execution on Habere Facias Seiſinam, and ſo *upon the whole Record put together, it appears that Damages have been aſſeſſed for eight Years where the Demandant has been ſeiſed for part of the ſaid eight Years*; whereupon the Tenant brought a Writ of Error, becauſe Damages are *aſſigned to the Time of the Inquiſition*, whereas they ought to be but to the Time of the Judgment only; ſed non allocatur. Le. 56. pl. 71. Paſch. 29 Eliz C. B. Walker v. Nevil.

2. Another Error aſſigned was, becauſe where it is *found that the Land was of the Value of* 8 *l. a Year* they have *aſſeſſed Damages for eight Years, to* 80 *l.* beyond the Revenue; For according to the Rate and Value found by Verdict it did amount but to 64 l. but that Error was not alſo allowed; for it may be, that by the long detaining of the Dower, the Demandants have *ſuſtain'd more Damages than the bare Revenue* &c. Le. 56, 57. pl. 71. Paſch. 29 Eliz. C. B. Walker v. Nevil.

3. Another Error was aſſigned becauſe Damages are *aſſeſs'd for the whole eight Years after the Death of the Husband*, where it appears that *for Part of the ſaid Years the Demandant was ſeiſed of the* Lands by Force of the Judgment and Execution in the Writ of Dower, and upon that Matter the Writ of Error was allowed. Le. 57. pl. 71. Paſch. 29 Eliz. C. B. Walker v. Nevil.

4. Writ of *Dower* was brought *againſt an Infant and two others*, and a *Recovery had by Default*. The Infant brought Error; but the Court ſeemed that it is not reverſable, becauſe it is *not a Recovery in which he might have his Age*. Mo. 342. pl. 465. Hill. 35. and Trin. 38 Eliz. Williams's Caſe.

Cro. E. 557. pl. 14. Williams v. Williams, S. C. adjornatur. —— Ibid. 567. pl. 1. S. C. the Conrt divided, & adjornatur. —— S. C. cited per Cur. Cro J. 592. that the Infant ſhould not avoid it by Error for this Cauſe; For if ſo, then ſhe never ſhould recover. —— Roll Rep 326 cites S. P. adjudged, Paſch. 35 Eliz. Williams v. Drue. —— Mo. 847. pl. 1148. cites S. P. and ſeems to be S. C. —— Cro E. 638 pl. 36 Mich. 40 & 41 Eliz. B. R. Harvey v. Wrot, S. P. the Court held it to be no Error; And Rule was given to affirm the Judgment; But it was afterwards reverſed for the Defect of Warrant of Attorney. —— Roll Rep. 326 pl. 32. S C. cited accordingly. —— Cro. J. 111. pl. 8. Hill. 3 Jac. B. R. Smith v. Smith, S. P. and Judgment in C. B. affirmed accordingly Niſi. —— 2 Brownl. 118. Mich 9 Jac Anon. S. P. adjudged accordingly in C. B. and affirmed in Error. —— 2 Le. 59. pl. 85. Mich. 32 Eliz. C. B the S. P. holden contra; But ſays that afterwards the Judgment was reverſed.

5. Another *Error* was *aſſigned*, viz. *that he had nothing in the Land.* The Court doubted, becauſe the Damages were recovered to 200 l. and the *Feme Demandant being dead, her Executors brought Scire Facias againſt the Infant for thi Damages.* Mo. 342. pl. 465. Hill. 35. and Trin. 38 Eliz. William's Caſe.

Cro. E. 568. pl. 1. Williams v. Williams, Trin. 39 Eliz. B R. the S. C. and Fenner J. as to this ſecond Error held, that he might well aſſign it for Error to diſcharge himſelf of the Damages, but the other Juſtices did not ſpeak thereto; ſed adjornatur. —— S. C. cited per Cur

Cur. Roll Rep. 326. that the Tenant being within Age at the Time of the Recovery, the Judgment was erroneous by reason of the Damages recovered against him.

6. Dower is brought *against an Heir being an Infant within Age. He makes Default. A Grand Cape issues.* He *makes Default again.* The *Demandant has Judgment.* The Infant shall not reverse this Judgment, because a Default is imputed to the Infant in this Case, and *his Infancy shall not save his Default as in other Cases*; For if so, the Woman Demandant shall have no Sustenance during the Infant's Nonage; For the Infant will make Default, and afterwards when she has Judgment upon Default the Infant will reverse it. By all the Judges. Regularly Infancy excuses the Default of an Infant, but it does not hold in Dower for the Reason aforesaid. Jenk. 284. pl. 16. cites Mich. 9 Jac. C. B. Rot. 1611.

7. The *Demand* in Dower *was of the third Part of two Messuages in three Parts to be divided*, and the *Judgment was to recover Seisin of the third Part of the Tenements aforesaid, with the Appurtenances, to hold to him in Severalty by Metes and Bounds*, and adjudged naught, because they are Tenants in Common, and the Judgment ought to be, to hold to him together and in Common; but if it had been in three Parts divided it had been good. Brownl. 127. Hill. 13 Jac. Glesold v. Carr.

8. The *Feme suggested that her Husband died seised in Fee* of all the Lands out of which she demanded in Dower. *Exception was taken that he died seised in Tail only*; but per Cur. it is not material if he died so seised, and that she ought to have her Dower. Sty. 69. Mich. 23 Car. in Case of Thynn v. Thynn,

9. If the Jury *assess Damages without finding the Husband died seised*, the Demandant may pray Judgment of the Land, and *release her Damages, or aver* that her Husband *died seised*, and have a Writ to inquire of the Damages. 3 R. S. L. 17.

(Q. a) Admeasurement. In what Cases. And for whom.

1. *Westm. 2. 13 E. 1. cap. 7.* A *Writ of Admeasurement of Dower shall be granted to a Guardian; neither shall the Heir, when he comes of full Age, be barred by the Suit of the Guardian if he sues against the Tenant in Dower feignedly and by Collusion, but he may admeasure the Dower after. And as well in this Writ as in a Writ of Admeasurement of Pasture, more speedy Process shall be than has been used hitherto; so that when it is come unto the great Distress, Day shall be given, within which two Counties may be holden, at which open Proclamation shall be made, that the Defendant come in at the Day; at the which Day if he come in, the Plea shall go forward; and if he do not come, and the Proclamation be testified by the Sheriff, upon the Default they shall proceed to make Admeasurement.*

2. The Writ of Admeasurement of Dower *lies* where the Heir when he is within Age endows the Wife of more than she ought to have Dower of, or if the Guardian endows the Wife of more than the third Part of the Land of which she ought to have Dower, then the Heir at his full Age may sue this Writ against the Wife, and thereby she shall be admeasured, and the Surplusage which she had in Dower shall be restored to the Heir, but in such Case there *shall not be assigned anew any*

Land to hold in Dower, but to take from her so much of the Land *which amounts to above the third Part of all* the Land of which she ought to be endowed F. N. B. 149. (F).

3. The Lord of F. brought Writ of Admeasurement of Dower against M. Tenant in Dower, who *said at the Grand Distress that she is ready to be admeasured*, and the *Writ was, that she had more by* 40 *l. per Annum than her third Part*, and Writ issued to the Sheriff, who *returned that she had more by* 40 *s. per Annum* &c. and because he *ought to have extended the Land into three Parts, and to have returned how much she had beyond the third Part* therefore ill, and *Sicut Alias issued*; Quod Nota. This is *intended that where Issue is joined in this Writ*, that this passes by Issue; But where it is by *Nient Dedire*, as here, there it shall be by Extent by Writ before the Sheriff, and this as Minister, and not as Judge, for upon his Return Judgment shall be given of it in Bank. Br. Admeasurement, pl. 2. cites 44 E. 3. 10.

The Writ of Admeasurement of Dower is Vicontiel, and not returnable, and the Parties may thereupon plead before the Sheriff in the County; But the Pleas may be removed out of the County Court by Pone at the Suit of the Plaintiff without shewing Cause in the Writ, but if it be at the Suit of the Defendant he ought to shew Cause. 2 Inst. 369.

4. In Admeasurement of Dower, where it is made before the Sheriff the *Sheriff is Judge*; Arg. 6 Rep. 11. b. cites 44 E. 3. 10. Per Finchden, and 44 E 3. 11. b.

Br. Scire Facias, pl. 241. cites Fitzh Execution 165. and 22 R. 2.

5. If the *Sheriff delivers the Moiety in Execution for the third Part*, the *Heir shall not have Assise* by reason of the Recovery, *but* shall have *Sci. Fa.* against the Feme. Br. Dower, pl. 83. cites 22 R. 2.

6. If the *Sheriff returns Nihil* in Writ of Admeasurement of Dower, yet the Plaintiff shall have Judgment as if the Process had been returned served; Quod non negatur. Br. Admeasurement, pl. 7. cites 11 H. 6. 3.

7. If the *Heir endows his Mother within Age* of more than of the third Part, he cannot enter into the Surplusage at full Age, but shall have Writ of Admeasurement of Dower, per Kingsmill J. But per Rede Ch. J. he may enter, As upon Partition made within Age which is not equal. Quære. Br. Admeasurement, pl. 4 cites 21 H. 7. 29.

If the *Guardian* in Knight's Service *indows the Mother* of the Ward &c. *of more than she ought to have* &c. The Heir when he comes at his full Age may sue forth a Writ of Admeasurement of Dower &c. Perk. S. 524.

If the *Heir within Age* be *out of Ward*, and *assigns more Dower than he ought* within Age, he may have an Admeasurement of Dower within Age; for enter he cannot. 2 Inst. 368.

8. If the *Heir within Age before the Guardian enters* into the Land *assigns to the Wife more Land in Dower than she ought to have*, then the *Guardian shall have the Writ of Admeasurement* against the Wife by the Statute of Westminster 2. cap. 7. And if the Guardian brings the Writ and pursues it against the Wife, yet the *Heir at his full Age by the same Statute shall have the Writ of Admeasurement* of Dower against the Wife. F. N. B. 148. (F).

If the *Heir* (*before the Guardian enters*) *endows the Wife of more than she ought*, and the *Guardian assigns over his Estate*; his Assignee shall have no Writ of Admeasurement. Because it was a Thing in Action. Co. Litt. 39. a.

9. By Bracton, Lib. 4. cap. 17. If *she has Lands in Dower, in diverse Countries*, there it ought to be Coram Justiciariis; And note there *the Tenant shall have several Writs*, viz. 1st. *In every Writ* of Admeasurement *all the Lands which she has in the same County shall be named and admeasured.* 2dly. If she has Lands in several Counties there shall be *several Writs, and several Extents of all the Lands of which the Party died seised*, as it seems, yet he shall have one Count, and one Admeasurement;

measurement; Sed Quære how it shall be made. 13 E. 4. Admeasurement 17. Yet note 7 R. 2. Ibid. 4. The Defendant was to answer, notwithstanding the Exception. 7 R. 2. Admeasurement. 4. F. N. B. 148. (G) in the new notes there (d).

10. If the *Wife after the Assignment* of Dower *improves the Land, and makes it better* than it was at the Time of the Assignment; an Admeasurement does not lie of that Improvement. But if the *Improvement* be *by Casualty of a Mine* of Coals or of Lead, which are in the Land &c. which have been occupied in the Husband's Time, the Doubt is the more; but *she cannot dig new Mines*; for that shall be Waste if she so do. F. N. B. 149. (C).

11. If a *Guardian in Chivalry assigns too much* for her Dower, the Heir shall have a Writ of Admeasurement by the Common Law. Co. Litt. 39. a.

2 Inst. 368. S. P.

12. So if the *Heir within Age assigns* before the Guardian enters into the Land *too much* in Dower, the Guardian shall have a Writ of Admeasurement by the Statute of Westm. 2. cap. 7. and in that Case he himself shall have a Writ of Admeasurement at full Age, and some have said, That in that Case he may have it within Age. Co. Litt. 39. a.

But in such Case before that Statute the Guardian had been without Remedy; For no Admeasurement of Dower, being a Real Action, lay for the Guardian at Common Law. 2 Inst. 367.

13. The Heir shall have an Admeasurement for the *Assignment in the Life of his Ancestor* by the Common Law. And a Writ of Admeasurement lies upon an *Assignment in Chancery*. Co. Litt. 39. a.

14. If the *Heir within Age assigns Dower and dies*, his Heir shall have the same Writ; but if the *Ancestor of full Age, being Tenant in Fee-Simple, assigns Dower more than he ought*, his Heir shall never avoid it, because he had full Power to assign as much as he would. 2 Inst. 368.

15. Although the Words of the Writ be in the present Time, *Plus habet in dotem* &c. yet it *is to be taken that she had more in Value at the Time of the Assignment* of Dower; for if by her Industry and Policy it be made of greater Value afterward, no Writ of Admeasurement lies for this Improvement. 2 Inst. 368.

16. If in Dower the *Sheriff gives Seisin on the Habere Facias Seisinam of more than a Moiety*, the *Heir* cannot enter, nor maintain an Assise, but *must have a Scire Facias to admeasure* the Lands in the Return. Ld. Raym. Rep. 1294, 1295. Arg. cites Br. Extent. 13. and Fitzh. Execution 165.

(R. a) In What Cases Dower may be defeated.

1. 6 E. 1. cap. 7. *Statute of Gloucester.* IF *a Woman sells or gives the Land which she holdeth in Dower, the Heir or other Person to whom the Land ought to revert after her Death, shall have present Remedy to recover the Land by Writ of Entry.*

2. *Westm.* 2. 13 *E.* 1. *cap.* 4. *If the Wife be wrongfully endow'd by the Guardian during the Minority of the Heir; the Heir when at full Age shall have Action to demand the Seisin of his Ancestor; but if she can shew that she had a Right to her Dower she shall retain it, and the Heir shall be grievously amerced according to the Discretion of the Justices.*

3. Doner

3. Donor referves *a Rent upon the Tenant in Tail* and dies, Wife is endow'd of the Rent, Tenant in Tail dies without Iffue; The Wife fhall not have Dower any longer. But otherwife of an Eftate in Fee-Simple though *Tenancy efcheat*, yet the Wife fhall retein her Dower of the Seigniory. Per Dyer Arg. Mo. 39. pl. 126. Trin. 4 Eliz.

4 *Wife of Feoffee on Condition* is endow'd. Condition is broken. By *Re-entry of Feoffor* Dower is defeated. Le. 299. Arg. pl. 409. Mich. 28 Eliz. C. B.

(S. a) Relief in Equity.

1. IF a Feme be *indow'd in Chancery*, and after the *Land is recover'd againft her*, fhe may have *Scire Facias there*, to be indow'd de novo. Br. Jurifdiction, pl. 114. cites 43 Aff. 32.

2. The Suit ought to be for the Dower by Petition *in the Chancery*, and not by Writ of Dower in Bank *againft the Committee of a Ward of the King*, for the Advantage of the King. Br. Dower pl. 66. cites 4 H. 7. 1. Per Brian.

3. A Bill was *to prevent Dower* becaufe her *Husband* was *paft Memory at the Time of Marriage*, but it was difmifed to Law. Toth. 81. cites 3. Jac. Pennington v. Cook.

4. In Dower, the Defendant pleaded that the Demandant was *endowed by Commiffion out of the Court of Wards*, De dote Affignanda, which fhe accepted of; It was holden by the Court to be a *void Affignment*, and fhall not bind, for that the Dower *ought to be* affiigned *out of the Chancery by Writ De dote Affignanda*. Cro. E. 364. pl. 28. Mich. 35 & 36 Eliz. B. R. Stainfield v. Bynden.

5. The Lord Keeper declared that a Woman cannot have Dower of a *Truft*, but compelled the Defendant to anfwer who is Tenant to the Land, to enable her to bring her Writ of Dower. Toth. 163. cites Mich. 2 Car. Kemp v. Lady Reresby.

6. A. before his Marriage with B. was queftioned for Treafon, and thereupon made a *Deed of his Lands to his younger Son*, and then marries B. A. was acquitted, and dies. B. brings a Writ of *Dower* againft the Heir, whereupon the faid Conveyance is given in Evidence to barr her; Thereupon fhe brings a Bill here, and 'tis decreed that that *Deed fhould not be given in Evidence*. 3 Ch. R. 94. 1653. Robinfon v. Fletcher.

S. C. cited by the Mafter of the Rolls, Pafch. 1705. that A. *on good Confideration had promifed to affure* the Lands *to B.* his eldeft Son in Fee, but falling into Trouble he *conveyed* them to C. his Younger Son, *only to fecure them againft a Forfeiture.* After *A.* was free of his Trouble he *conveyed the Lands to B.* and died *B. marries, and dies, and leaves a Widow, but no Child*, and C. was his Heir, the Widow brought Dower at Law, but upon C's. giving the Conveyance to him in Evidence, fhe was Nonfuited. Whereupon fhe brought a Bill, and had a Decree, and a Commiffion to fet out the thirds, and his Honour faid, that tho' this was much contefted, yet Equity and Juftice prevailed. Chan. Prec. 250. in Cafe of Lady Dudley v Ld Dudley cited it as 6 May. 1653. Fletcher v. Robinfon. ———S. C. cited by Sir Jofeph Jekyl Mafter of the Rolls, Hill 1732. who faid, that he took it out of the Regifter Books, and adds, that *C. executed a Declaration of Truft* to A. and that the Deed to C. was decreed to be fet afide as againft the Widow. 2 Wms's Rep 682 in Cafe of Sutton v. Sutton.———S. C. of Fletcher v. Robinfon cited 3 Wms's Rep. 231. Hill. 1733. in Cafe of Chaplin v. Chaplin.———And Ibid. 233. Chancellor Talbot faid, that this feem'd a ftrange Cafe and a moft extraordinary Truft, for if the Father, the Ceftuy que Truft, fhould have come for a Performance of that Truft he could never have recovered, bnt the Son fhould have held the Land difcharged, it being a fraudulent Truft made to protect the Eftate againft a Forfeiture. This probably was a fhort Note of the Cafe for the private Ufe of fome Gentlemen, and can be of Service to no other.———Chan. Prec. 250. S. C. Ld. C. Talbot in the Cafe of Att. Gen. v. Scot, calls this an obfcure Cafe.

7. *Devife of* Leafes and other *Perfonal Eftates* of a confiderable Value *in Truft*, that his Wife fhould thereout have during her Life 100 l. *per Annum in Lieu and Difcharge of her Dower*, decreed to Iffue out

of

of the Perſonal Eſtate only if ſufficient, but if not, then to be ſupplied out of the Real Eſtate. Fin. R. 134. Mich. 26 Car 2. Leſquire v. Leſquire.

7. The *Truſt of a Term to attend the Inheritance* ſhall not be *ſever'd* therefrom for Dower, or any other Conſideration, except for Payment of Debts. 2 Freem. Rep 66. pl. 77. Trin. 1681. Tiffin v. Tiffin.

8. Infant Tenant relieved where Dower was *unequally ſet forth* by the Sheriff. 2 Chan. Caſes 160. Hill. 35 and 36 Car. 2. Holby v. Holby.

Vern. 218. Hoby v. Hoby, S. C.

9. Bill was to ſet aſide a partial and *fraudulent Aſſignment of Dower*, and relieved. Vern. 218. Hill. 1983. Hobby v. Hobby.

10. The *Wife joins with her Husband in a Mortgage, and levies a Fine to the Intent to Bar her Dower*, and *in Conſideration thereof the Husband agrees the Wife ſhall have the Redemption of the Mortgage*, and the *Husband afterwards mortgages this Eſtate twice more.* The Court took this agreement to be fraudulent, as againſt the ſubſequent Mortgagees, ſo far as to intitle the Wife to the whole Equity of Redemption; But in regard the Wife, in Confidence of this Agreement, had levied the Fine, and thereby barred her Dower, and the *Husband and Wife being both living, the Court decreed that after the Husband's Deceaſe, the Wife, in Caſe ſhe ſhould happen to ſurvive him, ſhould enjoy her Dower*; And whereas the Mortgagees preſſed, that the Decree might only be, that ſhe ſhould enjoy her Dower notwithſtanding the Fine, the Court thought it unreaſonable in this Caſe to put Wife to her Writ of Dower; becauſe they might convey away the Eſtate, and ſhe not know againſt whom to bring her Writ of Dower; And therefore decreed the Dower to her. Vern. 294. 295. pl. 287. Hill. 1684. Dolin v. Coltman.

11. If there be a *Mortgage* by the Anceſtor of the Baron upon the whole Eſtate, Equity will permit her to *redeem* paying her Proportion according to the Value of Thirds for Life, and there is no Precedent in Equity to the contrary; Arg. and Agreed by the other Side, and that the Reaſon is, becauſe the Mortgagee has no Intereſt but to have his Money, and Equity is to execute all theſe Agreements, but never where there is a *Purchaſor*, or where the *Intereſt of the Mortgage* is *aſſigned to the Heir* between herſelf and the Mortgagee, ſhe comes in Place of her Husband, and the Husband could redeem, and ſo may the Wife; But againſt a Purchaſor ſhe has no more Equity than her Husband had, and that is none at all. Parl. Caſes 70, 71. in the Caſe of the Counteſs of Radnor v. Vandebendy.

A Dowreſs may redeem a Mortgage and held over till ſatisfied. Ch. Prec. 137. Palmes v. Danby.—— S. C. cited by Ld. C. Talbot, Mich. 1734. Caſes in Equity in Ld. Talbot's Time 140. in Caſe of Attorney Gen. v. Scott.——Ch. Prec. 33. Arg.——Per Ld. Wright Ibid. 152.

12. A gives his Wife a *Legacy and deviſed to her part of his Real Eſtate during her Widowhood*, and deviſed the Reſidue of his whole Eſtate to B. for Life, Remainder to his firſt Son &c. Per Somers C. this muſt be taken to be in Satisfaction of Dower, and a *Collateral Satisfaction* may be a good *Bar* to Dower in Equity, tho' pleadable at Law, and decreed accordingly; but this Decree was afterwards reverſed by Wright K. 2 Vern. 365. pl. 327. Mich. 1699. Lawrence v. Lawrence.

Deviſe of Lands to the Wife is no Bar of Dower unleſs it be *ſaid to be in Satisfaction* of her Dower. Ch. Prec. 133. Mich. 1700. Hitchin v. Hitchin.

13. Dower being an Intereſt that does not ariſe by any Contract but by Implication of Law, it *ought to ſtand or fall according to the*

Right at Law without any Assistance of a Court of Equity; Per Ld. Chancellor. 2 Freem. Rep. pl. 234. pl. 304. Mich. 1699. Browne v. Gibbs.

Chan. Prec. 97. pl. 86. S. C. and Bill dismissed.

14. A. settled Lands *to the use of himself for Life, Remainder to Trustees for 99 Years for raising 200 l. a-Piece for L. and M. Daughters of B. his Son, Remainder to the said B. and the Heirs of his Body &c. Remainder to his own Right Heirs; Provided, that if the Heirs of the Body of B. pay L. and M. 200 l. a-peice at 21, or Days of Marriage, then the Term to be void. B. died leaving no Issue but L. and M.* The *Widow of B. brought Dower* and had Judgment, but could have no Benefit at Law till the Determination of the Term, and therefore brought a Bill in Equity to set aside the Term, insisting that L. and M were now Heirs of the Body of B. and the Estate vested in them, which was equal to the Payment of the Money, and so the Trust of the Term being satisfied, the Term ought not to stand in the Way and so it is all one as if the Money was paid at the Time and then by the express Proviso it ought to be void; But the Court dismissed the Bill without Costs. 2 Freem. Rep. 233. pl. 304. Mich. 1699. Brown v. Gibbs.

2 Freem. Rep 212. pl. 28. S. C. accordingly. —Ld Somers said the Court went not on the Reason of his being a Purchasor. Ch. Prec. 99——Master of the Rolls thought it was decreed purely in Favour of a Purchasor. Ch Prec. 249 Pasch. 1705——Hill. 1732 Sir Jos. Jekyl Master of the Rolls cited the Case of Lady Bodmin v Vandebendy, since reported by the Name of Lady Radnor v Rotheram, and that after the different Opinion of two Chancellors, (Jeffries and Somers) it was settled by the Judgment of this Court, and affirmed by the House of Lords in that Case, that a Dowress shall not have the Benefit of a *Trust-Term to attend the Inheritance* against a Purchaser; And said it seems, that by the same Reason that she shall not have it *against a Purchasor* of the legal Estate, so she shall not be relieved against a Purchasor of the Inheritance of a Trust Estate, for in both Cases the Purchasor ought to be safe. 2 Wms's Rep 639 in Case of Sutton v. Sutton.——Show. Parl. Cases 69. 70. S. C. by Name of Lady Radnor v. Vandebendy.

The Master of the Rolls cited the Case of **Brown v. Gibbs** decreed by Ld. Sommers, and also the Case of **Wray v. Williams** decreed by Ld. K Wright, tho' contrary to his own Opinion, he thinking himself bound by the Case of Lady Bodmin v Vandebendy; And said, that the same Question came afterwards to be considered by the late Master of the Rolls, in the Case of **Lady Dudley v. Lord Dudley**, and that he in a solemn Argument, and great Deliberation, decreed for the Dowress; And that so did the Ld. Harcourt, Pasch. 1711. (not in 1710 as mentioned in Abr. Equ. Cases 219.) in the Case of **Higford v. Higford**; and that upon a Bill of Review in the Case of **Wray v. Williams**, he was of Opinion for the Dowress, and over-ruled a Demurrer, and that afterwards the Defendant submitting, a Decree was made by Consent, fixing a Sum, for the Arrears of Dower, and giving her Possession, agreeable to Ld. Hale's Opinion in Hard. 489. and to all the Resolutions in the Case of Tenant by the Curtesy; So that a Dowress shall have the Benefit of a *Trust-Term attendant* on the Inheritance *against the Heir*, and that this Point seems settled as to Dowresses and Tenants by the Curtesy. 2 Wms's. Rep 639 640. Hill. 1732 in Case of Sutton v. Sutton.

S. P. cited by the Master of the Rolls as mentioned by Ld. Sommers in the said Case of Brown v. Gibbs. 2 Wms's. Rep. 647. in the said Case of Sutton v. Sutton.

16. By Marriage Settlement a Term was limited in Trust for raising *Daughter's Portions*, proviso on Payment by the Heir the Term to cease. *The Husband dies leaving only two Daughters.* The Wife gets *Judgments* in Dower with a *Cesset Executio* during the Term Ld. Somers denied to set aside the Term, for that would be to relieve her against the very Judgment upon which she founds her Right of Relief, and she must be content with the Estate as the Law gives it. Ch. Prec. 97. Mich. 1699. Brown v. Gibbs.

But where the Trust of a Term was for raising Daughters Portions and Maintenance in the mean Time, and Annuities to others for Lives; after which followed this Clause, That the *Trustees may, shall and will permit the Person and Persons who from Time to Time shall have Right to the Freehold of the Premisses, by Virtue of or under any Use herein before limited &c. from Time to Time to have, receive, and take to his and*

and their own Use and Benefit, the Residue of the Rents and Profits which shall remain over and above, or after the Performance of the said Trusts &c — Proviso, the Term to cease &c. on Payment or securing &c. to the good liking of the Trustees by the Person or Persons that shall have Right to the Freehold &c. The Dowress had brought a Writ of Dower at Law and recovered, but with a Cesset Executio during the Term, and on a Bill by her to remove the Term, the Master of the Rolls decreed that she should have the Benefit of the Trust of the Term, as to a third Part of the Profits, above the Charge of the Annuities during their Respective Continuance, and after the Determination of all a third Part of the whole Profits for Dower, and the Trustees to account to her Accordingly, et vice versa. Ch. Prec 241. Pasch. 1705 Ld. Dudley v Lady Dudley.——Abr. Equ. Cases 219. pl 5. S. C.—S. C. cited by the Master of the Rolls, Hill 1732. 2 Wms's Rep. 639. in Case of Sutton v. Sutton.——S. C. cited by Ld Ch. Talbot Cases in Equ in Ld. Talbot's time 140. Mich 1735. in Case of Attorney Gen. v. Scott.——S. C. cited Arg. 3 Wms's. Rep. 232.

17. Chancery will not let the Heir set up an old *Mortgage Term that is satisfied* to bar the Widow of her Dower. Ch. Prec. 133. Mich. 1700. * Hitchin v. Hitchin.

* 2 Vern. 403. S C — S. C. cited by the Master of the Rolls, Hill 1732. 2 Wms's Rep. 648. —— 2 Freem Rep 241.

18. But in such Case, *if the Husband had assigned over the Term* which he had Power to do, she had been barred; For there had been a Purchasor in the Case. Ch. Prec. 137. Hill. 1700. * Palmes v. Danby.

* S. C cited by the Master of the Rolls, Hill. 1732 and said, that it was a Mortgage for Years (though not so reported) but that the Question is there stated generally, Whether a Dowress had a Right to redeem a Mortgage? and that Ld. Keeper Wright declared she had; And his Honour said, that he saw no Reason for a Difference between a Mortgage in Fee and for Years as to the Dowress's redeeming in a Court of Equity. 2 Wms's Rep 648, 649. in Case of Sutton v. Sutton.

19. Dower *cannot be assigned in Chancery* except it was in the Case of Chivalry and Wardship &c But if the Heir in Pursuance of a Decree there assigns Dower, the Wife is in by the Heir's Assignment, and not by the Decree. 7 Mod. 43 Trin. 1 Ann. B. R. Smith v. Angel.

20. The *Mother was Guardian of the Infant Heir*, and received the Rents and Profits of the Estate of which she was intitled to Dower, but it was never assigned; But Ld. Chancellor held, that the *want of a formal Assignment of Dower* is nothing in Equity; For still the Right in Conscience is the same; And if the Heir brings a *Bill against the Mother for an Account of the Profits*, it is most just that a Court of Equity should in the Account *allow a third* of the Profits *for the Right of Dower*. Wms's Rep. 118. to 122. Pasch. 1710. D. Hamilton v. Ld. Mohun.

21. A. the Father sold Land to J. S. and *granted a 99 Years Term* of other Lands *as a collateral Security*. A. died. B. his Son entered and died. M. the Widow of B. recovered a third of those Lands for her Dower. On a Bill by J. S. to be relieved against that Recovery, the Question was, Whether a Dowress shall be relieved in Equity against a Term of 99 Years granted by her Baron by Virtue of a Power in the Deed of Settlement on his Father, who by that Deed was only Tenant for Life, Remainder in Tail to his Son (the Baron) with Power to grant a Term of 99 Years of Lands in *five Parishes?* Wright K. decreed Ejectment to be brought upon the 99 Years Term, and so the Widow would be evicted of Dower. 2 Vern. 278. pl. 342. Trin. 1700. and 2 Vern. 680. pl. 605. Hill. 1711. Williams v. Wray.

Ld. Wright held that she was not Dowable Ch. Prec. 151. Hill. 1700. S. C.——The Case of Williams and Wray came by Bill of Review before Ld. Harcourt, and on solemn Argument he reversed Ld. Wright's Decree, and ordered that the Plaintiff, the Lady Williams, having recovered Dower at Law, the Trust-Term set up by Sir B. Wray should not stand in her way in Equity. Wms's Rep. 137. to 139. Hill. 1710 S. C.

22. Lands

22. Lands in Fee are *devised to J. S. in Trust to pay the Devisor's Debts and Legacies, and to educate B. until 21 or Marriage, and then to settle the same on B. and the Heirs of his Body.* B. after 21 married M. and some Years after died, the Estate Tail not being settled according to the Will. M. brought her Bill, praying the Aid of Equity to help her to her Dower, and the same was decreed to her by the Master of the Rolls. 2 Wms's Rep. 632. 651. Hill. 1732. Sutton v. Sutton, alias, Banks v. Sutton.

However, that learned Argument may be considered as tending to prove in general, that a Woman ought to be endowed of a Trust; yet in that particular Case the legal Estate was, by the Will of the Donor, directed to be conveyed to the Cestuy que Trust at his Age of 21, and he living to that Age, according to the Principle abovementioned, his Widow was well intitled to Dower. 3 Wms's Rep. 232. in a Note of the Reporter, cites 2 Wms's Rep. 632. Banks v. Sutton.

23. *And* though in the Case above the Lands were in Mortgage at the Death of the Devisor to W. R. in Fee, so that B. was intitled to an *Equity of Redemption* only, yet the Master of the Rolls decreed her the Arrears of her Dower from her Husband's Death, *she allowing the third of the Interest of the Mortgage Money unsatisfied at that Time*, and her Dower to be set out, if the Parties differ. 2 Wms's Rep. 632. to 651. Hill. 1732. Sutton v. Sutton.

And the Master of the Rolls said that he did not know, nor could find any Instance, where a Dower of an Equity of Redemption was controverted and adjudged against the Dowress. Ibid. 651. —— The Editor at the End of the Pag. 651. refers to the Case of the Attorney-General v. Scot & al', 12 Nov 1735, when upon a Bill for Sale of an Estate, the Ld Talbot determined that a Wife should not have Dower of an *equitable Estate devised to the Husband who had mortgaged it* to the Defendant.

24. The Widow of a *Tenant in Tail of a Trust, to whom the legal Estate is by the Will of the Donor directed to be conveyed at his Age of* 21, and he living to that Age is intitled to Dower; Per Sir Joseph Jekyl Master of the Rolls. 2 Wms's Rep. 647. Hill. 1732. in Case of Banks v. Sutton.

25. A Dowress shall be *aided* in Equity *against a Trust-Term* attendant on the Inheritance; Per Sir Joseph Jekyl Master of the Rolls. 2 Wms's Rep. 646. Hill. 1732. in Case of Banks v. Sutton.

27. As Dower is more favoured in Law, Reason and Equity, than Curtesy, therefore *every Precedent for Tenant by the Curtesy of a Trust is an Authority for Dower of a Trust*; Per the Master of the Rolls. 2 Wms's Rep. 644. Hill. 1732. in Case of Sutton v. Sutton.

25. A Dowress shall have the Benefit of a *Trust-Term* against an Heir or Devisee, but not against a Purchasor; Per Sir Joseph Jekyl Master of the Rolls. 2 Wms's Rep. 639. Hill. 1732. in Case of Banks v. Sutton.

26. The Lady Handby the Grandmother of P. C. being seised in Fee, conveyed divers Lands to the Use and Intent that certain Trustees, in the Deed named, should receive and enjoy a Rent-charge of 30 l. per Ann. to them and their Heirs, with Power to distrain for the said Rent, and to enter and hold the Land on Nonpayment for 40 Days; and then the said Rent was to be to the Use of P. C. in Tail Male, Remainder to the Use of the same Persons that had the Land in Fee. P. C. to whom this Estate Tail was limited in the Rent died, leaving Issue Sir J. C. who intermarried with the Plaintiff the Lady C. and afterwards died without Issue Male; whereupon one Question was, Whether the Plaintiff, the Lady C. was dowable of this *Rent of which her Husband died in Tail Male?* After much Debate and Consideration, Ld. C. Talbot was of Opinion, that the Case of a Trust-Term, set up in Opposition to Dower, was nothing like the present; for there the Judgment is, that the Plaintiff in Dower shall recover, but

but cesset Executio during the Term, and if the Trusts of such Term are satisfied and at an End, the Term ought not to subsist in Equity to stop a favourite Right at Law as Dower, whereas in the Case of a Trust there is no Judgment at Law that the Wife shall recover her Dower, for the Husband had no legal Estate, nor consequently any Thing of which the Wife is dowable; And in the Case of a Purchasor, nay even with Notice, the Court would not relieve a Dowress against a Trust-Term that stood in her way. 3 Wms's Rep. 229. to 233. Hill. 1733. Chaplin v. Chaplin.

29. *Lands in Coparcenary descended upon A. and B.—A. died* in about 8 Months after, *before any Receipt of Rent or Partition made.* The Widow of A. brought a Bill against B. and others, charging, that Defendants had got Possession of all the Title-Deeds, whereby she was disabled to sue for Dower at Law, and therefore prayed to have Dower assigned Here. Defendants demurred, because Dower is a Right merely at Law, and triable by Jury, and that no Impediment was suggested why she could not recover there; and it was insisted, that for Detainer of Dower Damages were to be assessed by a Jury, and that she was not intitled to the Possession of the Deeds, but that they belonged to the Defendant; But Ld. Chancellor over-ruled the Demurrer upon both Points, saying, that in this Case A. dying before Receipt of Rent or Partition, she could not recover without the Deeds; and that as A's Estate was complicated she must here for a Partition, or else she must at every six Months End sue such as held jointly with her and received the Profits, as well for her Share as for Damages for Detainer, which he thought absurd and unreasonable. Cases in Equ. in Ld. Talbot's Time, 126. Trin. 1735. Moor v. Black.

For more of Dower in General, See Jointress, and other Proper Titles.

Droit de Recto, or [Writ of Right.]

(A) *Who* shall have it.

Fol 686.

1. A Parson shall not have it, because he has not any absolute Fee. 33 Edw. 3. Aid del Roy 103.

Br. Droit de Recto, pl. 1. that Parson nor Prebendary cannot have a Writ of Right, but a Juris Utrum. —— If a *Parson prays Aid in Writ of Right of the Patron and Ordinary*, and *they will not join*, there, per Hill, the Parson *may join the Mise*, and Judgment final shall be given Br. Droit de Recto, pl. 36. cites 29 E. 3. 34. and Fitzh. Scire Facias, 152.—Ibid. pl. 39. cites S. C.

See pl. 1.

2. A Prebendary shall not have a Writ of Right, for he has not an higher Estate than a Parson. Contra 33 Ed. 3. Aid del Roy 103.

3. A Dean of a free Chapel shall have a Writ of Right, though he hath no College or Common Seal, for he has an absolute Fee. 33 Ed. 3. Aid del Roy 103.

4 An Abbot shall have this Writ, for he hath the mere Right. 10 Ed. 4. 16. 8 H. 6. 24. b.

5. Tenant in Fee determinable, who has but a base Fee, as where he has an Estate to him and his Heirs so long as J. S. shall have Issue of his Body, may maintain a Writ of Right Patent, for he cannot have other Writ in the Right, as Tenant in Tail, or a Parson may.

6. If *Tenant in Tail* brings Writ of Right, the Tenant may say, That he has nothing but to him and the Heirs of his Body. Br. Droit de Recto, pl. 31. cites 5 E. 4 2.

7. If *Tenant for Life*, the *Remainder over in Fee loses by Default*, he in *Remainder shall not have Writ of Right*, for he *never had Possession*. Br. Droit de Recto, pl. 41. cites Litt. lib. 3. cap. 8.

8 *But if he had entered upon Tenant for Life, and he had lost by Default*, there he shall have Writ of Right upon this Possession. Ibid.

9. *None* can sue or maintain such Writ of Right Patent *but they who have an Estate in Fee Simple*, as Tenant in Fee Simple, or Abbot, or Prior, or Bishop, or Master of an Hospital; and a *Body Politick*, as Mayor and Commonalty, or Bailiffs and Commonalty &c. and such Bodies Politick may have such Writs for their Possessions. But *Parsons*, *Vicars*, or Chantery Priests, or Prebendaries, *who have Patrons and Ordinaries over them*, cannot maintain this Writ of Right Patent, but another Writ which is called Juris Utrum. F. N. B. 5. (C)

(A. 2) What shall be said Writs of Right.

1. QUO *Jure*, and *Ne injuste vexes*, are Writs of Right Br. Droit de Recto, pl. 31. cites 5 E. 4. 2.

S. P. *So* of Writ of *Right of Land, and of Customs and Services*, *Quod permittat in the Debet*, *Right of Advowson*, Writ of *Secta Molendini*, and Battle, or Grand Assise lies; and *e contra* of Writ of Right *of Ward*, *Cessavit*, *Escheat*, and Right *upon Disclaimer*, which are for the Seigniory, and the same Law of Writ of *Mesne*, as of Cessavit. Br. Droit de Recto, pl. 34. cites F. N. B. —— And Writ of *Rationabili Parte* is a Writ of Right in its Nature. Co. Litt. 158. b.

2. Note, That a Writ of *Formedon in Descender* is admitted a Writ of Right in its Nature, and ordered as a Writ of Right, and not as an Action possessory; quod nota. Br. Droit de Recto, pl. 33. cites 18 E. 4. 23.

3. *Juris Utrum* is a Writ of Right in its Nature Br. Double Plea, pl. 1. cites 19 H. 8. 7.

(B) *Against*

(B) *Against whom* it lies.

1. A Lessee for Life cannot join the Mise upon the meer Right. 20 H. 6 46.
2. A Parson cannot join the Mise upon the meer Right, for the Weakness of his Estate. 20 H, 6. 46.

(C) *Of what* Things and Estates it lies, *and at what Time.*

Of what *Seisin* it lies.

1. If Tenant for Life surrenders to the Remainder-man in Fee, (as it seems to be intended not in Tail) this is a sufficient Seisin to have a Writ of Right. 42 E. 3. 9. b.

2. If an Estate be to two, and the Heirs of one, and he that has the Fee (it seems that it should be he that has not the Fee) survives, and dies, and a Stranger abates, the Heir may have Right. 42 E. 3. 9 b.

3. If Tenant for Life grants his Estate to the Remainder-man in Fee, he may have a Writ of Right. 44 E. 3. 31. b.

4 A *Man aliened pending Præcipe quod reddat against him* &c. *and after lost by Judgment*; the Feoffee has not any Remedy by Writ of Right, nor in other Manner; For the *Recovery has Relation to the Teste of the Writ*. Br. Droit de Recto, pl. 24. cites 12 Aff. 41.

S.P. Ibid. pl. 26. cites 50 Aff. 3 per some of the Serjeants.

5. *But* if the *Tenant brings Writ of Error, and is restored*, the *Alienee may enter*. Ibid.

6. Affise, if a *Man gives in Tail or in Fee upon Condition by Deed indented*, the *Condition is broken*; and after *Discent is had*, yet the *Donor, Feoffor, or his Heir may enter*; for he has no other Remedy upon Condition but to enter; for he cannot have Writ of Right; for he *cannot join the Mise upon the meer Right upon this Possession*; The Reason seems to be inasmuch as by the Feoffment the Right departs, and also *Condition is not a Right but a Title*, and *upon Title without Right never lies Writ of Right*; quod nota. Br. Droit de Recto, pl. 25. cites 33 Aff. 11.

7. The Seisin requisite in Writ of Right ought to be *actual Seisin*, and not a Seisin in Law. 4 Rep. 9. a. by the Reporter in a Nota cites 35 E. 3. tit. Droit. 30. and Litt. Lib. 3. cap. Releases, fol. 112. accordingly.

8. In a Writ of Right the Demandant must count *of a Seisin in himself or his Ancestors, and it was in the same King's Time as he counts in his Count.* Litt. S. 514.

For if neither he nor his Ancestors were seised within the Time of Limitation, he cannot maintain a Writ of Right; For the Seisin of him of whom the Demandant purchased the Land &c. avails nothing. Co Litt. 293 a.

9. *Disseisor died seised*, and *his Heir enters and is disseised by A. B. the first Disseisee releases to the second Disseisor all his Right*, the *Son of*

the first Disseisor enters, the *second Disseisor brought Writ of Right*, and yet the Entry of the Heir of the Disseisor was lawful to the Possession; but by the Release of the first Disseisee the second Disseisor got the best Right. Br. Droit de Recto, pl. 52. cites 9 H. 7. 25.

10. *Copyholds* are of so base a Nature that a Writ of Right will not lie of them; Per Cur. 1 Salk. 186. pl. 4. 7 W. 3. C. B. in Case of Brittle v. Dade. cites F. N. B. 12. * (A).

* This is misprinted, and should be 12 (B)

11. A Writ of Right does not lie of *Rent*. And. 16. in pl. 3. Mich. 10 & 11 Eliz.

Bendl. 194. pl. 231. S. C. & S. P —— But Ibid Marg. cites Trin. 3 E. 3. [35]. Fitzh. Hors de son Fee, pl. 3. that Writ of Right of a *Rent-Charge* is maintainable. —— Co. Litt. 160. a. observes that some have inferr'd from Litt. S. 236. that it lies of a *Rent Seck*, or a Rent-Charge, though they are against common Right; but that in those Actions there mentioned, (as Assise of Mortdancestor, Writ Ayel and Cosinage, and all other manner of Real Actions) it is to be understood *after Seisin had* by some of the Demandant's Ancestors; For without an actual Seisin or Seisin in Deed none of these are maintainable. —— Fitzh. Hors de son Fee, pl. 27. cites Pasch. 15 E. 2. where it was agreed, that in Writ of Right of a Rent-Charge, the Demandant shall be received to have his Writ *without Shewing Specialty*; [which is an Admission that it lies of a Rent-Charge]. — But Fitzh. Droit, pl 31. cites 4 E. 3. It. Nott. that it lies not of a Rent-Seck, or Rent-Charge, nor of any Rent unless of Rent-Service. Per Herle.

12. If the *Guardian of the College which now is*, was ever seised he ought to *count upon a Seisin within* 30 *Years*; But upon the *Seisin of his Predecessor* he ought to count of a Seisin *within* 60 *Years*, as another common Person; For the change of the Teste of such a Seisin is as the dying seised, and descent of a common Person. Le. 153. pl. 212. Trin. 31 Eliz. C. B. All Souls Scholars in Oxford v. Tamworth.

13. A Writ of Right does *not* lie *of an Office*; For at the Common Law an Assise did not lie of it, but now it doth by the Statute of Westm. 2. cap. 25. for it was not Liberum Tenementum, but the Party grieved was put to his Quod Permittat; And of this Opinion was the whole Court. Le. 169. pl. 236. Mich. 30 & 31 Eliz. C. B. Salway v. Luson.

14. A Writ of Right was brought by Custos & Collegium of All-Souls in Oxon; and the *Writ was Quod clamant tenere de nobis in Liberam puram & perpetuam Elemosinam, & quod clamant esse jus & Hæreditatem suam* &c. And exceptions were taken to the Writ. First, It ought to be in Liberam Elemosinam, and not puram & perpetuam. Secondly, It ought to be Eleemosinam with a double *ee*. Thirdly, They ought not to shew any Tenure in Special, but generally Tenent de nobis. Fourthly, For that they *say not in jure Collegii*; Sed non Allocatur. For the first is but Surplusage, and not material; the Second the common Course is so, and therefore it is good. Thirdly, they did well to express the Tenure; for otherwise it might be taken for a Tenure in Capite, which they do well to avoid. Fourthly, When the Writ is by Custos & Collegium, this cannot be but in Jure Collegii, as in their Incorporation; for they have no other Capacity, and the Precedents are both Ways. Cro. E. 232. pl. 1. Pasch. 33 Eliz. C. B. The Warden of All-Souls College in Oxon v. Tamworth.

15. *Lands are let to A. for Life*, the *Remainder to B. for Life*, the Remainder *to the right Heirs of A.* A. dies, B. enters and dies, a *Stranger intrudes*; the Heir of A. shall have a Writ of Right of the Seisin which A. had as Tenant for Life. Co. Litt. 281. a.

16. *Lands are let to A. and B. and to the Heir of A. A. dies, a Recovery is had against B.* the Heir of A. shall have a Writ of Right of the Whole; for every Jointenant is seised per my & per tout. Co. Litt. 281. a.

17. If *Lands* be *given in Tail* the *Remainder to A. in Fee*, the *Donee dies without Issue*, his *Wife privement enseint*, *A. enters*, the *Issue is born*, and

and *enters upon him and dies, without Issue.* A. shall have a Writ of Right of the Seisin which he had. Co. Litt. 281. a.

16. If *Lands* be given *in Tail to A.* the *Remainder to his right Heirs, A. dies without Issue,* the *collateral Heir of A. shall have a Writ of Right of the Seisin of A.* Co. Litt. 281. a.

(D) Proceedings. And of joining the Mise, and by what Persons.

1. NOTE, that *the four Knights chose* 16 *of themselves and of others to try the great Assise,* and the *Sheriff returned that there were not so many Knights there,* by which *Process was directed to the four Knights to choose of the County next adjoining.* Br. Droit de Recto, pl. 40. cites 33 E. 1. and Fitzh. Trial, pl. 97.

2. *Right of Advowson was brought by the King,* the *Tenant shall not tender the half Mark,* nor shall Judgment final be given against the King. Br. Droit de Recto, pl. 43. cites 20 E. 3.

3. *Release of the Demandant himself, or of other Ancestor Collateral,* is a good Bar without joining the Mise, and Judgment final shall be given. Br. Droit de Recto, pl. 43. cites 20 E. 3. and Fitzh. Droit 21.

4. The *Tenant before any Issue may tender the Half Mark* to have the Seisin inquired. Br. Droit de Recto, pl. 37. cites 34 E. 3. and Fitzh. Judgment 256.

5. In Writ of Right the *Tenant joined the Mise,* and *Writ issued to make four Knights to come to choose the Grand Assise returnable Quindena Martini,* and *at the fourth Day one of the four Knights came and had Day over.* Br. Droit de Recto, pl. 3. cites 42 E. 3. 14.

6. Droit *by two against the Baron and Feme, of a House, six Acres* &c. and the *Baron and Feme came in proper Person and defended Tort and Force,* and *the Right of the Demandant all* † *attrenched and their Seisin* &c. *all entered as of Fee and of Right* &c. *and namely of a House* &c. *and put himself in God and the Grand Assise of our Lord the King, the which of them have the best Right to hold the House* &c. *to them and to their Heirs in Jure Uxoris as they held, or the Demandants to have as they demanded,* and after the *Baron made Default,* and the *Feme was received and joined the Mise,* ut supra; and after *she made Default,* and *Judgment final was given* against him, *that the Demandants recover Seisin* &c. *to hold in Common to them and their Heirs for ever,* quit of the Baron and Feme and their Heirs. And it is said there that the Feme in this Case is ousted of all Actions. Br. Droit de Recto, pl. 4. cites 44 E. 3. * 24.

† Quære the Meaning of the Word.

* This seems misprinted for 44 E. 3. 28. a. pl. 7 — Fitzh. Judgment, pl 99. cites 44 E. 3. 28. S. C.

7. Droit; the *Defendant made Default* by which *came two at the second Default and were received and vouched,* which *Vouchee* came and *pleaded at the Grand Assise,* and the *Writ issued to the Sheriff to return four Knights, returnable at a certain Day, at which Day the Vouchee and one of the Prayees were dead,* by which *Resummons issued to the other returnable at a certain Day, at which Day he was essoined;* Per Culpepper, the Process is discontinued; because the Death does not come in by Return of the Sheriff, and yet he was awarded to answer; by which he joined the Mise, and the *Writ issued to make the four Knights come,* and it was returned that there were not four Knights but Burgesses; and for Insufficiency of the Return, he was amerced, and other issued ut supra, returnable &c. at which Day the Sheriff returned it, by

 which

which *they were demanded and came to the Bar with their Swords by their Sides, and were charged well and lawfully to be twelve Knights Gladio cinctos of themselves, and of others who best knew and could say true between the Demandant and the Vouchee, and* was commanded by the Justices *that the Parties go into a Chamber with the Knights to elect and declare their Challenge to the other chosen by the four Knights*; For after the Return of the Panel made by the four Knights, the Parties shall not have Challenge to the Panel nor to the Polls before the Justices. Br. Droit de Recto, pl. 6. cites 7 H. 4. 3. 20. and 39 E. 3. accordingly.

8. In Writ of Right upon Disclaimer *Acceptance of Rent in Pais after the Disclaimer* is a good Bar; Agreed Arguendo. Br. Droit de Recto, pl. 47. cites 21 H. 6. 25.

9. *Warrant of Attorney* in Writ of Right offered to Littleton *was refused, because the Party himself did not come in Person to record it*; For he said that Writ of Right was stronger than a Fine; for it was in Writ of Right. Br. Garrant. de Attorney, pl. 32. cites 7 E. 4. 9.

10 *Tenant for Life may join* specially, viz. *That he has better Right to hold for Term of Life, the Reversion regardant to W. S.* &c. *than the Demandant has to demand* &c. Br. Droit de Recto, pl. 15. cites 9 E. 4. 36. Per Littleton.

11. A Man brought a Writ of *Droit close in Ancient Demesne*, and *made Protestation to sue in Nature of a Writ of Right at the Common Law*; The *Tenant joined the Mise upon the mere Right*, and upon that *removed the Record by Accedas ad Curiam*; but because that is no Cause, a Procedendo was awarded to the Bailiffs. Dy. 111. pl. 47. Hill. 1 & 2 P. & M. Abbot v. Stafford.

Dal. 68. pl. 36. S. C. in totidem Verbis.

12. It was holden by the Justices in this Case, That it is a good *Challenge* in a Writ of Right *to the four Knights, that they* ***are not*** *Gladiis Cincti*; and a Challenge to them *must be made upon their Appearance*; For after they are once sworn they are not challengeable; Also the four Knights are to make the Pannel, and they need not put their Names to the Return of it, as the Sheriff shall do, for this is not within the Statute of York; and they ought to return but twelve Persons besides themselves to be of the Grand Assise. Mo. 67. pl 181. Trin. 6 Eliz. Squire v. Read.

D. 247. b. pl. 75. Hill. 8 Eliz. S. P. because the Mise is joined and prayed by him first. Spyrtie v. Read. —— Ibid says the same Order was observed between Newburgh and Thornhill in Com' Dorset, 9 Eliz. —— Ibid. Marg cites the same Order observed for Land in Com' Hereford, Trin. 28 Eliz. in Case of Haydon v. Ibgrave.

13. In Writ of Right it was ruled per Cur. 1st, That *the Demy-Mark ought to be tender'd at the joining of the Mise*, and yet the Judges in the present Case took it at the Appearrnce of the Jury. 2dly, The *Tenant ought to commence in the giving of Evidence.* 3dly, The *Jury cannot give a Special Verdict.* Mo. 762. pl. 1057. Trin. 3 Jac. C. B. Andrews v. Ld. Cromwell.

14. A Writ of Right of Advowson a Purchasor cannot have, without *alleging a Presentation* in his own Time. 2 Inst. 356.

(E) Pleadings.

(E) Pleadings.

1. ASsize; it was faid, that in Writ of Right *of Seifin of his Anceftor*, *Laft Seifin* is a good Plea. Quære if it fhall be pleaded, or if the Half Mark fhall be tendered to inquire of it. Br. Droit de Recto, pl. 49. cites 5 Aff. 1.

2. Recto; Præcipe in Capite *of 20 Acres of Land quas clamat Tenere de Rege in Capite*, the *Tenant fhall not have Pleas that the Land is held of J. N. and not of the King*; but the Lord, if he be prefent, may demand his Count; but the Tenant may take it by Proteftation and Anfwer. Br. Droit de Recto, pl. 9. cites 38 E. 3. 13.

3. Writ of Right *Præcipe in Capite quam clamat Tenere de Nobis in Capite*, and *does not exprefs by what Services*, and Exceptions taken; & non allocatur. Br. Droit de Recto, pl. 50. cites 39 E. 3. 20.

4. In a Writ of Right, if the *Tenant pleads a Releafe of Anceftor by whom the Demandant claims*, this is only to the Affife or Battle; but if it be of an Anceftor Collateral, this is a Bar; But it feems that this is intended where the *Releafe* is *with Warranty*, for otherwife there is no Cafe Ex Parte of a Collateral Anceftor which never has Right. Br. Droit de Recto, pl. 6. cites 7 H. 4. 19.

5. In Writ of Right there are *feveral Defences*, *one at firft*, and then may *demand Oyer of the Writ*, and then *Defence after the Count*, and may *vouch or plead in Bar*, and *after the Replication made, to make Defence and anfwer* to it; Nota, per Newton. Br. Droit de Recto, pl. 11. cites 21 H. 6. 26.

Br. Defence, pl. 7. cites S. C.

6. Præcipe in Capite, the Tenant fhall not fay by *Plea that the Land is held of another, and not of the King*, but *fhall take it by Proteftation*, and plead other Matter. Br. Droit de Recto, pl. 19. cites 27 H 6 27.

7 Debt in Writ of Right the *Mife is joined*, and the *Tenant gave in Evidence a Releafe made in another County*, the *Grand Affife ought to find it*; For it is faid elfewhere, that *nothing may be pleaded in this Action but Collateral Warranty*, but all others fhall be given in Evidence. Br. Droit de Recto, pl. 48. cites 9 E. 4. 40.

Br. Enqueft, pl. 59 cites S. C.

8. In Writ of Right, the *Demandant counted of the Seifin of his Anceftor, or of himfelf*, this *fhall not be traverfed, but* the *Tenant may tender the half Mark to inquire of the Seifin.* Br. Droit de Recto, pl. 32. cites 10 E. 4. 9.

9. *But* if *fuch Recovery* in Writ of Right be *pleaded in Bar in other Action*, there the *Demandant may traverfe the Seifin by way of falfifying*; Quære inde if it be againft Privies. Br. Droit de Recto, pl. 32. cites 10 E. 4. 9.

10. *But* at this Day *Iffue may be tendered upon the Seifin by* the new Statute of Limitation, 32 H. 8. cap. 2. Br. Droit de Recto, pl. 32. cites 10 E. 4 9.

11. *Collateral Warranty* is a good Bar in Writ of Right, and it fhall not be tried by Grand Affife, but by Jury; for it is not upon the Right, but upon the Deed. Br. Droit de Recto, pl. 42. cites F. N. B. fol. 1.

12. Error upon a Judgment in Wales in a Quod ei deforceat in nature of a Writ of Right. Error affigned was, that the Iffue is not well joined, becaufe he *pleaded he has majus Jus tenendi Tenementa prædicta than the Plaintiff*, and he does *not fay fibi & Hæredibus fuis*, ac-

according to the usual Course; for it may be that he was Tenant for Life, or Tenant in Tail, and therefore because he did not shew in Certainty que Estate it was ill; sed non allocatur; for the Court would not intend he had a lesser Estate than in Fee, and if he were but Tenant for Life, it was at his own Peril to plead in that Manner, for it is a Forfeiture of his Estate; and it was held to be no Error. Cro. C. 178, 179. pl. 2. Hill. 5 Car. B. R. Griffith v. Jenkins.

13. In a Writ of Right there *ought to be a Double Defence*, viz. [*against*] *the Plaintiff's Right, and to maintain his own Right*; Arg. and seems admitted. Cro. C. 310, 311. Trin. 9 Car. B. R.

(F) Necessary or not. In what Cases.

1. MOrtdancestor; Note by Award, that *where the Father dies seised*, the *Heir enters*, and a *Stranger recovers against him by Writ of Entry ad Terminum qui præteriit by Default*, the *Heir may have Mortdancestor though the Recovery was by Default, and shall not be put to Writ of Right*; and so see that upon every Recovery by Default a Man is not put to his Writ of Right. Br. Droit de Recto, pl. 23. cites 11 Aff. 17.

2. If *Præcipe quod* reddat be brought *against Tenant for Life who vouches a Stranger*, and the *Demandant counterpleads*, and it is *found for the Demandant*, he in the *Reversion has no Remedy but* by Writ of Right. Br. Droit de Recto, pl. 30. cites 5 E. 4. 2.

3. *So* where the *Vouchee enters into the Warranty and loses* by Action tried or by Default. Br. Droit de Recto, pl. 30. cites 5 E. 4. 2.

(G) Judgment Final.

1. RIGHT *of Advowson brought by the King*; Judgment Final shall not be given against the King. Br. Droit de Recto, pl. 43. cites 20 E. 3.

2. Where the *Defendant joins the Mise*, and *Day is given to him till the next Week*, and *he makes Default at the third Day after* &c. Judgment Final was given upon the Default. Br. Droit de Recto, pl. 43. cites Fitzh. Droit, pl. 15. ——— And this see in Droit in Fitzh. 27. Itin. Northt. but Judgment shall be that he shall recover. 33 E. 3. Ibid.

3. Judgment final was given *against a Feme Covert after she was receiv'd and join'd the Mise and made Default*, and she was barr'd of Action for ever. Br. Judgment, pl. 45. cites 44 E. 3.

Ibid. pl. 35. cites S. C.— Ibid. pl. 55. cites S. C.

4. Droit, the Court was informed that the *Tenant had only in Tail*, and therefore they would not give Judgment final. And from hence it seems that Judgment final shall bind the Tenant in Tail and his Issue. And it was said, that it was for fear of barring the Issue in Tail; and they took Advisement. Br. Droit de Recto, pl. 46 cites 3 H. 6. 55.

5. In Writ of Right, the *Tenant vouch'd one who was taken and entred into the Warranty*, and the *Demandant counted*, and *he made Defence and joined the Mise*, and the *Demandant imparled till the next Day*, at

at which Day the *Vouchee did not come*, by which upon good Argument *Judgment final* was given for the Demandant against the Vouchee *to hold quit*, *but common Judgment in Value was given for the Tenant against the Vouchee*, and not Judgment final. Br. Droit de Recto, pl. 57. cites 10 H. 6. 2.

6. Writ of Right, if the *Demandant* be *nonsuited after Appearance*, *or after Mise joined*, Judgment final shall be given 18 E. 2. and 10 E. 2. and 1 E. 3. & concordat 13 H. 4. 8. Fitzh. Judgment, 245. and *in other Cases*, *Judgment final shall not be given unless they be joined*, unless in Special Cases as here. Br. Droit de Recto, pl. 60. cites 11 H. 6. 9.

7. Judgment final shall *not* be given *against an Infant* within Age, per Danby and Yelverton, but Choke and Littleton contra. And Littleton said that the Opinion of him and his Companions was, that if a *Feme Covert* be *received* in Writ of Right in default of her Baron and joins the Mise, and it is found for the Demandant, yet the Demandant shall not have Judgment, and this for the Advantage of the Baron. Br. Judgment, pl. 46. cites 9 E. 4. 16.

8. Writ of Right *against an Infant within Age*, *who appear'd by Guardian*, *and vouched one who enter'd into the Warranty and joined the Mise*, *and after made Default*. Catesby prayed Judgment final against the Tenant, and had it upon great Debate. Br. Droit de Recto, pl. 15. cites 9 E. 4. 36.

9. *But* it is said that *if he had joined the Mise himself*, Judgment final should not be given against him. And per Choke J. *when he vouches*; he *loses the Benefit of his Age*, as if he had pleaded in Bar. Br. Droit de Recto, pl. 15. cites 9 E. 4. 36.

Note per Danby and Yelverton, Judgment final shall not be given *against an Infant*; Contra per Choke and Littleton. Br. Droit de Recto, pl. 17. cites 9 E. 4. 10.

10. The *Tenant shall have Judgment final against the Demandant if* it pass for him. Br. Droit de Recto, pl. 15. cites 9 E. 4. 36.

11. Droit, *Issue was joined upon the mere Right upon the grand Assise*, *and Nisi Prius issued*, *and at the Day the Tenant made Default*, and the *Demandant prayed Judgment final*. Br. Droit de Recto, pl. 28. cites 12 H. 7. 10.

12. *For if* the Demandant be *nonsuited after the Mise joined*, the Tenant shall have Judgment final. Br. Droit de Recto, pl 28. cites 12 H. 7. 10.

13. *And if* the Tenant *has Day to imparl to another Day in the same Term*, *and makes Default at the Day*, the Demandant shall have Judgment final. Br Droit de Recto, pl. 28. cites 12 H. 7. 10.

14. *But by Default of the Tenant at the Nisi Prius*, *the Demandant cannot have but only Petit Cape*, by which he sued Petit Cape. Br. Droit de Recto, pl. 28. cites 12 H 7. 10.

15. *And if the Tenant joins the Mise by Champion*, *and at the Day appears*, *and his Champion not*, Judgment final shall be given. Br. Droit de Recto, pl. 28. cites 12 H. 7. 10.

16. And *if the Tenant at the Day of the Return of the Petit Cape cannot save his Default*, Judgment final shall be given. Br. Droit de Recto, pl. 28. cites 12 H. 7. 10.

17. And per Vavisor *if the Demandant makes Default after the Mise join'd* he shall be barr'd for ever. Br. Droit de Recto, pl. 28. cites 12 H. 7 10.

18. Note, per Fitzherbert J. Judgment final *shall not be given* in Writ of Right, *but after the Mise joined*. Br. Droit de Recto, pl. 16. cites 26 H. 8. 8.

Br. Judgment, pl. 44. cites S. C.

And

Br. Judgment, pl. 44. cites S. C.

19. *And* by him and Shelly J. *where the Tenant vouches* in Writ of Right, *and the Demandant recovers against the Tenant and the Tenant over in Value* the *Judgment shall not be final for the Tenant against the Vouchee*; Quod Nota. Br. Droit de Recto, pl. 16. cites 26 H. 8. 8.

Bendl. 190. pl. 228. Low and Kyne v. Paramour, S. C. and the Pleadings and Judgment. The Reporter says he was of Counsel with the Demandant, and that the Nonsuit was by reason of an Agreement made between the Parties by the Justices.

20. In a Writ of Right the *Tenant chose Trial by Battel*, but when every Thing was prepar'd and perform'd, and the Day and Place appointed for the Battel, the *Demandants being solemnly call'd, made Default*, whereupon Final Judgment was against him. D. 301, 302. a Trin. 13 Eliz. Thevin v. Paramour.

21. In Writ of Right the *Issue was join'd on the meer Right, and when the Jury came to the Bar to give their Verdict*, the *Demandant was called, but did not appear*, whereupon the Tenant pray'd the Court to record the Nonsuit, and so it was done. Per Cur.. all is one as it he had appear'd; For *this Nonsuit is peremptory* for ever by reason that the Issue is join'd upon the meer Right, but had the Issue been join'd upon any *Collateral Point* it had been otherwise. Gouldsb. 90. pl. 1. Trin. 30 Eliz. Heiden v. Smithwick.

Mo. 403. pl. 536. Ap-Richard v. Penry S. C. The opinion of the Court upon Conference with several of the Justices of England was, that the Judgment ought to be affirmed.—Jenk. 259. pl. 56. S. C. accordingly. And says that a Writ of Error should have been brought to reverse the first Judgment, and if it had been reversed, yet it had not reversed the second Judgment; For the second Judgment was Collateral and independent, and it is executed. And in a Writ of Right, if the Tenant before the Mise joined loses by Default, he may have a Writ of Right against the Demandant, who has Execution against him upon the said Judgment by Default.

22. In *Quod ei deforceat in Wales* in the Nature of a Writ of Right, according to the Course there the *Mise was joined upon the mere Right*, and *Venire Facias return'd* and 12 *were Sworn, and before Verdict the Demandant was Nonsuited*, and *thereupon Judgment Final* was given. The Demandant afterwards brought another Quod ei deforceat. The Tenant pleaded the first Judgment in Bar. The Demandant demurr'd, and Judgment was given against him, whereupon Demandant brought Writ of Error, but Judgment was affirm'd. Resolv'd, 1st, that tho' by the Statute of Rutland 12 E. 1. Trial in Wales in Writ of Right shall be by 12 Common Jurors, yet Judgment final shall be given as before the Statute, and tho' the Manner and Dignity of the Trial be alter'd, yet the Judgment remains. 2dly, If *Judgment final* be *given in Writ of Right where it ought not, yet it shall bind till it be reversed*. 3dly, If the *Tenant after the Mise joined makes Default*, Judgment final shall not be given, (as F. N. B. 6. holds) but *Petit Cape shall issue*; For peradventure he may save his Default. 5 Rep. 85. b. Trin. 38 Eliz. B. R. Penryn's Case.

23. Seeing the Mise is join'd upon the mere Right, tho' the *Verdict of the Grand Assize be given upon another* Point, yet Judgment final shall be given. Co. Litt. 295. b.

But see Penryn's Case the third Resolution, e contra.

24. So if after the Mise joined the *Tenant makes a Default, or confesses the Action*, or if the *Demandant* be *Nonsuit*. Co. Litt. 295. b.

9 Rep. 85. b. Trin. 38 Eliz. Penryn's Case. S. P.

25. The Form of the Final Judgment is *Quod tenens teneat Terram illam sibi & Hæredibus suis in Pace versus petentem & hæredes suos in Perpetuum*. Co. Litt. 295. b.

26. The

26. The Statute of 34 E. 1. nor the Statute of 4 H. 7. as to Fines extends to Nonclaim upon a Judgment in a Writ of Right, and so the *Common Law in this Cafe remains to this Day*, viz. that Claim muft be made within a Year and a Day after Judgment. Co. Litt. 262. a.

Co Litt. 254. b. S P.

For more of Droit de Recto in General, See other proper Titles.

Durefs of Imprifonment.

(A) *What* Things may be *avoided by* Durefs.

Fol 687.

1. A Statute-Merchant may be avoided by Audita Querela, because it was made by Duress of Imprisonment 20 E. 3. Audita Querela. 27.

See tit. Audita Querela (E) pl. 53. S. C. and the Notes there

2. A Man fhall avoid *Outlawry* by Durefs of Imprifonment at the Time of the Outlawry pronounced. Br. Durefs, pl. 21. cites 38 Aff. 17.

3. *Formedon in Defcender*; the *Tenant faid that he made the fame Gift by Durefs of Imprifonment done to him by the Father of the Demandant to make the Gift*; Judgment &c. and a good Plea, by which the other faid, that at large and not by Durefs; Prift. Br. Durefs, pl. 3. 3. cites 41 *E.* 3. 9.

4. *Feoffment by Durefs* or Menace is not void, but voidable. Br. Feoffment de terre, pl. 48. cites 18 E. 4. 27.

5. A Man may avoid a *Bond made upon the Statute* 23 *H.* 8. *cap.* 6 *of Recognizance by Durefs*, and yet this is matter of Record. Br. Durefs, pl. 19. cites F. N. B. fo. 120.

6. *Declaration of Ufes (on a Fine)* by a Man in Durefs, denied to be good; Per Anderfon. 2 Le. 159. pl. 193. 21 Eliz. in the Star-Chamber. Anon.

And if Men compelled by Threatnings or Imprifonment fhould be *admitted to levy Fines*, they fhould thereby be barred, becaufe the Law intends fuch Perfons are at Liberty when they acknowledge Fines, 17 Ed. 3. 52 78. 17 Aff. 17. Well's. Symb. S. 11.

7. *Feme Covert* by Durefs in a *Leafe* with her Husband, the fame fhall bind her. 3 Le. 72. Per Manwood J. pl. 110. Hill. 20 Eliz. C. B. Northampton's Cafe.

8. N. brought *Debt upon Arrearages of Accompt*; the *Defendant fhewed that before the Accompt, the Plaintiff of his own Wrong did imprifon the Defendant, and affigned Auditors to him* being in Prifon, and fo the Account was made by Durefs of Imprifonment, and the fame was holden

den a good Plea by all the Juftices of both the Benches; and Judgment was given accordingly. Le. 13. pl. 17. Hill. 25 Eliz. B. R. Northumberland's Cafe.

Againft a Deed inroll'd a Man fhall not take Averment that it was by Durefs; for this is contrary to the Record. Roll Abr. 862. Eftoppel (A) pl. 2. cites 16 H. 7. 5. b. —— Br. Faits Enroll, pl. 17. cites 16 H. 7. 5. S. P. per Curiam.

9. *J. S. by Deed inrolled* in Chancery, *bargained and fold a Houfe and certain Lands to the Plaintiff, and after took the Goods again, and would avoid this Bargain* and Sale inrolled, *by Durefs of Imprifonment.* Godfrey faid, it cannot be avoided by fuch nude Matter in Fact, cited 7 Ed. 4. 5. 39 Hen. 6. 32. 13 Ed. Eftoppel 18. 48 E. 3. 33. For being inrolled it is a Thing of Record. Morgan contra; and he faid a Deed inrolled is no Record, but a Thing recorded 16 H. 7. 5. and cited Browne and Wefton's Opinion in one Morley's Cafe accordingly. The Court faid the Cafe was doubtful, and they would advife; but afterwards they conceived it would be hard to avoid the Deed by Durefs, but no Judgment was given, becaufe the Parties agreed. Cro. E. 88. pl. 12. Hill. 30 Eliz. B. R. Hamond v. Barker.

10. If a Party menace me, except I will *make unto him a Bond of 40 l. and I tell him that I will not* do it, *but I will make* unto him a *Bond of 20 l.* The Law fhall not expound this Bond to be voluntary, but fhall rather make Conftruction that my Mind and Courage is not to enter into the greater Bond for any Menace, and yet that I enter by Compulfion notwithftanding in the leffer. Bacon's Elements 81.

11. If I will *draw any Confideration to myfelf*, as if I had faid I will enter into your Bond of 40 l. *if you will deliver me that Piece of Plate.* Now the Durefs is difcharged, and yet if it had moved from the Dureffor who had faid at the firft you fhall take this Piece of Plate and make me a Bond of 40 l. now the Gift of the Plate had been good, and yet the Bond fhall be avoided by Durefs. Bacon's Elements 81.

12. A *Feoffment*, if made by Durefs, and the *Party himfelf delivers Seifin*; or in Cafe a *Gift of Goods* be made, *and he himfelf delivers them*, the fame are avoidable at any Time by Entry Action &c. but if they deliver it not with their Hand, as in a *Feoffment, by Letter of Attorney*, or in a *Grant of a Rent, Advowfon* &c. nothing at all paffeth. Finch's Law 102, 103.

13. A *Feoffment* by one *by Durefs is* not void *but voidable by Entry or Action, and that only by Privies in Blood inheritable*, and not by Privies in Law or Eftate. A *Bond* made by him cannot be avoided by Durefs on Non eft factum. A *Feoffment by Letter of Attorney* by Durefs is void, and the Feoffee a Diffeifor. 2 Inft. 482, 483.

14. If *Agreement be compelled by Threats* it fhall not bind. 3 Car. Toth. 67. Plowden v. Marfham.

15. If the Defendant is arrefted, and in Execution, and A. becomes bound for him to the Plaintiff, and the *Defendant gives A. a Judgment for his Counter-Security*, it is good though *no Attorney be prefent*, and it is not within the common Rule of Court, becaufe not given to the Perfon himfelf but to a third Perfon; Per Holt Ch. J. 5 Mod. 144. Mich. 7 W. 3. Churchy v. Roffe.

16. In Cafe of a pretended real *Difcharge of the Bailiffs before a Warrant of Attorney executed* by one under an Arreft for a juft Debt. Holt Ch. J. declared he would be well fatisfied by *Affidavits* that the Bailiffs were fo difcharged, as that if the Defendant had refufed to execute the Warrant they would not come again and feife on him, and that he would have Reafon to believe before he would let the Judgment ftand. 7 Mod. 139. Hill. 1 Ann. B. R. Gidden v. Drury.

17. If A. be arrefted on Procefs out of C. B. or any inferior Court, and gives a Warrant *to confefs a Judgment* in this Court while *in Cuftody*, no Attorney being there prefent, we can examine and fet afide this Judgment; otherwife where it is to confefs a Judgment in another Court. 1 Salk. 402. Mich. 2 Ann. B. R. Anon.

(B) *What* fhall be *Durefs.*

To avoid a Thing.

[And though made on another Perfon.]

1. If a Man be lawfully in Prifon, yet if he makes an Obligation againft his Agreement and Will, he may avoid it by Durefs. 43 E. 3. 10. b. 6.

2. Otherwife if he does it of his good Will. 43 E. 3. 10. b. 11 H. 4. 6. b.

Debt upon *Obligation* the *Defendant* pleaded that it was made *by Durefs*, and the *Plaintiff faid that he was his Receiver and Affigned Auditors to him to hear his Account who committed him to Gaol for Arrears, and there he made this Obligation for his Deliverance of his own Will*; and held a good Plea; by which the Defendant pleaded other Iffue, for this is not by Durefs. Br. Durefs, pl 4. cites 43 E. 3. 10.

3. If a Man makes a Deed by Durefs done to him by taking of his Cattle, though there be no Durefs done to his Perfon, yet this fhall avoid a Deed. 20 Aff. 14. Adjudged.

S P. awarded before the King's Council. Br. Durefs, pl. 12. cites S. C. ——— S. C. cited Arg. 11 Mod. 202, 203.

4. A Servant fhall not avoid a Deed made by Durefs to his Mafter. M. 7 Jac. B. per Coke.

Nor fhall a Man avoid a Deed by Durefs to his Servant. 2 Brownl. 276. Mich. 7 Jac C. B. Anon.

5. But a Son fhall avoid his Deed by Durefs to his Father. M. 7 Ja. B. per Coke.

So a Father fhall avoid a Deed by Durefs of Imprifonment of his Son. 2 Brownl. 276 Anon. ——— Per Wylde if the *Durefs* be *to a Father or Brother* and a Son enters into Bond, this is a Durefs to the Son and he may plead it; But per Twifden a Man fhall in no Cafe avoid his Deed by a Durefs to another, let him be related How he will. Freem Rep. 351. pl. 440. Mich. 1673. in Cafe of Wayne v. Sands.

6. The Baron fhall avoid a Deed made by Durefs to his Wife. M. 7 Ja. B. per Coke.

S. P. per Collowe, quod fuit conceffum. For Baron and Feme are one and the fame Body and Perfon in the Law. Br. Durefs, pl. 18. cites 21 E. 4. 8. 14 & 15 ——— 2 Brownl. 276. Anon. S P. accordingly. ——— Sid. 123. S. P. cited per Cur. as adjudg'd 7 Jac. in Cafe of Luntrell v. Witherington.

[6.] A Man fhall not avoid a Deed by Durefs to a Stranger. M. 7 Ja. B. per Curiam. M. 13 Ja. B. where the Obligation is joint and feveral.

A Man cannot avoid an Obligation by Imprifonment of any other Friend than his Wife. Br. Durefs, pl. 18. cites 21 E. 4. 8. 14 & 15 ——— Ld Raym. Rep. 357. Arg. S P.

7. If A. and B. make an Obligation by reason of Duress done to A. B. shall not avoid this Obligation, though A. may, because he shall not avoid it by Duress to a Stranger. M. 7 Ja. B. per Curiam, between *Montall and Woollington.*

8. If a Pursuivant of the High Commission, upon a Suit, and by their Command imprisons a Man until he enters into a Bond to appear in the Court of Audience, this Obligation may be avoided by Duress, because the Suit there was upon a Contract, of which they had not original Conusance, and therefore the Imprisonment wrongful. H. 8 Ja. B. between *Cufford and Huntly*, per Curiam resolved.

9. In Assise it was found that the *Conusor upon Statute Merchant after Execution sued against him takes the Conusee by Force, and swears him that he shall render him the Land*, and *of his own Will he releases all Actions of Debt and Trespass, and after he of his own Will surrender'd the Land*, and this Oath he took for fear of Death; and therefore notwithstanding the Surrender was made at large, yet because it was done by reason of Duress before, therefore Perning adjudged it a Disseisin, when the Conusee entred by such Surrender. Br. Duress, pl. 11. cites 14 Ass. 20.

10 If a *Release be made at D.* it is a good Plea that *a Stranger menaced him at S.* by reason whereof he menaced him at D. Br. Faits, pl. 81. cites 43 E. 3. 19.

11. A Writing *made by Duress*, and *delivered at large* was adjudged void, Anno 6 R. 2. Per Rolf. Br. Duress, pl. 20. (bis) cites 8 H. 6. 7.

12 Duress cannot be to a *Body Politick*, but may be *to a Mayor*, to do a Thing belonging to his Office; by the best Opinion; For he is Head of the Corporation. [And] Imprisonment of the natural Body in a Pillory is imprisonment of all the Body. Fer intire. Br. Duress, pl. 18. cites 21 E. 4. 8. 14, 15.

13. Where a Man is *imprisoned by Capias* &c. by the Law, *and makes an Obligation for his Deliverance*; this is good, and not by Duress. Br. Duress, pl. 15 cites 4 E. 4. 17.

14. In Replevin, if a *Man be condemned to me and in Execution*, and *makes to me an Obligation for his Deliverance*, this Obligation is not by Duress. Br. Duress, pl. 17. cites 12 E. 4. 7.

15. If I *menace* you *in one County* to make an Obligation of 20 l. *and after at another Day* I find you *in another County*, and I demand if you will make the Obligation to me, and you make the Deed according to my first Request in the first County, this Obligation is avoidable because it has its Respect, and *was made by Reason of the first Menace in the other County.* Per Frowike Ch. J. Kelw. 52. b. pl. 7. Trin. 19 H. 7. in Case of Keble v. Vernon.

16. A. is *imprisoned till he promises to enter into an Obligation who does it when he is at large*, yet he may plead this to be per Duress. D. 143. b. Marg. pl. 56. cites Mich. 23 Eliz. per Meade.

17. Debt upon an Obligation was brought by B. against U. and H. who pleaded the Statute of 23 H. 6. and shewed that *U. was in Execution*, and that *the Bond was made for his Deliverance* against the Statute; The Plaintiff *replied*, and said, *that at the Time of the making* of the said Bond, *the said U. fuit sui Juris, and at large, absque hoc that he was in Prison tempore confectionis scripti prædict' modo & forma* &c. Egerton Solicitor moved, that the Traverse was not good; for if a Man be

be in Prifon in Execution, and makes a Promife to make a Bond for which he is enlarged, and within an Hour after he makes the Bond, the fame is within the Statute; and therefore this Iffue is not well joined, but it ought to be *abfque hoc, that it was pro deliberatione* &c. And of fuch Opinion was Fenner and Gawdy Juftices. 2 Le. 107. pl. 136. Pafch. 32 Eliz. B. R. Bows v. Vernon. See Dive v. Manningham. 4 E. 6. Plo. Com. 68, 69. Acc.

18. Debt upon Obligation, the Cafe was, A. *Sheriff* of C. *by* Virtue of *an Attachment under the Seal of the Court of Requefts, took the Defendant, and for his Enlargement he made* this *Obligation to appear before the Queen's Council attending the Court of Requefts* at Weftminfter; It was the Opinion of the Court, that this was not lawful, but taken by Durefs, and fo avoidable, becaufe *that Court had not any Power by the Statute, or by the Common Law*; It was adjudged for the Defendant. Cro. E. 646. pl. 58. Mich. 40 & 41 Eliz. Stepney v. Lloyd.

2 And 122. pl. 66. S. C. adjudged — 4 Inft 97. cap. 9. S. C.

19. Debt by a Sheriff on a *Bond for the Appearance of T.* &c. the Defendant *pleaded, that W. fued out a Capias which was deliver'd to the Plaintiff (Sheriff of Oxford) who made a Warrant to the Bailiff* of the Liberty of H. to arreft the faid T. *and that one J. S. put his own Name in as a fpecial Bailiff to arreft him*; *and* that he *did arreft him at D. in the faid County, and carried him to R.* in the County of Berks, *and there kept him till he and T. gave the faid Bond*; adjudged an ill Plea, for though the Bond was made by Durefs as all the Court agreed, and that the Defendant might well have pleaded it and relied upon it, yet it is not within the Statute 23 H. 6. nor is the Defendant aided thereby. For T. never was in the Sheriff's Cuftody after the Arreft; And the Bond taken out of the County is by Durefs, but not within the Statute. Cro. E. 745, 746. pl. 23. Hill. 42 Eliz. B. R. Brown v. Adams.

20. If a Man menace me, that he will imprifon or *hurt in Body my Father*, or my *Child, except I make fuch an Obligation*, I fhall avoid this Durefs as well as if it had been to my own Perfon. Bacon's Elements 66. Becaufe *Perfona Conjuncta æquiparatur Intereffe propriæ*.

21. Anciently there was a Writ of *Dum fuit in Prifona*, where an Alienation was made by Durefs, and that for the party himfelf. 2 Inft. 482.

22. *Every Reftraint of a Man's Liberty* is an Imprifonment, tho' he be not within the Walls of any Common Prifon. 2 Inft. 482.

23. Durefs *per minas aut Caufa metus* are fufficient to avoid a Man's own Act in four Cafes, viz. 1ft, For fear of Lofs of Life. 2dly, Of Lofs of *Member*. 3dly, *Of Mayhem*, and 4thly, *Of Imprifonment*; otherwife it is for fear of *Battery*, which may be very light, or *burning of his Houfes*, or *taking away or deftroying of his Goods*, or the like, for there he may have *Satisfaction* by Recovery of Damages. 2 Inft 483.

24. Durefs is where a Man is compelled to do a Thing by Imprifonment, or *Fear of fome bodily Hurt threatned to himfelf*, * *not to his Father, Mother* &c. as Lofs of Life and Member, or though it be but of *Imprifonment*; for Imprifonment is a corporal pain, and one may bee imprifoned that he may dye of it. Otherwife it is of a *Menace to break or burn down ones Houfe*, for that is but the Lofs of one's Goods. Finch's Law. 102.

* See pl. 5.

25. If a Man be *imprifoned by Order of Law*, the *Plaintiff may take a Feoffment* of him, *or a Bond for his Satisfaction, and for the Deliverence of the Defendant* notwithftanding that Imprifoment, for this is not by Durefs, becaufe he was in Prifon by Courfe of Law; for it is

S. P. as to a Bond obtain'd; and if in fuch Cafe Durefs

not

be pleaded the other may fay that of his own Accord fine Duritia Imprifonamenti without faying abfque hoc that it was per Duritiam Imprifonamenti. 3 Le. 239. pl. 330 Mich. 32 Eliz. C. B. Knight v. Norton. And Ibid. fays it was fo holden in B. R.

not accounted in Law Durefs, but where either the Imprifonment or the Durefs that is offered in the Prifon, or at large is tortious and unlawful, for *Executio Juris non habet Injuriam.* 2 Inft. 482.

In Debt on an Obligation, the Defendant *that one R. was bound with him, and that R. enter'd into the Bond by Durefs*, but it feemed to the Court that it was no Plea; For a Man fhall *not avoid his own Bond by a Durefs to another*, tho' he be but a Security. Freem. Rep. 351. pl. 440. Mich 1673. Wayne v. Sands.

26 Debt on an Obligation of 40 l. conditioned to pay 24 l. The Defendant pleaded, that W. R. was imprifoned by Covin of the Plaintiff, and detain'd there in Danger of his Life, againft Law, until the faid W. R. fhould pay the faid 24 l. or become bound with a furety for Payment thereof; whereupon, to inlarge the faid W. R. and to avoid Danger of his Life, he and the faid *Defendant as Surety* for the faid W. R. *entred into the faid Bond* &c. Adjudg'd to be *no Plea for the Surety*, tho' it had been a good Plea for W. R. For none fhall avoid his own Bond for the Imprifonment or Danger of any but of himfelf only. Cro. J. 187. pl. 8. Mich. 5 Jac. B. R. Hufcombe v. Standing.

27. *Mayor and Commonalty* may avoid a Deed fealed, by Durefs of Imprifonment of Mayor. 2 Brownl. 276. Mich. 7. Jac. C. B. Anon.

28. A Man may avoid Seifin for Payment of *Rent* by Coertion *of Diftrefs*, but not his Deed. 2 Brownl. 276. Mich. Jac. C. B. Anon.

And the Imprifonment in fuch Cafe to avoid the Deed *muft be fuch as was made for the making the Deed* &c. See Perk. 9 S. 17. 18. cites 8. Aff. pl. 25.

29 If a Man be imprifoned upon a formal Suit, tho' there was no juft Caufe of Suit yet if he give a Bond for his Releafe he fhall not avoid it by a Durefs; For 'tis *Incarceratio Legitima*, that is by Law, tho' the Plaintiff did untruly procure it. Hob. 266. pl. 352. in Cafe of Waterer v. Freeman.

30. An Agreement for *furrendering of a Copyhold* (tho' *made* when the Party was *in Prifon*) upon Bonds for Performance thereof. Toth. 66. 3 Car. Wadbroke v. Cheeke.

31. In Debt upon a Bond of 10 l. and by Durefs pleaded, the Cafe upon Evidence was, that the Plaintiff *charged the Defendant with Felony* for ftealing a Horfe, and procured a Warrant to a Conftable, whereby he was taken, and being in Cuftody, upon Promife of the Plaintiff to difcharge him fealed the Bond, and was thereupon immediately difcharged, and it appeared that the Horfe was the Defendant's Horfe; And Roll directed the Jury, that thefe Proceedings being but to *cover the Deceit*, the Bond was gotton by Durefs, whereupon the Plaintiff was nonfuited. All. 92. Mich. 24 Car. B. R. Anon.

32. A *Man having no good Caufe of Action caufes another to be arrefted, and to be detained in Prifon until he made a releafe, with Menaces that he fhould lye there and rot if he would not Seal* a Releafe, upon which a Releafe was executed, and the Man was difcharged. On Evidence at Guildhall Bridgman Ch. J. held, that the Party here being in Cuftody by the King's Writ, this was no Durefs to be pleaded in Avoidance of a Deed, and being arrefted without Caufe he may have an Action, but he offered to have it found fpecially if Baldwin the Counfel would pray it but he did not, and fo the Jury gave their Verdict

Verdict that it was a good Release. Lev. 68. 69. Trin. 14 Car. 2. at Guildhall. Anon.

33. If a *Bond* be *given by Force or Terror, tho' not so as to make it to be for Duress*, it ought to be set aside, or at least not carry'd into an Execution; Per Wright K. 2 Vern. 467. pl. 447. Pasch. 1705. in Case of Attorney Gen. ad Relationem Collart & Dutrie Sothon.

34. A Man cannot avoid a Bond by Duress of *Imprisonment of a Stranger*; Arg. Ld. Raym. Rep. 357 Trin. 10 W. 3.

35. A Man arrested and under Confinement of the Bailiff gives a Warrant of Attorney to confess a Judgment, and *no Attorney by*, it is always taken to be by Duress; But if a Man that has been *long in Gaol*, voluntarily confesses a Judgment to his Creditor that comes to him, that Judgment is good, though no Attorney is by; And if one *imprisoned in B. R.* confess Judgment or Action to another, it is good, As if Declaration be delivered to one in Custody of the Marshal, and he confesses the Action and gives Judgment, though no Attorney by, yet it is good; Per Holt Ch. J. 7 Mod. 115. Mich. 1 Ann. B. R. Anon.

36. A *Barge was attach'd on the Thames by Process out of Windsor Court*, and the Manager or *Governor of the Barge gave a Bail Bond for his Master to appear* in Windsor Court, to answer in a Plea of Trespass. The Question was, whether this was a Bond obtained by Duress, and therefore void, but the Bond was adjudged good. 11 Mod. 201. Hill. 7 Ann. B. R. Sumner v. Ferryman.

37. A Bond shall never be avoided by Duress but when the *Person is put in some Terror*. and So when his Goods and Chattels are taken illegally or irregularly, but in such Cases he may avoid his Bond; Arg. 11 Mod. 202. Hill. 7 Ann. B. R. But ibid. Powell J. said, that a Man cannot avoid a Bond by Duress to his * Goods, but only to his Person; But the Reporter adds a Quære.

* Because he may have an Action for them if taken. Perk. S. 18.

(C) *By whom* being *made*.

A *Stranger*.

1. DURESS by a Stranger by Procurement of the Party that shall have the Benefit, **is a good Cause to avoid &c.** 43 E. 3. 6.

Br. Duress, pl. 20 cites S. C — S P. but the Opinion of Rede and others was, that this is no Plea without making the Obligee a Party to this Duress. Keilw. 154 a. pl. 3. Mich. 1 H. 8.

2. **Duress of Imprisonment** by the Master to his Servant, to make an Obligation to the Obligee, **is good Cause to avoid the Deed.** 6 H. 4. 5. **adjudged.**

(D) Pleadings.

Br. De son tort &c. pl. 8. cites S. C.

1. WRIT of *Error upon a Judgment in Re-disseisin given against him at the Suit of the Father of the Defendant*, and the *Defendant pleaded a Release of all the Right, and of all Actions and Demands made to his Father*; And the *Plaintiff said, that this was made by Duress of Imprisonment*; and the *Defendant said, that he was imprisoned by Virtue of the same Condemnation, and made the Release for his Deliverance, absque hoc that he was otherwise imprisoned*; Prist; Judgment &c. and the *other said, he imprisoned him De son tort Demesne, and without such Cause till he made the Release* &c. Prist. and the other e contra. Br. Duress, pl. 6. cites 11 H. 4. 6.

2. Where a Man *avoids a Deed by Duress at D. in another County*, it is no Plea nor Evidence for the Party to *say that he never came to D.* for the Place is [not] traversable there; For if it be by Duress *in any Place it is sufficient*. Br. Traverse per &c. pl. 53. cites 14 H. 4. 25.

3. If a Man *makes Writing by Duress or Menace*, and *makes Defeasance of it at large*, there the Defeasance estops him to say that it was made by Duress &c. by the best Opinion. Br. Defeasance, pl. 17. cites 3 H. 6. 16. and 35 H. 6. 18.

4. Debt upon Obligation; Chock said, the Plaintiff *took and imprisoned him at T. and from thence brought him in Prison to C. by Force of which* Imprisonment he made the Obligation &c. These two Imprisonments are double; Quod Curia concessit. Br. Duress, pl. 7. cites 38 H. 6. 13.

S. P. per Moile, but per Laicon contra; for Imprisonment was determined before. Br. Double Plea, pl. 79. cites S. C.

5. *By which he said, that he took and imprisoned him at T.* ut supra, *till he agreed to make to him the Obligation, by Force of which Imprisonment he made the Obligation at C.* and a good Plea; Per Moile. Br. Duress, pl. 7. cites 38 H. 6. 13.

6. *Debt upon Obligation upon a Covent Seal*, it is no *Plea that A. B. C. D.* &c. *Eight Persons, Chanons* &c. *made the Covent tempore* &c. *who were imprisoned by the Abbot at D. till they sealed it, and so by Duress* &c. For this is double; For it is several Imprisonments in each of them; *But* it is a good Plea *to say that the Abbot imprisoned the Covent till they made the Deed, and* if they sealed it against their Will, or not knowing, this is not the Deed of the Covent; and the *other said that they sealed it at large, and not by Duress*; Quære as to the Doubleness, if there be a Diversity between Menace by speaking of one and the same Words to them altogether, and Imprisonment of them in one and the same Place. Br. Duress, pl. 8. cites 38 H. 6. 27.

Br. Exposition, pl. 27. cites S. C. that (ibidem) shall be intended at D. quod nota bene.

7. Debt upon Obligation; the *Defendant said, that the Plaintiff imprisoned him at D. and the Defendant ibidem per duritiam Imprisonamenti fecit Obligationem*, and the Plaintiff challenged it, inasmuch as this Word *(ibidem)* is not certain, but because this shall have Relation to D. and also this is the usual Entry, therefore well. Br. Duress, pl. 15. cites 4 E. 4. 17.

8. In Replevin, if a *Man condemned to me, and in Execution*, and *makes to me an Obligation for his Deliverance*, this Obligation is not by Duress, per Brian. Per Littleton, if the *Defendant pleads that it was by Duress*, and the *Plaintiff traverses it*, it shall be found against him, but *Lessee ll* [illegible]

ſhew the Matter by Replication, that the Obligation made for his Deliverance &c. and then well. Br. Dureſs, pl. 17. cites 12 E. 4. 7.

9. Where it is alleged in Count or Bar that Obligation or Deed was made at D. in Com' M. yet the other may allege that it was made at N. in Com' E. by Dureſs &c. Br. Dureſs, pl. 18. cites 21 E. 4. 8. 14, 15.

10. If a Man ſeals and delivers a Deed by Dureſs, he *cannot plead Non eſt Factum*; For it is his Deed at the Time of the Action brought, and *ought to be avoided by ſpecial Pleading, and conclude Judgment ſi Actio.* 5 Rep. 119. a. Reſolved per Cur. Trin. 2 Jac. C. B. in Whelpdale's Caſe.

Where a Marriage may be avoided by Dureſs, See Baron and Feme (A) pl. 5. and the Notes there, and ſee Tit. Marriage (H. a) per totum.

Ejectment.

(A) How conſidered.

1. Solicitor and Agents in Ejectment were committed till they *find a Plaintiff able* to pay the Coſts, or pay the Coſts themſelves. 2 Lev. 66. Mich. 24 Car. 2. B. R. Henloe v. Peters.

2. Ejectment *is a mixt Action*; it is Real in reſpect of the Lands, and Perſonal in reſpect of the Damages and Coſts; Per Holt J. Cumb. 250 Paſch 6 W. & M. in B R. Barwick v Fenwood.

3. The Court will take Notice that an Ejectment *is only a fictitious Proceeding* for recovering the Poſſeſſion which cannot be well obtained otherwiſe, and the Entry laid in the Declaration, or confeſſed by the Defendant, is not an Entry that is real, for it ſhall neither avoid a Fine nor be ſufficient Evidence to ſupport Treſpaſs for the mean Profits. 1 Salk. 256. Paſch. 6 W. & M. in B. R. Smart v. Williams.

4. It is a *great Abuſe* in Ejectments that People make *nominal Leſſees*, Perſons *not in Rerum Natura*, or at beſt not known to the Defendant, ſo that thereby he may loſe his Coſts; and per omnes, the Attorney that does ſo ought to pay *Coſts*, and in the principal Caſe an *Attorney* was put to anſwer Interrogatories for ſuch Practice per Cur. 6 Mod. 309. Mich. 3 Ann B. R. Anon.

(B) What

(B) What is, or ſhall be ſaid to be an Ouſter.

1. TAKING the whole Profits by one *Tenant in Common* is no Ejectment, but if he drive out of the Land any of the Cattle of the other Tenant in Common, or not ſuffer him to enter or occupy the Land, this is an Ejectment or Expulſion, whereupon he may have an Ejectione Firmæ for the one Moiety, and recover Damages for the Entry, but not for the mean Profits Co. Litt. 199. b.

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2. Ejectment of *Part* of a *great Cloſe* is Ejectment of *all*. Lat. 82. Paſch. 1 Car. Cally v. Fiſher.

3. Where a Leaſe is to try a Title if my *Cattle come upon the Ground* and are permitted by me to *reſt there* a long Time I ſhall be an Ejector, otherwiſe if a ſmall Time. Clayt. 29. pl. 50. Aſſiſa Mar. 10 Car. Vernon Judge. Rawcliff v. Booth.

4. *One Room*, or *a third Part of a Manor*, is good finding enough. Mar. 98. pl. 168. Trin. 17 Car. C. B. Juxon v. Andrews.

Ejectment by Mortgagee was argued to be an admitting himſelf to be out of Poſſeſſion, for the Ejectment *complains of a tortious Entry and an Ouſter*, and this being a Matter of Record he is eſtopped to ſay e contra ; non allocatur ; For firſt, per Cur. an Ejectment as it is in common Practice *is but a feigned Action*, to which the *Leſſor* of the Plaintiff, who is a principal Perſon, is *not a Party* ; and not being a Party, this cannot be given in Evidence as an *Eſtoppel* againſt him ; and therefore he cannot maintain an Action for the mean Profits, without an actual Entry, but the Leſſee may. Skinn. 424. Paſch. 6 W. & M. in B. R. Andrew Newport's Caſe.

(C) Of bringing Ejectment by Way of Leaſe.

See Clayt. 6. Braadhead v. Beamond. —— But Entry into two of the ſeveral Parcels of Lands, or into two ſeveral *Houſes, and leaving the former Occupiers upon the Land* &c. and then entering into the third Houſe &c. and there ſealing a Leaſe for Years unto another Man of that *third Houſe, and naming the two other Houſes &c.* this is good only for the third, and not for the two other Houſes in which the Leaſe was not delivered ; for the Entry or Continuance of the Occupier defeated the Entry of the Leſſor. Godb. 72. pl. 87. Mich. 28 & 29 Eliz. B. R. Earl of Kent's Caſe.

1. WHEN a *Leaſe* is made to bring an Ejectment *of Land in divers Men's Hands*, they muſt enter into one of the Parcels and leave one in that Place, then he muſt go to another and leave one there, and ſo on, and when he has made the *laſt Entry*, he *ſeals and delivers the Leaſe*, and then thoſe that were left there muſt come out of the Land, and this is a good executing the Leaſe. Brownl. 128. Weeks v. Meſey.

2. Leaſe by *Copyholder* for more than one Year, without Licence or Cuſtom, is not good to try a Title in Ejectment, but he will be Nonſuit on his own Evidence, and ſuch Leſſor will be taken to be a Diſſeiſor ; Per tot. Cur. Brownl. 133. Paſch. 8 Jac. Cramphorn v. Freſhwater.

3. *Leaſe*

3. *Lease by two Husbands and their Wives* to try a Title in Ejectment, and the same executed by Letter of Attorney &c. they must be sealed by the Wives as well as the Husbands, and the Entry by the Attorney ought to be in all their Names. 2 Bulst. 13. Mich. 10 Jac. Chamberlain v. Ewer.

4. When a *Lease is to be executed by Letter of Attorney*, the Course is this, that the Lessor do seal the Lease only and the Letter of Attorney, and delivers the Letter of Attorney but not the Lease, for the Attorney must deliver that upon the Land. Brownl. 130. Pasch. 12 Jac. Pettison v. Reel.

5. By the *Antient Law*, Lands and Tenements were never recovered in any personal Action, but antiently the Writs of *Entry* and *Assize* were the usual Means for the Recovery of the *Possession*, and these lay only against the *Freeholder*, because the Estate for Years was heretofore only a precarious Possession, and therefore to have Actions against such Persons was to no Purpose, because such *Terms* were generally defeated or determined before any intricate Title could be decided; besides these Possessions being so precarious, the *Possessors* were not trusted with the Defence of the Interest of the Land, and if they were ousted they could only have recovered Damages for the Loss of their *Possessions*, and if ousted by their Lessors they could seek only a Remedy from their *Covenants*.

Thus the Law continued till the 14 *H.* 4. and then it began to be resolved that an *Habere Facias Possessionem* would lie to recover the *Term* itself.

It seems that the long Terms about this Time had their Beginning, and that since such Lessees could not by Law recover the Land itself, therefore they used to go into Equity against the *Lessors* for a *Specifick Performance*; and against Strangers, to have *Perpetual Injunctions* to quiet their Possessions; This drawing the Business into the Courts of *Equity* obliged the Courts of *Law* to come to a Resolution, that they should recover the Land itself in an *Habere Facias Possessionem*.

But this Resolution brought on a new Method of *Trial* unknown before to the *Common Law*, for then it became usual for a Man that had a Right of *Entry* into any Lands to seal *Leases of Ejectment* on the Lands, and then any Person that next entered on the Freehold was an Ejector; and the Conveniency that arose from this Method was, They could try the Title *toties quoties*; whereas, if the Plaintiff was barred in an Assize, he was put to his Writ of Right, but this was a Means of turning a Man out of Possession because such Plaintiff would recover his Term without any Notice to the *Tenant in Possession*, and therefore the Courts of Justice would not suffer that they should lose their Possessions without any Opportunity to defend them; wherefore the Court made it a standing Rule, that no Plaintiff should proceed in Ejectment to recover his Lands against such a *casual and titular Ejector*, without delivering the Tenant in Possession a Declaration, and making him an Ejector and proper Defendant if he pleased.

This was a proper Rule of Court and in its Power to form; for otherwise the Court would be made instrumental in doing an Injury to a third Person, because a Declaration might otherwise be delivered to a Stranger, a faint Defence be made, and a Verdict, Judgment and Execution obtained without the Tenant's having any Notice of it; But it is not to be doubted but that such Actions were brought at first against the real Ejectors that resided in the Possession; but because any Person that came into the Land *Animo Possidendi*, was equally an Ejector with him that resided, the Action in Strictness of Law might be brought against him, but because this (as has been said) turned to the Injury of the residing Possessor, the Rule was made that he

ſhould have Notice of it, and therefore they would not give Judgment in Ejectment unleſs an Affidavit was made, that the Tenant in Poſſeſſiou was ſerved with a Copy of the Declaration. But the Antient Cuſtom was, that ſuch Leaſes were actually to be ſealed and delivered, becauſe otherwiſe the Plaintiff would maintain no Title to the Term, and were alſo obliged to be ſealed on the Land itſelf, becauſe it was Maintenance to convey out of Poſſeſſion, and therefore in relation to the Quickneſs of the Remedy the *Aſſize* had the Advantage, becauſe none of this Preparation was required before-hand, for the Writ of *Aſſize* came down to the Aſſizes and the Jury was there warned, the *Cauſe* tried and *Judgment* given, yet the Method in Ejectment from the Conveniency of the repeated Trials notwithſtanding the previous Preparations, was generally preferred.

Thus it ſtood till the Time of the Lord Ch J Rolls, and he invented the Rule now in Uſe, which is that if the Defendant comes into the Room of the *caſual Ejector*, he ſhould enter into a Rule to confeſs *Leaſe*, *Entry* and *Ouſter*, and ſhould ſtand upon the *Title* only. This Rule was reaſonable, becauſe when the Plaintiff had made his *Leaſe* upon the *Land* any third Perſon that came upon the Land *Animo poſſidendi* in Strictneſs of Law, was an Ejector, therefore when any other Ejector was placed in his Stead, it was very reaſonable in the Court to impoſe Terms upon him, and therefore the proper Terms were, that he ſhould not ſtand on the Proof of an *actual Entry*, *Demiſe*, *and actual Ouſter*, becauſe this was no more than a Form of bringing the Title in queſtion, it was not fit that the Plaintiff ſhould be nonſuited for want of proving the formal Demiſe ſet forth in the Declaration when the caſual Ejector would have let the Judgment go by Default. Ld. Ch. Bar. Gilb. Law of Ejectments 2.

(D) Rules.

1. EXception taken in Ejectment becauſe the *Original bore Teſte the ſame Day the Ejectment was made*, and adjudged good per tot. Cur. Brownl. 129. Trin. 13 Jac. Beamont v. Coke.

2. In Ejectment we rarely grant a *New Tryal*, for they may try the Title over-again; Per Withers. J. Cumb. 18. Paſch. 2 Jac. 2. B. R.

Eſpecially after a Trial at Bar. 7 Mod. 156. Hill. 1. Ann. B. R. Grovenor v. Fenwick.

3. Fifteen Days between *Teſte and Return* need not be in a *Scire Facias* on a Judgment in Ejectment becauſe an Ejectment is a mixt Action. Cumb. 68. Mich. 3 Jac. 2 B. R. Cart v. Mogg.

4. In Caſe of Ejectment it is always deny'd to *amend the Memorandum*; Per Thomſon. Cumb. 74 Hill. 3 & 4 Jac. 2. B. R.

5. The Demiſe being laid before the Leſſor of the Plaintiff had any Title, the Court was *moved for Leave to* amend the Declaration and *alter the Time of the Demiſe*, ſed non allocatur; For the altering the Time will make it a new Demiſe. Carth 178. Hill. 2 & 3 W. & M. in B. R. Bennet v. Gandy.

S. P. Carth. 401. Puleſton v. Warburton —— 1 Salk 48. S. C. —— 5 Mod. 332. S. C.

6. *But* where a Demiſe was made *by the Rector and Scholars of Exeter College* generally, which was to try they Right of the Rectorſhip, but which could not be done upon that Declaration, and ſo not good, is

it was ordered upon Motion *to alter the Demise* in the Declaration, *and lay it to be made by Painter Rector of Exeter, and the Scholars of the same.* Carth. 180. Hill. 2 & 3 W. & M. in B. R. Philips v. Bury.

7. Tho' the *Lessor* is Principal by the Course of the Court, yet legally he *is a Stranger to the Record*, and therefore cannot be *estopp'd*; Per Holt Ch. J. Cumb. 249. Pasch. 6 W. & M. in B. R. Smartle v. Williams.

8. In Ejectment for *empty Houses*, a Lease was sealed upon the Land, and a Declaration delivered to the casual Ejector, and Judgment and Execution had, yet because they had *not moved for a peremptory Rule to plead*, the Judgment was set aside, and in such Case there *must be Affidavit of the Sealing of the Lease, Entry* &c. 1 Salk. 255. pl. 3. Hill. 8 W. 3. B. R. Smartley v. Henden.

9. *And* where a Judgment in Ejectment was *by Confession*, an Amendment of the Time of the Demise was made in the Declaration cited Carth. 401. Pasch. 9 W. 3. B. R. as the Case of Parr v. Cawley; But that being a Judgment by Consent of Parties, was held no Authority in the principal Case of Puleston v. Warburton.

10. *Light* was denied to be *amended and made Bosci*, cited by the Reporter. Carth. 402 Pasch. 9 W. 3. B. R. as the Case of Thompson v. Leech.

11. After a whole *Term elapsed* without doing any Thing the Plaintiff must give *new Notice.* 1 Salk. 257. pl. 9. Trin. 10 W. 3. B. R. Anon.

12. No Body can complain of an *Irregularity* in an Ejectment but the Tenant in Possession, or the Landlord. 1 Salk. 256. pl. 7. Hill. 11 W. 3. C. B. Hollingworth v. Brewster.

13. The Court will not make a *Rule for naming a good Lessor* in Ejectment, unless there were a Nonsuit or Verdict against Plaintiff in a former Trial. 12. Mod. 445. Hill. 12 W. 3. Anon.

(E) As to the Delivery.

1. IT is sufficient upon an Action of Trespass and Ejectment brought, to try the Title of Land, if the *Tenant in Possession of the Land, have a Copy of the Declaration in* Ejectment *delivered to him or his Wife*, altho' he be but an Under-Tenant of the Land, and altho' no Notice thereof is given to the proper Tenent, or to the Owner of the Land, whose Title is concerned. 23 Hill. Car. B. R. and Pasch. 24 Car. B. R. For the *Possession of the Land is only recoverable in this Action*, and that doth chiefly concern the Tenant in Possession of it; and it is the Property in Law that is to defend the Title. 21. L. P. R. 237.

2 *Declaration* in Ejectment *delivered to a Servant* is ill in B. R. but it is allow'd in C. B. Cumb. 47.—Such Service and *Acknowledgment* of the Tenant that he receiv'd it, is sufficient 1 Salk. 255. Hill. 10. W. 3. B. R. Anon.

3. Declaration in Ejectment had been delivered *to one to whom the Keys were given to let the House*, and Per Cur. not good, because it should be to the Tenant in Possession, and he is only a Servant, and Plaintiff is not without Remedy, for he may sign a Lease on the Land. 12. Mod. 313. Mich. 11 W. 3. Anon.

(F) As to the Term expiring.

1. IN Ejectment, if the Term *expires*, *pending the Suit*, the Plaintiff shall go on to *recover Damages*; For though the Action is at an End quoad the Possession, yet it continues for the Damages after the Term ended; Arg. 3 Mod. 249. cites 1 Inst. 285.

2. Tenant for Years has Judgment in Ejectment, and the Term incurs, then he brings a *Scire Facias quare Executionem habere non debet of the Land and his Damages and Costs*, and a Demurrer to the Scire Facias, and the Court held the Scire Facias ill; For though he may have a Scire Facias for Damages and Costs, yet this being for the Term likewise which was incurred it was ill, and a *new Scire Facias* ought to be; Afterwards, in the next Term, it was argued by Holt, that the Scire Facias was good for the Damages, but not allowed. A new Scire Facias was granted. Skin. 161. pl. 10. Hill. 35 Car. 2. B. R. Sedgwith v. Grofton.

3. The Court compelled the Defendant to consent to the *Enlargement of a Term* in an Ejectment Lease. Comb. 50. Pasch. 3 Jac. 2. B. R. Dighton v. Greenvill.

Carth. 3. Dickens v. Greenvill, S. C. ruled accrdingly. —— S. C. cited Carth. 400. —— Denied to be enlarged without Parties Consent, where the Party was hung up by Injunction, so that the Term expired. 1 Salk 257 pl. 8. Pasch. 12 W. 3. B. R. Anon. —— After a Special Verdict in Ejectment the Term expired, and the Court refused to inlarge it without the Defendant's Consent. Carth. 402. Pasch 9 W. 3 B. R cites it as the Case of Hutchins v. Basset, but that in the Case of Dighton v. Greenvill, the Term was inlarged though the Defendant refused to consent.

4. Lease for five Years, and Verdict for Plaintiff, but he was delayed of Judgment and Execution by *Injunction* out of Chancery till the *Term expired*. Upon Motion to *renew the Term*, it was said to have been done in the Case of **Dangdell v. Greenvill**, and it was frequently done in the Exchequer, and Gould J. said, that in **Sir John Roll's Case**, they held it might be done by Consent, but not otherwise; But the Motion was deny'd. 6 Mod. 130. Pasch. 3 Ann. B. R. Anon.

(G) Where a second &c. Ejectment is brought.

1. MOTION to stay Proceedings on a *second Ejectment*, the Costs of the first not being paid; Per Cur. we never grant this without an Affidavit that it is the same Land, the same Lessor, and the same Title. Comb. 59. Trin. 3 Jac. 2. B. R.

Ibid. 106. Tredway v. Herbert, S. P. —— Plaintiff recovered but had no *Costs*, then Defendant brought Ejectment; The Plaintiff in the first Action prayed hi. Costs before he pleaded, but denied, because he had no Vexation, the Verdict being for him; but had the Verdict been against him, or he had been nonsuited, he must have paid Costs before he brought a new Action. 4 Mod. 379. Hill. 6 W. & M. in B. R Roberts v. Cook.

2. It

2. It is a known Maxim in Law, that *a Man may try his Title as often as he pleases in an Ejectment*, and therefore Lord Cowper denied to grant a perpetual Injunction (after several Trials) to stop all further Proceedings in Law. 10 Mod. 1. Trin. 8 Ann. in Canc. Anon.

3. Where a Plaintiff *brought a second Ejectment*, it was ordered he should not proceed unless he paid the *Costs of the first*. 8 Mod. 226. Hill. 10 Geo. Crundell v. Bodily.

(H) Of altering the Defendant or Plaintiff.

1. IF *one moves* that the Title of Land belong to him, and that the Plaintiff made an Ejector of his own, and thereupon prays that giving Security to the Ejector to save him harmless *he may defend the Title*, this Court of C. B. will grant it, but not compel the Plaintiff to confess Lease, Entry, and Ouster, except he will be Ejector himself; But it is otherwise in B. R. for there in both Cases they will *compel* him to confess Lease, Entry and Ouster; Per Pinsent Prothonotary. But quære &c. Sty. 368. Hill. 1652. C. B. Anon.

2. After Declaration delivered, and *before Plea pleaded*, he that had the Title moved the Court to *alter the Plaintiff*, he being a Witness in the Cause, and the Court agreed on Payment of Costs, and giving Security for new Costs, and this as it seems without Imparlance. Sid. 24. pl. 5. Hill. 12 Car. 2. C. B. Anon.

3. No Man is to be *admitted Tenant* or Defendant in Ejectment, by the Common Rule, unless he has been in Possession, or received Rents, and not a meer Stranger; Per Holt Ch. J. Cumb. 209. Trin. 5 W. & M. in B. R.

4. *Landlord* may be joined a Defendant if he requires it, but is not compellable. 1 Salk. 256. pl. 6. Trin. 11 W. 3. B. R. Underhill v. Durham.

5. It is due of Right to *Tenant in Possession*, or Landlord, to be made Defendants, and so a *pretended Wife*, but who denied the Marriage was made Defendant. 7 Mod. 70. Mich. 1 Ann. B. R. Fenwick v. Gravenor.

6. *Trustees* are not to be joined with the Tenant as Defendants in Ejectment without their Consent. Cumb. 332. Trin. 7 W. 3. B. R. Jones Lessee of Pride v. Carwithen.

7 A *Peer interested* made Defendant in Ejectment with Tenant in Possession, which the Court thought reasonable, and said there may be several Costs notwithstanding. Cumb. 339. Trin. 7 W. 3. B. R. Jones Lessee of Pride v. Carwithen.

8. 11 *Geo.* 2. *cap.* 19. *S* 13. *Landlord may make himself Defendant by* joining with the Tenant *to whom such Declaration in Ejectment shall be delivered, in Case he shall appear; but in Case such Tenant shall refuse or neglect to appear, Judgment shall be signed against the casual Ejector for want of such Appearance; but if the Landlord of any Part of the Lands, Tenements &c. for which such Ejectment was brought, shall desire to appear by himself, and consent to enter into the like Rule that, by the Course of the Court, the Tenant in Possession, in Case he had appeared, ought to have done, then the Court where such Ejectment shall be brought, shall and may permit such Landlord so to do, and order a Stay of Execution upon such Judgment against the casual Ejector, until they shall make further Order therein.*

Where the Act says, that in Case Judgment in Ejectment be had against the Tenant in Possession on his refusing or neglecting to appear (no Notice being given to the Landlord) the Landlord may move, that Execution may be stayed on entering into a Rule to become Defendant himself in another

other Ejectment &c. yet in Case *Judgment is signed so late in the Term that the Landlord cannot apply for a Stay of Execution*, yet upon Application by the Landlord as soon as may be, the Court will set aside the Execution, upon this Judgment, although the Words are only (Stay Execution) M. 12 Geo. 2. in B. R. in Case of Sir Wm. Clayton v. Boone.

Before this Act the Rule of Court upon the *Tenant's, in Possession, refusing or neglecting to appear* was, that the Landlord might be made *Defendant una cum the Tenant, but not alone*, till this Act, and the Case in 12 Mod. 211. cited to the contrary was denied to be Law; Per Cur. M. 12 Geo. 2. B. R. in Case of Sir Wm. Clayton v. Boone.

(I) Ejector. Who.

1. IF a *Feme Covert* eject one, and after the *Husband assents*, yet the Husband is no Ejector; For an Ejectment *is made in an Instant*, and hath not a Continuance. Otherwise of a Disseisin; Per Anderson J. Noy 52. Broth v. Archer.

Yelv. 145. S. C.

2. *A Servant dwelling with the pretended Owner* of a House, of which Ejectment is brought, is a sufficient Trespassor or Ejector against whom to bring the Ejectment. Brownl. 143. Mich. 6 Jac. Wilson v. Waddell.

(K) Of what it lies.

1. EJectment *does not lie of the Heir*, but Ravishment of Ward. Br. Ejectione &c. pl. 13. cites 30 E. 3. 11.

Hardr. 58. Arg. cites 16 E 2. Warrantia Chartæ. [Garrante de Charters, pl. 31.] that Ejectment lies not de Pastura.

2. Ejectment lies *de Pastura ad Centum Oves*; Per Wray and Southcote; For if Præcipe quod reddat lies as is held in 27 H. 8. he may have Ejectment. Dal. 95. pl. 20. Anno 15 Eliz. B. R. Anon.

3. Lessee for Years of Tythes shall have Ejectment of *Tithes set out and afterwards carried away*; For by the setting out the Property is in the Parson. Ow. 84. Mich. 14 & 15 Eliz. Tottenham v. Bedingfield.

4. A Lease was of a *Garden containing three Roods of Land*. Lessee brings Ejectment, and *declares for three Roods of Land*. Meade and Windham J. but Dyer e contra held the Declaration good; For that this Action is in Nature of Trespass, and the Party may elect to declare as here he does, or of the Ejectment of a Garden; For a Garden may be used at one Time for a Garden, and at another Time be plow'd and sown with Corn; but they conceived the better Order of Pleading had been to have declared, that he was ejected of a Garden containing three Roods of Land, as in the Lease is specified. Godb. 6. pl. 7. Hill. 23 Eliz. C. B. Anon.

5. Ejectment *de quadam Fabrica* was held good; Hardr. 58. mentions it as a Case cited by Wray Ch. J as adjudg'd 29 Eliz.

Cumb. 101. S. P.—Ejectment was brought of an House, the Jury found the Defendant Guilty of two Parts of it; Per Manwood Judgment ought to be for the Plaintiff; For Omne Majus continet in se Minus; But per Shute if the Count had

6. A *Chamber* may be demanded by the Name of a House, and Part of a Messuage by Name of a Messuage. Per Walmsley. Le. 152. pl. 210. Trin. 31 Eliz. C. B. in Case of Hayes v. Allen.

had been of two Parts of an House, and the Defendant had pleaded Not Guilty, and the Jury had found him Guilty, the Plaintiff should not have Judgment. Sav. 27 pl. 65. Pasch. 24 Eliz. Anon. ——— If a *Man has Title but to Part of a House*, he may well *declare for the Whole* in an Ejectment, and the Jury ought to find such Part or so many Foot of the House, and he shall have Judgment and Execution accordingly; Per Pollexfen, and not denied per Cur. Comb. 101. Mich. 4 Jac. 2. B. R. Anon.

7. Ejectment doth lie of a *Copyhold Estate*; it lies of a Lease made by a Copyholder, but not of a Demise made by the Lord of a Copyholder by Copy of Court Roll. Cro. E. 224. pl. 9. Pasch. 33 Eliz. B. R. Cole v. Wall and Burnell. ——Le. 328. S. C.

8. It was adjudged than an Ejectione firmæ lies not *of a Close*, although a Name be given unto it, but it ought to be demanded by a certain Number of Acres; And for this Cause a former Judgment was reversed. Cro. E. 339. pl. 3. Mich. 36 & 37 Eliz. B. R. Jordan v. Cleabourn.

9. Ejectment was brought *de una Virgata terræ*, but adjudged that it does not lie. Cro. E. 339. at the End of pl. 3. in a Nota cites Pasch. 38 Eliz. in Cam. Scacc. Penn v. Merevill.

10. Ejectione firmæ *de una Pecia terræ vocat. M.* furlong. una Pecia terræ vocat. Ashbrokee, *uno Gardino vocat. Mucking-Garden*, quæ omnes & singulæ parcellæ terræ jacent in W. It was assigned for Error that Pecia terræ is uncertain, and so the Declaration not good. And 2dly, Because no Place certain is alleged in which the Garden is; and for these Causes Judgment in B. R. was reversed in Cam. Scacc. Mo. 702. pl. 976. Trin. 39 Eliz. Palmer v. Humfrey. Ow. 18. S. C. and Judgment revers'd in the Exchequer Chamber.——Hetl. 176. has a Note that it was said that an Ejectione firmæ does not lie de una Pecia Terræ although it was added, Containing by Estimation half an Acre of Land vocat' &c. it is not good, but he ought to shew the Longitude and Latitude.

11. If it lies of *a Park* Quære? without saying so many Acres. 1 Sid. 417. D. 115. b. at 67. Marg. Trin. 43 Eliz. B. R. Merideth v. Brow.

12. It lies *de Cottagio*; adjudged. Cro. E. 818. pl. 9. Pasch. 43 Eliz. B. R. Hill v. Giles. Cotagium is a Word known at Common Law. Cro. C. 555. per Jones and Brampston, in pl 10. ——— An Ejectment does lie of a Cottage, because the Description of the Thing by that Name is sufficient, and certain enough to shew the Sheriff of what to deliver the Possession of; yet it was said that a Recovery lies not of a Cottage. Sty. 215. Pasch. 1649 Hamond v. Ireland ——— Lev. 58. Hill. 13 & 14 Car. 2. S. P. accordingly per Cur. in Dacre's Case.

13. Ejectione firmæ *de pomario*. After Verdict it was moved, That an Ejectione firmæ lies not thereof, nor more then a Præcipe quod reddat. Sed non allocatur; for this Action is but Personal, wherein Damages are the Principal; And although it is usual in this Case to award an Habere Facias Possessionem, yet it is well enough, and comprises sufficient Certainty. Wherefore it was adjudged for the Plaintiff. Cro. E. 854. pl. 15. Trin. 43 & 44 Eliz. B. R. Wright v. Wheatley. Noy. 37. S. C. and adjudg'd well brought; For it need not be demanded by the Name of a Garden as a Præcipe ought to be. And Popham said, that 18 Eliz. an Ejectment was brought de Pomario, and well brought ——— Cro J. 654. pl. 3. Hill. 20 Jac. B. R. Kopston v. Eccleston. S. P. adjudged accordingly; For an Ejectment is but an Action of Trespass in its Nature. ——— S. C cited Roll Rep. 55. in pl. 29. ——— Lev. 58. S. P. mention'd as resolv'd upon View of Precedents in C. B.

14. Ejectment lies not of a *Copyhold*, unless the Plaintiff declare the Custom, the Lease and the Ejectment. Mo. 679. pl. 927. Hill. 45 Eliz. C. B. Gregory v. Harrison. Le. 100. pl. 128. Pasch. 30 Eliz. B R. Rumsey v Eve, e contra, for that shall come of the other Side ——— In such he ought to shew the Estate of his Lessor, and the Licence of Lessor, and the especial Custom to warrant it. Cro. E. 469. pl 20. Hill. 38 Eliz. B. R. Wells v. Partridge.

15. Ejectment was brought of *Land, and a Colpit in the same Land*, and though it was objected that it was *bis petitum*, yet it was held good. Becau'e it is a Perſonal Action, and he demands nothing certainly. Cro. J. 21. pl. 1. Hill. 1 Jac. B. R. Harbottle v. Peacock.

Noy 121. Comyn v. Wheatly. S. P. accordingly, and ſeems to be S. C. ——— S. C. cited 2 Roll Rep. 483. as adjudg'd. ——— S. C. cited Hardr. 57. in pl. 3.

16. In Error of a Judgment in Durham of an Ejectment of a *Cole-Mine* it was reſolved that it well lies thereof. Cro. J. 150. pl. 9. Hill. 4 Jac. B. R. Commyn v. Kineto.

S. P. and there was no Doubt of its lying. Noy 132. Sanders v Patridge. ——— Sid. 161. pl. 16 Mich. 15 Car. 2. B. R. Smith v. Barret. S. P admitted, the Caſe there being of eight Boylaries out of 372 and found for the Plaintiff. ——— Lev. 114. Smith v. . . . . . S. C.

17. Ejectment lies of *Boyllary of Salt*; cited by Tanfield. Cro. J. 150. Hill. 4 Jac. B. R. in pl. 9. as adjudg'd in B. R. in Wyld's Caſe.

Ejectment lies not of a *Watering Curſe*, but it lies of *Terra Aqua cooperta*; Arg Poph. 167. cites 11 H. 7. 4 and Mich 6 Jac. Challoner v. Moor ——— Lat. 153. S C. cited is adjudg'd becauſe it is not a thing fixed but always Errant. ——— It lies *de Aquæ Curſu*. Godb. 157. pl. 213.

18. Ejectment was brought *de Aquæ Curſu, called Lothar in L.* and *declares upon a Leaſe made by D. de quodan Rivulo & Aquæ curſu*; and by the Opinion of the whole Court the Judgment was reverſed, for Rivulus ſeu Aquæ curſus lie not in the Demand, nor doth a Præcipe lie of it, nor can Livery and Seiſin be made of it, for it cannot be given in Poſſeſſion; but it appears by 12 H. 7. 4. the Action ought to be of ſo many Acres of Land Aqua cooperta. Brownl. 142, 143. Mich. 6 Jac. Challenor v. Thomas.

19. An Ejectment will well lie of a *Stange*, for a Præcipe lies of them, and a Woman ſhall be endowed of the third Part of them, as it is in 11 E. 3. But if the Land under the Water or River do not pertain to the Plaintiff, but the River only, then upon a Diſturbance his Remedy is only by Action upon the Caſe, upon any Diverſion of it, and not otherwiſe. Quod nota. Brownl. 143. in S. C.

3 Keb. 738. pl 36 Hill. 28 & 29 Car. 2. B. R. in Caſe of Barton v. Hampſhire, it was admitted by Twiſden and Cur. that Ejectment would not lie of Common alone, but it being after Verdict it ſhall be intended Appurtenant and ſo well enough. ——— Tho' an Ejectment will not lie of a Common by itſelf, yet when Land is join'd in Ejectment it ſhall be intended appurtenat to the Land; Arg. and to this the Court inclin'd; Et adjornatur. Freem. Rep. 447. pl. 608. Hill. 1676. Anon.

20. Ejectment lies not of *Common of Paſture* or of *Sheep-gate*. Brownl. 129. in Caſe of Weekes v. Meſey ſays it was ſo Adjudged. Paſch. 9 Jac.

Palm 337. S. C. adjudged accordingly, ——— S. C cited Per Cur, 3 Lev. 97. Hill. 34 Car. 2. C. B. ——— Ejectment does not lie *de Una Domo*; Agreed, becauſe it may be either a Dove-Houſe or a Dwelling Houſe; and ſo the Sheriff has no certainty as to making Execution. 2 Roll Rep. 483 Mich. 22 Jac. B R ——— S. C. cited Arg. Hardr 76. as the Caſe of Warren v. Walker ——— But Ejectment de Una Domo *vocat. Holts* &c it was adjudg'd good and certain enough. Hardr. 76 Arg. cites Paſch [illegible]. B. R Fry v. Petchey.

21. Ejectment lies *de una Domo*. Cro. J. 654. pl. 3. Hill. 20 Jac. B. R. Royſton v. Eccleſton.

Domus

Domus est Nomen Collectivume contains many Buildings, as Barns, Stables &c. 4 Le. 16. pl. 56. 33 Eliz. B. R. Hore v. Briddleworth.——2 Le. 184. pl. 230. Mich. 32 Eliz. B. R. Hore v. Wriddlesworth, S. C. in totidem Verbis.

23. An Ejectment lies of *Underwood*, tho' a Præcipe does not. 2 Roll Rep. 482, 483. Mich. 22 Jac. Warren v. Wakely.

24. An Ejectment cannot be of a *Manor* because there cannot be an Ejectment of the *Services* but if they do express farther *a Quantity of Acres* it is sufficient. Per Richardson and Hutton J. Het. 81. Pasch. 4 Car. C. B. cited by them to be Hurtlton's Case.

Tho' an Ejectment lies of a Manor or of the *Moiety of a Manor* if Attornment of the Tenants may be proved yet it is not safe to bring Ejectment of a Manor. Het. 146. Mich. 5 Car. C. B. Warden's Case.

25. Ejectione Firmæ of a Lease *of Tithes appertaining to such a Chappel*; It was said it did not lie of Tithes only, but that it might of such a Rectory, or such a Chapel, and of the Tithes thereunto belonging, so as he may be ejected from a Thing in Possession whereof an Habere Facias Possessionem may be, but not of Tithes only; Curia advisare vult. But afterwards adjudg'd for the Plaintiff. Cro. C. 301. pl. 4. Pasch. 9 Car. B. R. Baldwin v. Wine.

Jo. 321 pl. 6 Badwyn v. Wine, S. C. but stated that the Ejectment was for Tithes belonging to the Rectory of D. in R. and A and that after Verdict for he Plaintiff it was moved that the Declaration was not good, because it did not allege that the Tithes were appertaining to the Rectory of D. and for Cause it was adjudg'd per tot Cur. quod Querens nil capiat per Breve.——Mar. 32. in pl. 66. Trin. 15 Car. Jones J. said, it had been adjudg'd that an Ejectment will lie of Tithes.

26. A Judgment in B. R. in Ireland in an Ejectione Firmæ, brought there *de Piscaria in such a River*, was reversed in B. R. here, because an Ejectione Firmæ lies not thereof, no more than of a Common Apprender, or a Rent; Arg. and the Court held that Ejectment would not lie of a Fishery. Cro. C. 492. pl. 17. Mich. 13 Car. B. R. Herbert v. Laughluyn.

Cro. J. 146 Hill. 4 Jac. B. R in Case of Molineux v. Molineux. S. P. doubted.——An Ejectment will not lie of a Fishery, nor in any Case but where there may be an Entry and Expulsion; and that cannot be of a Fishery, especially in this Case, where it was of a Fishery *in the River Tyne*, which cannot pass by the Name of so many Acres Aqua co opert', because it is not like a Pond, where the very Soil is the Property of another; but this is only a Freedom to Fish in that River. 8 Mod. 277, 278. Trin. 10 Geo. in Case of Waddy v. Newton.

27. In Ejectment it was doubted whether it well lie *de uno Crofto*, because it is a Word of uncertain Signification. Sty. 30. 364. Trin. 23 Car. and Hill. 1652. Ashworth v. Staley.

But Sty 194. Hill. 1649. Roll. Ch J. said, that Ejectment would lie de uno Crofto.——Per Twisdem. J. tho' an Ejectment will not lie of a Croft, yet it will lie de uno Crofto call'd Black acre; For this is certain enough to be delivered in Execution, and so he said it was adjudg'd in one Fairbeard's Case. Lev. 51. Hill. 13 & 14 Car. 2.

28. An Ejectment lies not of 3000 *Acres of Waste*, because the Word Waste is uncertain, and may contain Land of of any Quality, and the Sheriff will be at a Loss what Land to deliver; Adjudg'd. Hardr. 57, 58. Pasch. 1658. Hancock v. Price.

29. Ejectment was brought inter alia *de uno Stabulo*. It was moved that it did not lie, but upon View of Presidents, in C. B. of Recoveries suffered de Stabulo, it was resolv'd that it well lies. Lev. 58. Hill. 13 & 14 Car. 2. Dacres's Case.

Keb. 236. pl. 65 Whitacre v Dacres, S C. and held that it lies.

30. Ejectment will not lie of a *Free Warren* Keb. 500. pl. 55. Pasch. 15 Car. 2. B. R. Tremain v. Sands.

31. An Ejectment lies not *de Pannagio*, which is but a Privilege to take Pannage; Adjudg'd. Lev. 212. Hill. 16 & 17 Car. 2. Pemble v. Stern.

32. Ejectment lies *of a Close* if a Name be given to it; Per Cur. Cro J. 654. in pl. 3. Hill. 20 Jac. B. R.

Palm 338. S P. per Cur that it lies of a Close containing 3 Acres of Land, and that so it has been adjudg'd here, because it is sufficient for the Sheriff to give Possession upon; but that otherwise it lies not.——If it does not say how many Acres it is ill. Sid. 229. at the End of pl. 26. cites it as adjudg'd. Mich. 18 Car. 2.

33. Where a *Statute is extended* it cannot be tried in an Ejectment if it be *satisfied or not*, but the only Remedy is by Scire Facias ad Comp. or Bill in Chancery; but where Land is extended on an *Elegit* the Debt and yearly Value appears on Record, and it may be well known when the Debt is paid, and may come in Evidence on a Trial in Ejectment. Vern. 50. pl. 49. Pasch. 1682. Arg. E. of Huntington v. Greenvill.

34. Ejectment lies not *De Tenemento*. Cro. E. 116. pl. 20. Mich. 30 & 31 Eliz. B. R. in Case of Austin v. Courtney.

35. *De Mineris Carbonum* in Parochia de D. &c. generally *not saying How many* Mines &c. Upon Error brought the Court inclined that the Judgment was erroneous; but then the Plaintiff produced several Precedents in Durham, and *alleged that all the Entries in Durham* in Ejectments for Coal Mines *were the same as in this Case*; so the Judgment was affirmed. Carth. 277. Pasch. 5 W. & M. in B. R. Andrews v. Whittingham.

1 Salk. 255. pl 2 Whittingham v. Andrews, S. C and because it was the constant Course in Durham, that Judgment was affirmed ——4 Mod. 143. S. C. and Judgment affirmed for the same Reason.——Comb 201. Ambrose v. Whittingham, S. C. Holt Ch. J. hæsitavit; but the Judgment was affirmed.——Show. 364. S. C. but no Judgment,

36. An Ejectment was brought in the Exchequer *de minutis Decimis*, and upon Not Guilty pleaded, Verdict for the Plaintiff; And Mr. Cheshyre, about five or six Years ago, moved in Arrest of Judgment, that an Ejectment would not lie for small Tithes, 1st, Because Eggs are small Tithes, and it is absurd to say, that an Ejectment would lie of an Egg. 2dly, Because the Sheriff does not know of what he is to deliver Possession upon an Habere Facias Possessionem, sed non allocatur; because it has been adjudged, that an Ejectment lies *of Wool*, being Tithe, and by the same Reason for an Egg; And therefore by all the Barons Judgment was given for the Plaintiff and cited 11 Rep. 25. Ex Relatione M'ri Cheshire. 2 Ld. Raym. Rep. 789. Trin. 1 Ann. Camell v. Clavering.

(L) Of what it lies. By what Name or Description.

1. E*Jectment of Ward lies not of the Body, but* only of the *Land*, and *Ravishment of Ward and Body*. Br. Ejectione, pl. 10. cites 14 E. 3.

2. An Ejectione Firmæ was brought *de uno Cubiculo*, and Exception was taken to it; but the Exception was disallowed. The Declaration was Special, viz. Of a Lease unius Cubiculi, per nomen unius Cubiculi, being in such a House in the middle Story of the said House. And the Declaration was holden good enough; and the Word Cubiculum is a more apt Word than the Word Camera; and such was the Opinion

Opinion of Wray Ch. J. 3 Le. 210. pl. 275. Trin. 30 Eliz. B. R. Anon.

3. And it was said that Ejectione Firmæ brought *de una Rooma* had been adjudged good in this Court. 3 Le. 210. in S. C.

4. Ejectione Firmæ; The Declaration was *De uno Messuagio sive Tenemento* and four Acres of Land to the same belonging; The Court held clearly that no Judgment should be given for the Messuage, and Land cannot be properly said to belong to an House; yet it was good for the four Acres. The Plaintiff released his Damages, and Judgment was given accordingly. Cro. E. 186. pl. 8. Trin. 32 Eliz. B. R. Wood v. Payne.

3 Le. 228. pl. 306. S. C. and held that as to the four Acres it is certain enough; For the Words (to the same belonging) are meerly void; and Plaintiff recovered Damages and had Judgment. ——— Ejectment de Messuagio sive Tenemento is not good for the Uncertainty. Poph. 197. Mich. 2 Car. Anon. ——— S. P. and a Judgment in C. B. was reversed for the Uncertainty. Noy 86. Rochester v. Keckhouse. ——— Cro. J. 125. in pl. 9. cites S. P. to have been adjudged ill. ——— Sid. 295. pl. 17. Trin. 18 Car. 2. B. R. Burbury v. Yeomans S. P. ruled accordingly. And it was said per Curiam, that, as this Case is, the Plaintiff cannot aid himself by releasing of the Party as perhaps he might if there had been Lands also in the Declaration. But Twisden said, that if it had been de uno Messuagio sive Tenemento vocato the Black Swan &c. it had been good; because that would have ascertained it. ——— 2 Keb. 82. pl. 81. S. C. ——— 3 Mod. 238. Trin 4 Jac. 2. B R. Hexham v. Coniers, S P. adjudged accordingly; for Tenement is a Word of an uncertain Signification; it may be an Advowson, a House or Land, but Messuagium sive Tenementum called the Black Swan, would be good. ——— So *de Burgo sive Tenemento* is not good any more than de Messuagio sive Tenemento; adjudged. Poph. 203. Mich. 2 Car. B. R. Rochester v Rickhouse. ——— But *pro uno Messuagio sive Burgagio* in Hay infra muros the Court held it to be good, and that an Ejectment lies well de Burgagio; and that Messuagium & Burgagium signify the same Thing in a Borough. Hardr. 173. pl. 2. Mich. 12 Car. 2. in Scacc. Danvers v. Wellington.

5. Ejectione Firmæ *of seven Closes, one called Green Mead, and so gave to the other several Names*; is well enough; for when a Name is given to every Close, although *the * Contents of the Acres are not mentioned*, viz. So many of Land, so many of Pasture &c. it is sufficient, though it were more formal to express the Acres; and it is aided by the Statute of Jeofails, and the Court is ascertained of the Truth. And Popham Attorney said, he had known it thrice so adjudged; and the Plaintiff had Judgment. Cro. E. 235. pl. 1. Pasch. 33 Eliz. in Scacc. Jones v. Hoel.

* Cro E. 339. pl. 3. Mich. 36 & 37 Eliz. B R. Jordan v. Cleabourne, S P. but the Court was divided tho' the Close had a Name given to it, & adjornatur. ——— Godb. 53. pl. 66. Mich. 28 & 29 Eliz. B. R. the Number of Acres ought to be set forth; and says that so it was adjudged in a Shropshire Case ——— In Ejectment of a Close if he does not give it a Name, nor declare of what Nature the Land is, it is not good; Per Roll Ch. J. Sty. 193, 194. Hill. 1649. Meers v. French.

6. An Ejectment lies not *de Coquina, (Anglice a Kitchen)* because of the Uncertainty, for any Room by Usage may be made a Kitchen. Adjudged, though a Case in 2 Jac. was cited, where it was adjudged that it lay pro Coquina. Noy 109. Trin. 2 Jac. Ford v. Lerk.

It was said at Bar that 2 Jac. in C. B an Ejectment de Coquina was held not good, but that it has been adjudged here by Bill to be good enough; but Coke said it seems to be good enough by Writ ——— S. C. cited Roll Rep. 55. in pl. 29. to have been adjudged not good.

7. An Ejectment lies not of *a Close containing three Acres without shewing of what Nature* the Acres are, as Land, Meadow, Pasture, Wood &c. because the Possession is to be recovered by Habere Facias Possessionem, and must follow the Form of other Writs of like Nature, as a Writ of Right, of Ward, Ejectment de Gard &c. Adjudged, and Judgment arrested accordingly, though the Name of the Close was inserted in the Declaration. 11 Rep. 55. Mich. 12 Jac. Savill's Case.

Roll Rep. 55. pl. 29. Hammond v Savil, S. C. adjudged against the Plaintiff ——— The Name and Quantity will not serve without the Quality, and Certainty ought to be comprised, because the Possession is to be recovered

covered Bridgm. 56. cites S. C. —— S. C. affirmed for Law by Holt Ch. J. 1 Salk. 254. in pl. 1. Pasch. 4 W. & M. in B. R. —— Cro. J. 124, 125 in pl. 9. S. P. per Cur. that both the Certainty of the Land ought to be shewn and in what Place it lies.

8. *De una pecia* Pasturæ *continen.* 201. *Acras Terræ sive plus sive Minus jacent' inter terras B.* This after Verdict given was held ill, & nihil Capiat per Billam. Jo. 400. pl. 9. Mich. B. R. Anon.

See this Case denied to be Law in Case of Kildare v Fisher. (Sup pl. 19)

2. An Ejectment did not lie *de 50 Acris Montani*, because that may contain Arable, Wood, Pasture, or other Species. Upon a Writ of Error upon a Judgment out of Ireland, it was for this Reason reversed. Palm 100 Pasch. 17 Jac. Stafford v. Macdonnough.

12. A Judgment in Ejectione Firmæ was reversed, because the Declaration was *of a Messuage, and of* 40 *Acres of Land, Meadow and Pasture thereto appertaining*, and it was *not set forth how much* there was *of each* of them. Cro. C. 573. pl. 13. Hill. 15 Car. B. R. Martin v. Nichols.

Mar 96. pl. 166. Sprigg v. Rawlenson, S. C. adjudged accordingly.— Cro C. 554. pl. 10 S. C. it was objected that Repositorium is a Cupboard as well as a Warehouse, and a Cupboard is a Personal Thing, of which Ejectment will not lie. The Court was divided, and would advise, and they continuing afterwards divided, the Defendant in Error commenced a new Action, and consented that this Judgment should be reversed —— S. C. cited Mar. 134. by Brampston Ch. J. but he said it would have been good if it had been said Anglice a Warehouse.

13. Ejectment *de uno Repositorio* was found for the Plaintiff. Upon Error brought Crooke and Berkley held, that Repositorium should be intended a Warehouse, but Brampston and Jones held that it was uncertain, and the greater Opinion of the Justices at Serjeant's-Inn was, that it was not good, whereupon Berkley retracted his Opinion, and the Judgment was reversed. Jo. 454. pl. 2. Pasch. 16 Car. B. R. Sprigg v. Rawlson.

14. Ejectment was brought *de quatuor Molendinis*, *without expressing whether* they were *Wind-Mills or Water-Mills*. Hales said, that it is well enough; the Precedents in the Register are so. Mod. 90. pl. 55. Mich. 22 Car. B. R. Fitzgerald v. Maskal.

15. The Ejectment likewise was *of so many Acres Jampnor' & Bruer'*, *not expressing how many of each*. Cur. That has always been held good. Mod. 90. pl. 55. Mich. 22 Car. 2. B. R. Fitzgerald v. Maskal.

16 An Ejectment lies *de quodam Loco vocat' the Vestry in D.* for this is a sufficient Description, so that Execution may be had thereof; Adjudged. 3 Lev. 96, 97. Hill 34 Car. 2. Hutchinson v. Puller.

17. Ejectment *of five Closes of Arable and Pasture, called containing* 20 *Acres in D.* Upon Not Guilty pleaded Verdict was for the Plaintiff, but Judgment was arrested, because Ejectment lies not of 20 Acres of Arable and Pasture, *without shewing how much of the one, and how much of the other*, and Clausum does not help the Matter; *Farlinga* is a known Measure, so is *Bovata*, *Hida*, *Caruca*, but Clausum is not so certain in Law, and the adding a Name to the Close is nothing, and Holt Ch. J. affirmed Savil's Case for Law. 1 Salk. 254. pl. 1. Pasch. 4 W. & M. in B. R. Knight v. Syms.

18. The Court seemed clear of Opinion, that a *Church* is demandable *by the Name of a Messuage*, but said they would hear the Counsel again as to that. 1 Salk. 256. pl. 7. Hill 11 W. 3. C. B. Hollingworth v. Brewster.

19. A Writ of Error was brought upon a Judgment given in an Ejectione Firmæ in Ireland, and it was assigned for Error, that the Ejectment was brought (inter alia) *of* 4000 *Acres of Montan'*, which Word

Word it was said was of an uncertain Signification, and did only denote the Situation, and not any particular Sort of Land, and after divers Arguments at the Bar, the Judges of this Court wrote to the Judges of Ireland to inform them, 1st. Whether Mountain-Land signified only Land so situated, or that it signified any particular Sort of Land. 2dly, Whether Land had usually been demanded in a Præcipe by that Name, and Fines usually levied of Land by that Name. 3dly, Whether Ejectments had been usually brought of Land by that Name; to which Letter the Ch. J. of B. R. and the Ch. J. of C. B. and the Ch. B. of the Exchequer, and several others of the Irish Judges, sent back an Answer, and to the first Quære said, that Mountain-Land did not only signify Land so situated, but also coarse barren Land, whether it was covered with Furze, Heath, or Stony; and the Lord Chancellor of Ireland, in Answer to a Letter which Parker Ch. J. wrote to him upon this Matter said, that Mountain-Land signified coarse barren Land, whether it was Mountainous or not, and that he knew some such Land called by that Name, which was no High Grounds. To the second Quære the Judges answered, that Fines had been levied, and Recoveries suffered of Land by that Name, in the Reign of Jac. 1. and in every succeeding Reign, none of which had been called in Question, and sent over very many Precedents of the same. And to the third Quære they answered, that Ejectments had been frequently brought of Land by that Name, many Precedents whereof they also sent over, upon which Reasons this Court affirmed the Judgment given in Ireland, and denied the Judgment of Reversal in **Macdunrock's Case**, 2 Roll Rep. 189. to be Law. MS. Rep. Mich. 4 Geo. B. R. Earl of Kildare v. Fisher.

(M) For whom it lies.

1. IF *A. ejects B.* and *after C. ejects A.* there B shall not have Writ of Ejectment against C. the second Ejector, Per Kyrk, which Thorp agreed; For the first Owner *shall not have Trespass against the second Trespassor.* Br. Ejectione &c. pl. 8. cites 38 Ass. 9.

2. Ejectment of Ward, where *he who ejects me aliens to another*, yet *I shall have Ejectione Custodiæ against him who ejects me*; Per Hank. quod non negatur, and yet a Man shall recover the Land by Ejectment of Ward. Br. Ejectione, pl. 2. cites 12 H. 4. 10.

3. If a *Lease for Years be made at Lammas to commence at Michaelmas*, the Lessee cannot have Ejectione Firmæ before Michaelmas. Br. Surrender, pl. 21. cites 37 H. 6. 17.

5. *Lessee for Years of Copyholder* may have Ejectment *before Admission of Lessor*, or any Presentment that he is Heir. N. B. in this Case 19 Years were incurred in Infancy, and after the Court was not held in several Years, and then the Steward refused to admit. Le. 100. pl. 128. Pasch. 30 Eliz. B. R. Rumney v. Eves.

If Copyholder makes a Lease for Years, his Lessee may maintain an Ejectment.

Mo. 539. pl. 709 Hill. 39 Eliz. B. R. Stoper v. Gibson —— Ruled, that the Lease was good before Admittance, but otherwise of a Surrender before Admittance. Mo. 596. pl. 813. Pasch. 35 Eliz. Bullock v. Dibley.

6. If a *Stranger enters on the Queen's Farmer*, he gains an Estate for Years, and if he makes a Leafe to another, his Leffee may maintain an Ejectment. 3 Le. 206. pl. 265. Pafch. 30 Eliz. in the Exchequer, Anon.

If the King's Copyholder be oufted, and the *Intruder makes a Leafe for Years*, this Leffee fhall not have Ejectment if oufted, but he fhall have Action of Trefpafs againft any Stranger, Cited per Gawdy J. Owen 16. as adjudged, 34 Eliz. in the Cafe of Badington v. Hale.

7. *Copyholder of Inheritance* of a Manor in the Hands of the King *is oufted*; It was held, that he has not gained an Eftate fo as he may make a Leafe for Years, upon which his Leffee may maintain an Ejectment, but he hath but a Poffeffion againft all Strangers. 3 Le. 221. pl. 294. Pafch. 30 Eliz. B. R. Anderfon v. Heyward.

8. *Leffee of the King* may bring an Ejectment, though the King be not put out of Poffeffion; Per Fenner, to which Popham agreed. Cro. E. 332. pl. 9. Trin. 36 Eliz. B. R. in Cafe of Lee v. Norris.

8. A Declaration of a Leafe made *by Reverfioner during the Life of a Jointrefs*, as appeared by the Special Verdict, for the Leafe was made the 11th of January, *habend' from Mich. before*, and the Jointrefs died after Mich. Refolved that the Declaration was good; For being by Indenture (as it was found) it is good between the Parties, and the Jointrefs being dead, it fhall be faid to begin according to the Time limited by the Indenture, and he cannot declare in any other Manner, but if it had been without Deed, peradventure it had been otherwife. Cro. E. 322. pl. 10. Pafch. 36 Eliz. B. R. Read and Morpeh v. Errington.

Yelv. 1. Pafch. 44 Eliz. B R. Wilfon v. Rich, S. P. held e contra. — *Baron* may bring Ejectment of the Lands of his Wife. 2 Mod. 270. in Cafe of Frofdick v. Sterling.

4. *Husband and Wife had Right to enter* into certain Lands *in the Right of the Wife*, and a Deed of *Leafe* for Years is written *in the Name of the Husband and Wife*, to one A. for to try the Title, and alfo a *Letter of Attorney to B. to enter* into the Land, and to deliver *the faid Deed of Leafe* to the faid A. *in the Name of the Husband and Wife*, and as well the Letter of Attorney as the faid Deed of Leafe, are fealed by the faid Husband and Wife with their Seals, and Entry and Delivery is made accordingly; The faid A. enters, and upon Ejectment brings an Ejectione Firmæ, and the whole Matter aforefaid was found by Special Verdict, and the Plaintiff had Judgment to recover, for the fpecial Matter found by Verdict, i. e. the Deed of Leafe, and the Letter of Attorney, do maintain the Declaration well enough, and here is a Leafe made by Husband and Wife, according to that the Plaintiff hath declared. 2 Le. 200. pl. 253. Mich 26 Eliz. B. R. Cooper's Cafe.

Cro. 2. 676 pl 4. Spark's Cafe S. C. & S. P. by Popham, quod Gawdy conceffit.

9. If *Copyholder* makes Leafe for a Year warranted by the Cuftom, Leffee fhall maintain an Ejectment, and per Popham, he fhall maintain it tho' the *Leafe was not warranted* by the Cuftom. Mo. 569. pl. 776. Trin. 41 Eliz B. R. Sparke's Cafe.

10. Ejectione Firmæ; A Leafe was made *by two Coparceners*, the Declaration was, Quod *demiferunt*; Ruled not good, becaufe it is a feveral Leafe of each of them for his Part. Mo. 682. pl. 939. Mich. 42 & 43 Eliz. B. R. Milliner v. Robinfon.

It was ruled by Holt Ch. J. at Ryegate in Surry, Summer Affifes, 10 W. 3. upon Evidence at a Trial, that Coparceners may join in Ejectment and Holt faid that this Cafe in Mo 682. pl 939 is not Law. Ld Raym. Rep. 726 Bonet [illegible] Juner.

11. Land

11. Land devised to Persons in Trust to let Leases, and distribute the Profits to twenty of the poorest Kindred of Devisor, the *twenty poor Kindred* have only a *Confidence, and not an Interest*, so the have no Power to make Lease to try Title in Ejectment. Mo. 753. pl. 1040. Mich. 2. Jac. Griffith v. Smith.

So where the Devise was that the Trustees should *have the letting and setting of his Land during the Minority of his Heir*, the Trustees cannot make a Lease to try the Title; Per Whitlock J. Lat. 39. cites it as Resolved 41 Eliz. Piggot's Case ——— Cro. E. 6-8 734 Piggot v. Garnis.——The Reason is because they have *an Authority only, and not an Interest*. Per Whitlock J. Lat. 135.

12. If a *Copyholder without Licence* makes a Lease for Years, the Lessee which enters by Colour of that is a Disseisor, and a *Disseisor* cannot maintain Ejectment. 2 Brownl. 40. Hill. 8 Jac. C. B. in the Case of Petty v. Evans.

13. *Lessee of a Guardian in Socage* shall have Ejectione Firmæ. Hutt. 16. Pasch. 16 Jac.

And held good tho' *not shewn in the Writ that the Heir was within Age at the Time* &c. But note, that the Nonage of the Heir *appear'd in the Declaration*, and Judgment affirmed. Noy. 155. Simmonds v. Barham.

14. Lease in Writing is delivered upon the Land, and it was *Habend' a Die Datus*, now when the Lessee is upon the Land afterwards in the *same Day*, it is a *Disseisin*, but his Continuance there the next Day by Virtue of that Lease *purges* the Disseisin; and now he is rightfully in of the Lease only, and so may maintain an Ejectment. Clayt. 27. pl. 47. Aug. 10 Car. Crawley J. Metcalf v. Stavely.

See 8 Mod. 53. Sheers v Lammas. —8 Mod. 54. Adjudged. Mackdonell v. Welden.

15. Ejectment lies for *Infant*; Per Mallet J. Mar. 143. Mich. 17 Car.

It lies for *Lessee of an Infant*. Noy. 130 Rames v. Machlin.———If Infant makes a Lease to try a Title it is a good Lease; Per Glynn Ch. J. 2 Sid. 110. Mich. 1658.

16. Disseisee *after Seisure* for the King *on Outlawry* of Disseisor may. Hardr. 176. pl. 2. Hill 12 & 13 Car. 2. in Scacc. Hammond's Case.

17. *Tenant at Will* cannot. Raym. 137. Trin. 17 Car. 2. B. R cites Blunden v. Baugh.

Sty. 380 Trin 1652. it was said in the Case of Homes v. Bingley that Tenant at Will may make a Lease for Years to try a Title of Land.——S. P. by Popham, which Gawdy agreed. Cro. E. 676. pl 4. Trin 41 Eliz. B. R. in Spark's Case.——Hetl. 73. Hill. 3 Car. S.P. by Hutton.

18. *Lessee for Years makes a Lease at Will; Lessee at Will is Ousted;* Lessee for Years may maintain Ejectione Firmæ, cites 9 H. 7. otherwise if Lessee for Years makes a *Lease for Years*, and Lessee is Ousted. Per Bridgman. Ch. J. Cart. Pasch. 18. Car. 2. C. B.

Roll Rep 3. pl. 5 Pasch 12 Jac. B R. Stone v Grubham S. P. resolved e Contra as to Ouster of Lessee at Will ———2 Bulst. 217. S. C and Coke Ch. J said it had been so rul'd; and says that clearly upon a Possession in Law, a Man shall never maintain an Ejectment but he must have an actual Possession.

19. *Conusee of a Statute-Staple* can bring no Ejectment before the Liberate. Vent. 42. Mich. 21 Car. 2. B. R. Anon.

But after he may; Arg Show. 40. Trin. 2 W. & M. in Case of Dighton v. Greenvill.———But in Case of a *Statute Merchant* it is otherwise; For there is no need of a Liberate; Per Cur. Vent 41. S. C.

20. *Vendee of Commissioners of Bankrupts* cannot maintain Ejectment by his Lessee before Inrolment, tho' the Deed be inroll'd after the Action

Vent 360. S. C. adjornatur, but

afterwards adjudg'd accordingly. Action brought. 2. Jo. 196. Pasch. 34 Car. 2. B. R. Perry v. Bowers.
—— Skinn. 30. pl. 6. S. C. argued, and says it was held afterwards that Sale of Lands by Commissioners must be by Deed inroll'd, and is void if otherwise.——2 Show. 156. pl. 142. Berris v. Bowyer S. C. adjudg'd accordingly.

It was so Ruled at a Trial at Bar. Mod. 217. Ogrel v. Ld. Arlington.

21. Tenant by *Elegit* before Actual Entry may have Ejectione Firmæ or Trespass; Arg. Show. 40. Trin. 1 W. & M. in Case of Dighton v. Greenvill.

22. *Assignment of a Term by Commissioners of Bankruptcy* was made to a Creditor, who before Inrollment of the Deed of Assignment, made a Lease to the Defendant, and then the Deed was inrolled; Per Cur. such a Lessee cannot maintain an Ejectment, because the Lease could not have been before the Inrollment; the Words of the Statute are, that Commissioners may sell by Deed inrolled, so *without inrollment* no Sale. Vide tamen. 2 Co. 26. a. 12 Mod. 3. Mich. 2 W. & M. Elliot and Danby.

(N) Against whom it lies.

1. IF the *Heir himself enters and ousts his Guardian of the Land*, Writ of *Ejectment of Ward lies not, but Writ of Intrusion of Ward.* Br. Ejectione &c. pl. 11. cites 32 E. 3.

2. Where *Disseisor makes a Feoffment reserving Rent*, this Rent shall not make him Parnor of the Land; quod nota Per Cur. Br. Parnor de Profits, pl. 15. cites 39 H. 6. 44.

3. If *Master* of the Cattle appoint his *Servant* to look to the Cattle being there, the Master and not the Servant shall be the Ejector, but where no Servant is so appointed, if a *Stranger* come over the Ground while my Cattle are there he shall be the Ejector. Clayt. 29. pl. 50. Assisa Mar. 10 Car. Vernon J. Rawcliff v. Booth.

4. Ejectment lies *not for Lessee* for Recovery of his Term *against Feoffee*, because he came to the Land by Title of Feoffment, and not by Tort, but Quare Ejecit infra Terminum is given by Stat. W. 2. cap. 24. per Vaughan Ch. J. Vaugh. 127. Pasch. 21 Car. 2. C. B. in Case of Hayes v. Bickerstaff.

(O) In what Cases it lies.

1. WITHOUT *Possession at the Time of the Ouster* a Man shall not have an Ejectment. Kelw. 130. a. pl. 99. Casus incerti Temporis.

2. In an Ejectione Firmæ there ought to be a *Right in Fact*, and it is not sufficient to be by *Estoppel*. Per Anderson. Godb. 15. pl. 22. Pasch. 25 Eliz. C. B. in Skipwith's Case.

3. In an Ejectione Firmæ it was observed by the Court for an infallible Rule, That *what may be reduced by a real Action, may* be reduced *by an Entry*, (as *in one Acre in the Name of more*). Noy. 108. Trin. 2 Jac. C. B. Nichol's Case.

4. *Rent*

4. *Rent* granted in Fee with *Proviso* the Grantee may *enter and retein* till he be satisfied of the Profits, he may make Lease to try the Title in Ejectment. Lev. 170. Trin. 17 Car. 2. B. R. Jemmot v. Cooly.

Saund. 112. S. C.—Sid. 223. S. C.—Raym. 135. 158. S. C.

5. If a *Sheriff sells a Term on a Fieri Facias* he cannot and must not put the Person out of Possession and the *Vendee* in, but the Vendee must bring his Ejectment, per Cur. 2 Show. 85. pl. 74. Hill. 31 & 32 Car. 2. B. R. The King v. Dean and Bird.

(P) What is Title sufficient.

1. WRIT of Ejectment of Ward lies of *Rent without Possession or Seisin*; For there is *Possession in Law*, because it cannot be received till the Rent-Day. *Contra of Land.* Br. Ejectione &c. pl. 9. cites 11 H. 4. 64, 65.

2. If Parson lease his *Rectory* for Years by Parol it is good, and Lessee shall have Tithes and Offerings as Incident, and it is good though there is no Parsonage House, and but only Church and Church-Yard, and if such Lessee be ousted he shall have Ejectione Firme. Br. Lease, pl. 15. cites 15 H. 7, 8. And the same Law is of a *Hundred.* Ibid. cites Trin. 6 H. 8.

3. Upon Evidence it was agreed, that if a *Lease for Years* be *made to A. and delivered to B. to the Use of A.* and *B. enters to the Use of A.* If B. be ejected, A. may have an Ejectione Firmæ. Noy. 43. Purrell v. Bishop.

4. Ejectment of a Lease of *Tithes* and *shews it not by Deed*; and because Tithes cannot pass without Deed, after Verdict for the Plaintiff Exception was taken for this Cause and ruled to be Ill, and Judgment for the Defendant. Cro. J. 613. pl. 3. Pasch. 19 Jac. B. R. Swadling v. Piers.

5. *Grantee of a Rent* with *Power to enter and take the Profits* till satisfied of Arrears may maintain Ejectment. Raym. 158. Trin. 18 Car. 2. B. R. Jemmot v. Cooley.

Saund. 112. S. C.—Lev. 170. S. C.—Raym. 135. 158. S. C. but all these Books state it as a Rent granted in Fee; But Sid 262. Jenet v. Cowley, S. C. states it as a Rent for Years.

6. A. *Lessee for three Years demises to B. for five Years* who brings an Ejectment, and *declares against the first Lessor for five Years*; and upon the Evidence it appeared, that he had Right but for three Years, because A. that leased to him had no more; and the Court were of Opinion, that the Plaintiff could have no Judgment. Freem. Rep. 400. pl. 522. Trin. 1675. Roe v. Williamson.

2 Lev. 140. S. C and Hale held this Verdict against the Plaintiff; For the Judgment shall be, That the Plaintiff recover Terminum suum prædictum, which is five Years, and the Lessor's Interest does not continue so long. And perhaps the Defendant may be the Reversioner after the three Years ended, and so the Lessor of the Plaintiff will recover for two Years more than he has Right to hold it. Wylde held accordingly, but Twisden seem'd e contra. Et adjornatur —— 3 Keb 490. pl. 31. S. C. the Court held the Declaration ill, and that the Plaintiff can have no Judgment.

7. *Payment of Rent* to the Lessor or to any for his Use is a *sufficient Title* for the Plaintiff, if the Defendant has no Title at all but Posses-

 sion,

ſion.; Held per Scroggs Ch. J. 2 Show. 126. pl. 105. Trin. 32 Car. 2. B. R. Anon.

8. If a *Leſſee holds over his Term*, an Action of Treſpaſs cannot be brought without an *actual Entry*. 5 Mod. 384 Hill. 9 W. 3. B. R. Anon.

9. If *H. has Poſſeſſion of Land for 20 Years uninterrupted, and B. gains Poſſeſſion*, upon which H. brings Ejectment; though H. is Plaintiff yet his Poſſeſſion for 20 Years will be a good Title for him, as well as if H. had been then in Poſſeſſion; becauſe Poſſeſſion for 20 Years now by Virtue of the Statute of 21 Jac. 1. cap. 16. is like a Deſcent at Common Law which tolls the Entry. Ruled by Holt Ch. J. Summer Aſſizes at Lincoln 11 W. 3. 1699. and at Aylesbury. Ld. Raym. Rep. 741. Stocker v. Berney.

10. *Ceſty que Truſt* of a Remainder executed by the Statute 27 H. 8. of Uſes has Eſtate ſufficient to make a Leaſe. Gibb. 11. 18. Paſch. 1 Geo. 2. B. R. Shaw v. Weigh.

(Q) Pleadings. Declaration.

1. IF a *Leaſe* is *dated the 28th* Day, and it is *ſealed on the Land* after the Commencement of the Term, viz. *the 29th Day*, and *the Ejectment is ſuppoſed and laid to be the 30th Day*, this is well enough, though the Leſſee did not enter on the 30th Day but the Day before; Per Dyer. Dal. 105. pl. 47. Anno 15 Eliz. Covert v. Leonard.

2. The Plaintiff counts of a Leaſe of the *fourth Part of a Houſe* in N. in four Parts to be divided, by Force of which he entered in *Tenementa Prædict'* and was inde Poſſeſſionatus until the Defendant did eject him *de Tenementis prædict'* and held good. Cro. E. 286. pl. 2. Trin. 34 Eliz. B. R. Rawſon v. Maynard.

3. Exception to a *Declaration* in an Ejectione Firmæ becauſe it *was a Poſſeſſione ſua (inde) ejecit*; where it ought to be according to the Suppoſal of the Writ. *Quod a Firma ſua ejecit*, all the Juſtices held that the Word *(inde) had Relation to the Farm*, and ſhall be as much as if he had ſaid, a Poſſeſſione Firmæ; and the Declaration was ruled to be good notwithſtanding the Exception. Godb. 71. pl. 85. Mich. 28 & 29 Eliz. B. R. Anon.

4. Alſo it was *of three Cloſes*, *naming them* with a, viz. *containing by Eſtimation* 30 *Acres*, which was objected did contain no Certainty, where he ought to have alleged in Fact, that they did contain ſo many Acres. But it was holden by all the Juſtices, that although he does not put in the Declaration the Certainty of the Acres, if he *gives a certain Name to them*, *as Green-Cloſe &c.* that it is good. Godb. 71. in S. C.

5. In an Ejectione Firmæ Exception was taken becauſe the *Plaintiff in his Declaration did not ſay extra tenet*; for in every Caſe where a Man is to recover Poſſeſſion he ought to ſay extra tenet. But all the Juſtices agreed, that in an Ejectione Firmæ thoſe Words were not material; for if the Defendant put out the Plaintiff it is ſufficient to maintain this Action. And Kempe Secondary ſaid, that ſo were all the Antient Precedents; although of late Times it has been uſed to ſay in the Declaration extra tenet; and the Declaration was holden to be good without thoſe Words. Godb. 60. pl. 72. Mich. 28 & 29 Eliz. B. R. Anon.

6. In

6. In Ejectment the Plaintiff declared, Quod cum R. D. *per Indenturam ſuam gerent. dat.* 20 *Maii dimiſit* &c. Exception was taken that he ought to have ſaid iiſdem Die & Anno; For though the Indenture bears Date as above yet, it may be, it was delivered at another Day, and then it begins to be a Demiſe. But Judgment was given for the Plaintiff. 2 Le. 117. pl. 157. Paſch. 30 Eliz. B. R. Cony v. Cholmley.

Cro. E. 773. Mich. 42 & 43 Eliz. B. R. Hall v. Denbigh. S. P. reſolv'd per tot Cur to be well enough; for when he declares that he let by Indenture of ſuch a Date, it ſhall be always intended to be delivered at the ſame Time whereon it bare Date, if it be not ſhewn with a Primo Deliberatum at another Day; and he who pleads a Deed of ſuch a Date, cannot by Replication, or other Pleading, maintain to be delivered at another Time, for it would be a Departure, as 5 H. 7. 26. Dy. 167. 221. Wherefore it was adjudged for the Plaintiff. ——— Ibid. 890. pl. 7. Trin. 44 Eliz. B. R. Houſe v. Laxton, S. P. by all the Juſtices præter Gawdy.

7. Ejectione Firmæ by H. againſt C. The Plaintiff declared upon a *Leaſe for Years, to have and to hold* to him *from the Sealing and Delivery* of it; and *declared that the Sealing and Delivery was* 1 *May, and the Ejectment the ſame Day*; and this Matter was moved in Arreſt of Judgment, that the Ejectment could not be ſuppoſed the ſame Day, for the Leaſe did not begin till the next Day enſuing the Sealing &c. But the Exception was not allowed by the Court; for where the Leaſe is to begin from the Time of the Sealing and Delivery, or by theſe Words, for 21 Years next following the Ejectment may be well ſuppoſed to be the ſame Day; for the Beginning of the Leaſe is preſently upon the Sealing and Delivery, and ſuch a Leaſe ſhall end the ſame Time and Hour as it began. 4 Le. 144. pl. 255. Trin. 31 Eliz. B R. Higham v. Cooke.

8. Ejectione Firmæ *of a Leaſe made* 20 *Aug. from Mich. then laſt Ante datum hujus Indenturæ*, and he *ſhews neither the Indenture nor the Date of it*, which was ſaid to be not good, becauſe it does not appear when the Leaſe began; But the Court held it good, and the Words Ante Datum Indenturæ ſhall be void, and the Beginning of the Leaſe appears certain enough, and Judgment for the Plaintiff. Cro. E. 606. pl. 5 Paſch. 40 Eliz. B. R. Darrel v. Middleton.

9. Ejectione Firmæ; The Plaintiff *declared of a Leaſe for Years, Habendum a die Datus virtute cujus* dimiſſionis he entered and *was poſſeſſed until the Defendant ejected him.* It was moved in Arreſt of Judgment, that the Declaration was not good, becauſe the *Time of the Entry was not alleged*; for if he entered on the Day of the Demiſe he a Diſſeiſor, and then the Action not maintainable; Adjornatur; but afterwards it was reſolved that for that Cauſe the Declaration was ill, and adjudged for the Defendant. Cro. E. 766. pl. 4. Trin. 42 Eliz. and Trin. 43 Eliz. B R. Douglaſs v. Shank.

10. In Ejectment the Plaintiff *declared of a Leaſe for Years of a Houſe and* 30 *Acres of Land in D. and that J. S. did let to him the ſaid Meſſuage and* 30 *Acres, by the Name of his Houſe in B. and* 10 *Acres of Land there five plus five minus*; It was moved in Arreſt of Judgment, becauſe that 30 Acres cannot paſs by the Name of 10 Acres five plus five minus, and ſo the Plaintiff has not conveyed to him 30 Acres; for when 10 Acres are leaſed to him five plus five minus, theſe Words ought to have a reaſonable Conſtruction to paſs a reaſonable Quantity, either more or leſs, and not 20 or 30 Acres more. Yelverton agreed; for the Word 10 Acres *five plus five minus, ought to be intended of a reaſonable Quantity*, more or leſs by a Quarter of an Acre, or two or three at the moſt; but if it be three Acres leſs than ten the Leſſee muſt be content with it; Quod Fenner and Crook conceſſerunt; and Judgment was ſtaid. Ow. 133. Trin. 43 Eliz. C. B. Day v. Fynn.

12. In

Cro J. 96. pl. 25. Mich. 3 Jac. B. R. S. C & S. P. held by three Juftices, abfente Popham. —— Cro J. 429. in pl. 3 cites S. P. and intends S. C and fays that a Precedent was then fhewn thereof. ———— S. C. cited Freem. Rep. 146 pl. 166. Pafch. 1674 in Cafe of Merton v. Brand, where the Point was, that the Plaintiff declared of a Leafe made the 10th January, Habend' a primo Januarii, by Virtue whereof he entered, and that the Defendant Poftea, viz. Primo Januarii ejected him The Queftion was, if the viz. being repugnant was not void as in the Principal Cafe cited; Sed adjornatur. ———— Sid. 8 has a Nota at the End of the Cafe there that the Ch. J. faid he did not apprehend any Reafon for fuch Judgment in the faid Cafe of Adams v. Goofe.

11. In Ejectment the Plaintiff *declared of a Leafe the 6th September, and that he was poffeffed, and that Poftea fcilicet 4 September the Defendant ejected him.* This Declaration was held good by three Juftices, and that it is fufficient that he declared of his Poffeffion Virtute Dimiffionis, and that he was afterwards ejected, and *the viz. the 4 September is void and repugnant.* Arg. Sid. 8. cites it as Cro. J. 96, 27. Adams v. Goofe.

12. Ejectione Firmæ was brought upon a *Leafe made 1 Jan. 3 Jac. Habend. a datu Indenturæ* prædict. and the *Ejectment was the fame Day.* Refolved, the Date is the Time of the Delivery, and it differs from the Time or Day of Delivery, wherefore the Ejectment alleged poftea the fame Day, is good enough; Adjudged for the Plaintiff. Cro. J. 135. pl. 10. Mich. 4 Jac. B. R. Osborn v. Rider.

13. The *Leafe was dated 8 May, 7 Jac.* and the *Ejectment was laid 13 May, 7 Jac.* and the *Action was brought in Eafter Term following.* Adjudged that if the Ejectment is proved at any Time after the Leafe, and before the Action brought, it is fufficient, though it was laid at a certain Time which the Plaintiff could not prove; but becaufe the Plaintiff failed to prove this the Plaintiff was Nenfuit. Bulft. 122. Pafch. 9 Jac. Hall v. King.

2 Bulft 29. Mirril v. Smith, S C. and the whole Court held the Declaration good, and fo a Judgment in C. B. was affirmed in B. R.——Jenk. 325. pl. 41. S. P. cites S. C.

14. In Ejectione Firmæ, the Courfe of C. B. is, where the Defandant appears, then to Count, and after Imparlance to make a fecond Count by way of Recital; but the firft ought to contain the Subftance of the Matter. In the firft Count in this Cafe the *Leafe is alledged to be made 25 Mar. 6 Jac. and* afterwards *the Ejectment, the faid 6 Jac. without mentioning the Day of the Ejectment*; The fecond Count mentions the Ejectment to be the 26th of March 6 Jac. and the Ejectione Firmæ was brought in the 7 Jac. The Plaintiff had Judgment affirmed in Error; *A certain Day of the Ejectment is not neceffary to be alledged in the Count*; *It will ferve to fay Poftea* &c. Jenk. 341. pl. 98. cites Cro. J. 311. pl. 11. Mich. 10 Jac. Merrel v Smith.

Mo 837 pl. 1130. Worrall v. Harper. S. C. no Judgment was given, becaufe the Declaration was faulty ——S. C. cited accordingly, Palm. 101. by Dodderidge J. Pafch. 17. Jac. B. R.

15. An Ejectment lies not *de omnibus & omnimodis Decimis in W. without faying Garbarum, Fæni, Lanæ, Agnellorum, or fome other Certainty of the Nature or Quality of the Tithes,* fo that a certain Judgment may be given, or Execution by Habere Facias Poffeffionem be had thereof; and tho' the certain Number thereof fhall not be expreffed (for the Fruitfulnefs or Barrennefs may be more or lefs) yet the certain Kinds ought to be fhewed, and all the Tithing may confift in Modo Decimandi by Payment of an Annual Sum in Satisfaction thereof, of which no Ejectment lies; for the Statute of 32 H. 8. cap. 7. which gives the Action for Tithes, gives it as they fhould or might do for Land; and in an Action for Lands, the Plaintiff ought to fhew the Quality or Nature thereof, as arable Land, Meadow, Pafture &c. adjudg'd, 11 Rep. 25. b. Trin. 12 Jac. Harpur's Cafe.

16. Original in Ejectment was *againft A. and three others*; Plaintiff counts againft 3 of the Defendants, and *no Simul-cum againft the fourth*; Judgment was ftaid; Per tot. Cur. Brownl. 129. Trin. 13 Jac. cites Goodhall v. Hill.

17. Ejectione

17. Ejectione Firmæ of a *Leaſe* 21 *Oct.* 4 *Jac.* *Et quod poſtea ſcilicet eodem* 21 *Oct. Anno* 3. *Jac. ſupradict. he ejected him.* It was moved, that the Ejectment being alledged to be a Year before the Leaſe is void, but three Juſtices, Tanfield e contra, held it to be good, becauſe the Words be, Poſtea ſcilicet eodem 21 Die Oct. and and therefore there needed not any Year to be mentioned, and the Addition of a Year not mentioned before, and repugnant to the Day mentioned is Idle, and ſhall be taken for null. Cro. J. 154. pl. 4. Paſch. 5. Jac. B. R. Brigate v. Shork.

S. C. cited Lat. 201. — Ejectment was *on a Leaſe of the 6th May.* 7 *Jac.* and that the Plaintiff enter'd, and was poſſeſſed, untill the *Defendant afterwards,* viz. 18*th Day of the ſame Month of May, Anno* 6 *ſupradicto, ejected him*; After Verdict for the Plaintiff it was objected, that the Declaration was not good, becauſe the Ejectment is alledged a whole Year before the Leaſe was made, for the Leaſe was on the 6th May 7 Jac and the Ejectment was ſuppoſed to be Anno 6 Jac but adjudged it was good, and that *the Word* (*Sexto*) *was void*; for the Day of the Ejectment being laid to be *ejuſdem Menſis Maii,* it *cannot be intended* to be *of another Year than that in which the Leaſe was made.* Yelv. 182 Mich. 6 Jac. B. R. Davis v. Pardy.——Brownl. 146 S. C. in totidem Verbis.

If a *Leaſe* be *made* 1*ſt Feb.* 5 *Jac. and ſo laid, &c. Quod poſtea,* 1*ſt Feb.* 4 *Jac. the Ejectment was,* this is good, and 4 *Jac void,* and the Word *Poſtea guides all, and agrees with the Leaſe.* Judged and affirmed in Error Superflua non nocent. Jenk 325. pl, 41.——2 Bulſt. 29 in Caſe of Mirril v. Smith, cites the Caſe of Moyl v. Ewers S. P. and adjudged the Poſtea to be good, and the (viz.) to void for the Ejectment.

18. Ejectione Firmæ *of two Cloſes, called the Higher G. and the Lower G. containing three Acres of Land*; It was ſaid the Words containing three Acres of Land were uncertain, and Savil's Caſe, 11 Rep. was vouched; But adjudged by three Juſtices, contra Houghton that the Ejectione Firmæ did lie, and this Caſe differs from Savil's for there neither the Quantity nor the Quality of the Land is mentioned; But here, the ſaying containing three Acres of Land, and the Cloſes being named it is certain enough what Nature of Land it is, and altho' the Cloſes do contain more then three Acres, he ſhall recover the whole Cloſes. Cro. J. 425. pl. 4. Mich. 15 Jac. B. R. Wikes v. Sparrow.

S. C. cited 2 Roll Rep. 167.

19. In Ejectment, the Plaintiff *declared on a Leaſe* made to him *by one J. C. dated* 1*ſt Jan.* 15 *Jac. and ſealed and delivered* 5*th Jan. following, to hold from Chriſtmas laſt paſt for two Years*; The Jury *found* the Leaſe and a Letter of Attorney to execute it, (viz.) that the Leſſer was ſeiſed in Fee of the Lands, and being ſo ſeiſed, *he made, ſign'd, and ſeal'd an Indenture of Demiſe in hæc Verba &c. but did not deliver it as his Deed to the Plaintiff on the* 5*th Day of Jan. but by a Letter of Attorney bearing Date on that Day he gave full Power to M. M. his Attorney to enter* on the Lands in his Name, and after Poſſeſſion taken to deliver the ſaid Indenture to the Plaintiff, by Virtue whereof he entred, and immediately afterwards delivered the Leaſe to the Plaintiff as the Deed of the Leſſor. It was objected, that this Declaration was ill, for the Plaintiff declared on a Leaſe made to him by J. C. which if ſo, then the Letter of Attorney had been idle, and to no purpoſe; but adjudged good, and that it was the Leaſe of the Leſſor. Brownl. 128. Trin. 16 Jac. Hill v. Scales.

20. Ejectione Firmæ *of a Leaſe of Tithes,* and does *not ſhew that it was by Deed,* and becauſe Tithes cannot paſs without Deed, after Verdict for the Plaintiff, Exception being taken for this Cauſe, it was ruled to be ill, and adjudged for the Defendant. Cro. J. 613. pl. 3. Paſch. 19 Jac. B. R. Swadling v. Piers.

21. Ejectione Firmæ *of a Leaſe made by the Lady Morley to the Plaintiff,* 1*ſt Maii* 14 *Jac. for five Years, if ſhe is ſo long lived, and that he enter'd and was poſſeſſed, and that the Defendant poſtea, viz.* 6 *Maii, entered upon him and ejected him a termino ſuo prædict' nondum*

Palm. 267. S. C. adjudged accordingly in B. R. — Ibid.

dum finito. It was said the Declaration was not good, because *there is not any Averment of the Life of the Lessor at the Time of the Action brought.* Three Justices contra, Chamberlain held it good enough, for he shewing that the Defendant ejected him a termino nondum finito, implies the Lady was alive; Judgment was for the Plaintiff, and the Judgment affirmed in Error brought. Cro. J. 622. pl. 13. Mich. 19 Jac. B. R. Arundel v. Mead.

327 Mead v. Arundel, Hill. 20 Jac. Judment affirm'd una voce in the Exchequer.

22. If in Ejectment the Plaintiff *of a Lease the 22d May 20 Jac. habend' a primo Die Maii for three Years, Virtute cujus he entred and was possessed quousque postea, scilicet eisd' Die & Anno the Defendant ejected him,* this is well enough, for his Entry being laid to be Virtute Dimission', the *postea eisd' Die &c. refers to the Day of the Lease made*; Adjudged in B. R. and that Judgment affirmed in Cam. Scacc. upon a Writ of Error accordingly; tho; it was objected, that the eisd' Die &c. referred to the last Antecedent, and so the Ejectment was laid before the Lease commenced. Cro. J. 662. pl. 12. Hill. 20 Jac. Rutter v. Mills.

23. Judgment was for the Plaintiff in Ejectment brought in Ireland, and Error assigned was, that the Plaintiff had *declared on a Lease made to him to commence at a Day to come, Virtute cujus he entred and was possessed, and did not shew when he* entred, *either before or after the Day* on which the Lease was to commence. Sed non allocatur, because he said Virtute cujus &c. But Ley Ch. J. said that if he had said Prætextu cujus it had been otherwise. 2 Roll Rep. 466. Mich. 22 Jac. B. R. Wakely v. Warren.

24. If the *first Declaration* in the Common Pleas *is vitious*, and the *second is as it ought to be*, the first is not amendable in this Case; For the first Declaration is the Foundation, and the second is only by way of Recital. Jenk. 325. at the End of pl. 41.

25. B. brought an Ejectione Firmæ against J. and *declared upon a Lease* of Land *Habend. a Die dat' Indentur' prædict.* And *does not speak of any Indenture before*, and for that the Declaration adjudged naught. Hetl. 63. Mich. 3 Car. C. B. Brady v. Johnson.

And so it was between Bell and March, and this same Term between Spark, and ...... where it was shewed quod concessit per eandem Indent' where he had not spoke of any Indenture before. Ibid.

26. It was resolved, that an Ejectione Firmæ *of* 40 *Acres of Land by Estimation* is not good, for the Demand ought to be certain. Ley 82. Mich. Car. in Case of Row v. Ocam.

27. The Declaration was *of a Messuage and* 40 *Acres of Land, Meadow and Pasture* thereto appertaining, and it was *not distinguished how much* there was in Land, how much in Meadow, and how much in Pasture, therefore the Judgment was reversed. Cro. C. 573. pl. 13. Hill. 15 Car. B. R. Martyn v. Nichols.

28. In Error of a Judgment in Ireland, the Error assign'd was, that the Plaintiff *declared upon a Demise made* 12 *Junii* &c. *Habendum a Prædicto duodecimo Die Junii*, (which must be the 13th Day of the same Month) Usq; &c. virtute cujus quidem Dimissionis he entred &c. *and that the Defendant postea scilicet eodem duodecimo Die Junii, did eject him* &c. So that it appears upon the Face of the Declaration that the *Defendant entred before the Plaintiff had a Title*; for the Lease commenced on the 13th of June, and the Entry was on the 12th of that Month; Per Curiam, the *Plaintiff entred as a Disseisor by his own shewing*, and thereupon Judgment was reversed. 3 Mod. 198. Pasch. 4 Jac. 2. B. R. Evans v. Crocker.

S. P. but if the Plaintiff declares of a Lease of the first of Decemb. Habendum a Die datus, the Ejectment cannot be alleged the same Day; but if the Lease be made the first of Decemb. *Habend. henceforth*, the Ejectment may be alleged the same Day; wherefore it was adjudged accordingly. Cro. J. 258. pl. 18. Mich. 8 Jac. B. R. Lewelyn v. Williams.

If

If the *Lessor of the Plaintiff entered before the Term began*, he was a Disseisor; Per Bridgman Ch. J. Cart. 160. Mich. 18 Car. 2. C. B. at the End of the Case of Foot v. Berkley, and cites Dyer 89. * Clifford's Case.——* D. 89. a. pl. 111. Trin. 7 E. 6. in Writ of Error brought in B. R. Clifford v Warren. —— Lev. 46. Mich. 13 Car. 2. C. B. per Bridgman Ch. J. in delivering the Opinion of the Court. Hennings v. Brabazon.

29. *A. B. and C.* Jointenants *join* in the Lease of a *House to J. S. to commence from Michaelmas last*, afterwards *on the same Day B. and C.* without A. *demise the same House to J. S. to commence from the same Time, and for the same Number of Years* as in the Lease made by all three, and in Ejectment by J. S. he declares upon both these Leases. Resolv'd, that the Declaration was not *Double*, for when the three demised the Whole, and afterwards two of them demised all the same thing, this is a *Surrender* of the first Lease, and a new Lease of their two Parts, and the old Lease continues as to the third *Part* of A. and so J. S. entred, and was possessed by both Leases, viz. of the third Part of A. by the *first Lease*, and of the two Parts of B. and C. by the *second Lease*. 3 Lev. 117. Pasch. 34 Car. 2. in Cam. Scacc. Turbervill v. Stockton.

30. In Ejectment the Plaintiff declared that Frances Ford, and Elizabeth, dimiserunt, and put no Sur-name to Elizabeth. After Verdict for the Plaintiff it was moved, that this was a joint Demise, and no Sur-name being given to one of the Parties the Declaration was void; and the Court held it void for the Uncertainty, and so Judgment was arrested. Freem. Rep. 146. pl. 167. Pasch. 1674. Carter v. West.

31. *Declaration* in Ejectment mentions the Demise to be for 11 Years Habendum *from the same Day on which the Entry is alledg'd to be*, and ill. Cumb. 83. Pasch. 4 Jac. 2. B. R. Stephens v. Croker.

32. *Declaration recital an Original*; and an *Original was produced Teste 2 Novembris, which was after the Demise.* And the Prothonotary informed the Court, that this was frequently allowed, and that no Memorandum of the Originals bearing Teste within the Term was used to be made upon the Record. 2 Vent. 174. Pasch. 2 W. & M. C. B. Tunstall v. Brend.

33. A Fine was levied in Hillary Term, and an Ejectment brought upon the Title, and the *Demise was laid before the Fine took Effect*, and upon Motion it was ordered, that the Demise be laid of Lady-Day last. Cumb. 290. Trin. 6 W. & M. in B. R.

A Lease by an Assignee of a Bankrupt's Estate *before Inrolment*, by which nothing passed till Inrolment, and upon which an Ejectment was brought, was denied to be amended; and per Holt Ch. J. it is *not amendable*, because no other Lease than what was laid was confessed. Show. 206. Pasch. 3 W. & M. Bennet v. Gaudy.

34. Two or three *several Demises from several Persons* may be laid in one Declaration in Ejectment. Cumb. 290. Trin. 6 W. & M. in B. R.

And though there is *but one Habendum*, viz Habend' Tenementa prædicta so demised by the aforesaid several Parties for seven Years, and lays in his Declaration, that the Defendant entered into all the aforesaid Tenements, & *ipsum* (the Plaintiff) *a firma sua prædicta* (in the Singular Number) *ejecit, expulit &c* Per Cur. it is well enough, Reddendo singula singulis. Carth. 224. Pasch. 4 W. & M. in B. R. Fursden v. Meor.

35. Error on a Judgment in C. B. in Ejectment. The Error assigned was, that the *Declaration was on two Demises*, and there was *no Habend' in the First*, *but* afterwards the *second Demise was Habend' Tenementa prædicta*, which as it was urged, did not extend to both the Demises, nor would it be good in Case of a Grant, and the Judgment is intire quod recuperet Terminos prædict'; but per Cur. it is well enough,

Carth. 224 Fursden v. Moor. S. C. the Count was of several Demises by

several Parties; and per Curiam it is well enough, reddendo singula singulis. enough, and the Judgment was affirmed. Comb. 190. Pasch. 4 W. & M. in B. R. Moor v. Parndon. ——— 2 Vent. 214. Moor v. Fursdon. S. C. and the Plaintiff also set forth, that he entered into the Premisses demised to him by J. S. and J. N. in Forma prædicta; And the Court held, that this is an Averment that all was demised for five Years; For that is the Forma prædicta, and adjudged for the Plaintiff in C. B. and that Judgment affirmed in B. R. ——— It was held that two *Tenants in Common* Lessors must make *several Leases* in Ejectment. And *Quod Cum* is well enough because the Ejectment is positive. Show. 342. Mich. 3 W. & M. Moor v. Fursden.

Per three Justices he ought to declare upon several Leases of their several Parts; but Williams J. contra. Cro. J. 166 Mantle v. Wellington.

36. If two *Tenants in Common* are disseised, their Lessee in Ejectment must declare upon *two several Demises*. Comb. 213. Trin. 5 W. & M. in B. R. Per Eyres J.

37. The *Demise was on the Essoin Day* of Hill. Term, and the *Declaration was of the same Hill. Term*, both which relate to the first Day, and so the Action was brought before the Title accrew'd, or at least on the very same Day, which cannot be, because the Law allows no *Fractions of Days*. But per Cur. this being after a Verdict the Ch. J. said, that if the Plaintiff in Error would take Advantage of this Matter he should have alledg'd *Diminution*, and procured the original Writ to be certified, and if that was returnable before the Plaintiff's Title it would have been *Error*. Carth. 288. Mich. 5 W. & M. in B. R. Cook v. Darbyson.

38. Ejectment was *brought as of the last Term*, and the *Demise was laid in October*, the Tenant does not appear. Holt said, he *would not grant a Rule for Judgment* against the casual Ejector, *where it appears upon the Record, that the Ejectment was brought before Title accrued*, though the Practice may have been so. Comb. 345. Mich. 7 W. 3. B. R. Clayton v. ———.

Carth. 390. Patrick v. Ball. S. C. and per Cur. since the Case in 2 Cro. 613. the Law is altered as to this Point concerning Declarations in Ejectment. For now they are grounded on Fictions only. And Plaintiff had Judgment and affirmed in Error.

39. Ejectment of Lands in Suffolk *upon the Demise of the Corporation of Bury*. Upon Not Guilty pleaded a Verdict was given for the Plaintiff. But it was moved in arrest of Judgment in C. B. that it does *not appear upon the Record that the Lease was by Deed*. And the Prothonotaries there certified, that the Practice was (notwithstanding the common Rule, of confessing Lease, Entry, and Ouster in Ejectment) for Things Incorporeal, as Tithes, or upon Demises of Corporations, to lay the Demise by Deed. But it was adjudged in C. B. that it was aided by Verdict. And Judgment was given there for the Plaintiff. Upon which Error was brought in B. R. and that Judgment was affirmed. And Holt Ch. J. said, that at this Day the Case of 2 Cro. 613. Snadling v. Piers is not Law. Ld. Raym. Rep. 136. Hill. 8 & 9 W. 3. Partridge v. Ball.

40. In Ejectment the Plaintiff *declared upon two several Demises habendum Tenementa prædicta* &c. *by Virtue whereof he entered and was possessed, quousque the Defendant entred in Tenementa, and the Plaintiff expulit et amovit a termino suo prædicto inde nondum finito* &c. Mr. Northey moved in arrest of Judgment, that Tenementa prædicta was uncertain, and therefore ill, for it did not appear which. The same of Termino suo prædicto inde nondum finito, which makes the former Objection the stronger, because it complains but of one. But the Court held the first to be well enough, and that it would extend to both; And as to the other, if it had been omitted, the Declaration had been well enough, and

and therefore it would not hurt it. Judgment for the Plaintiff. Ld. Raym. Rep. 561. Pasch. 12 W. 3. Slabourne v. Bengo.

41. Per totam Curiam, by the Course of this Court *there can be no Alteration in the Declaration in the Issue from the first Declaration deliver-ed, only in the Defendant's Name.* And a Rule was made, that the Issue should be made according to the Declaration delivered against the casual Ejector. Ld. Raym. Rep. 1411. Mich. 12 Geo. in Case of Bass v. Bradford.

42. In Ejectment the Plaintiff declar'd *of the Manor of Queensbrough, with the Appurtenances,* 400 *Acres of Land, and Common of Pasture for all Manner of Cattle, and for the Rectory and Advowson, with the Appurtenances, and for all, and all Manner of Tithes,* and held good. Hill. 6 Geo. 2. B. and affirm'd in Error in the Exchequer Chamber Trin. 8 & 9 Geo. 2. and afterwards in the House of Lords 10th March 1735. Doe (on the Demise of Savil) v. Borlace.

43. In Ejectment the Plaintiff declared *of* 100 *Acres of Marsh, and one Beast-gate,* with the Appurtenances; After Judgment a Writ of Error was brought, and the Error assign'd was, that the Declaration was ill for the Uncertainty what is meant by the Word *(Beast-gate;)* On the contrary a Case was cited, where so many Acres of (Alder-Carves) in the County of Norfolk was held good, because it was a Term well known in that Country. And in the Case of Metcalf v. Roe. Mich. 9 Geo. 2. *Ten Acres of Pasture and Cattle-gates* was held good. The Court held the Ejectment was well laid, and said there was no Difference between Cattle-gate in the Case of Roe v. Metcalf, and Beast-gate in the present Case. And that any Name well understood in the particular Place to denote a certain Sort or Quantity of Land is good; And per Lee Ch. J. so many Acres of (Mountain) in Ireland is good. And the Judgment was affirm'd. Hill. 11 Geo. 2. B. R. Benington v. Goodtitle.

(R) Plea. Replication.

1. Ejectione custodiæ *by the Lord,* the *Defendant said, that he is Tenant by the Curtesy of the same Land, by which he enter'd* &c. the *Plaintiff said that the Land was specially tailed to the Feme and her first Baron, and to the Heir of their two Bodies,* and a good Replication. Br. Ejectione &c. pl. 12. cites 46 E. 3. 5.

2. It is a good Plea in Abatement that the Plaintiff has *other Ejectione* Firmæ *pending* for the same Land in the Common Pleas. Mo. 539. pl. 710. Trin. 39 Eliz. Digby v. Vernon.

3. *Ancient Demesne* is a good Plea. 5 Rep. 105. Hill. 43 Eliz. C. B. Alden's Case.

4. In Ejectment a Man shall *not give Colour,* because the Plaintiff shall be adjudged in by Title; Adjudged per tot. Cur. Godb 159. pl. 221. Mich. 7 Jac. B. R. Piggot v. Godden.

5. *Concord with Satisfaction* is a good Plea in Ejectment. Brownl. 133. Trin. 9 Jac. Pats v. Chitty.

2 Brownl. 128. Peto v. Checy, S. C. & S. P adjudged. —— Godb. 149. pl 193 S C. adjudged accordingly. —— 9 Rep. 77. b. Peytoe's Case, S. C adjudged accordingly

 6. *Expira-*

6. *Expiration of the Term* is no Plea in Ejectione Firmæ; Per Jermin. Lat. 206. Trin. 3 Car. Dale v. Penhalerick.

7. In Ejectment by A. against B. the Court was moved for C. that he will save B. harmless, and prays that giving B. Security to do so, B. may be *ordered by Rule of Court to plead as C. should direct B.* and that B. be not suffered to confess a Judgment; Per Roll Ch. J. it is out of the way for you to give such Security, for there yet appeared no *Collusion*, but you shall be *made a Party to defend the Title*, and then move again. Sty. 382. Pasch. 1653. Ricot v. St. John.

8. If Judgment in Ejectment be signed in a Country Cause for *want of Plea*, but no Possession delivered, a Judge in his Chamber at any Time before the Assises, may compel the Plaintiff to accept a Plea, but if Possession is delivered he is without Remedy; Per Holt Ch. J. 2 Salk. 516. pl. 9. Mich. 9 W. 3. B. R. Anon.

9. In Ejectment *Plea of Ancient Demesne* was allowed to be well, *without an Affidavit* to verify the Fact, and such Plea had been before allowed to be good in Earl Coningsby's Case. 2 Ld. Raym. Rep. 1418. Trin. 12 Geo. B. R. Goodright v. Shuffil.

(S) Bar.

1. A Recovery in one Ejectment *is a Bar* in another; Per Anderson Ch. J. especially (as Periam J. said) if the Party relies on the Estoppel. 3 Le. 194. pl. 242. Mich. 29 Eliz. C. B. Anon.

2. Declaration of a *Park* containing 60 Acres, and the Jury find but of 30, adjudged against the Plaintiff for the whole. N. B. The Park was *a Thing intire*. D. 115. b. pl. 67. Marg. cites 29 Eliz. Baskervill's Case.

3. A Bar *in one* Ejectione Firmæ *is* a Bar *in another* for the same Ejectment, but not for another or new Ejectment. Mar. 59. pl. 92. Mich. 15 Car. Anon.

4 Le. 77 pl. 163. Pasch. 28 Eliz. C. B. Spring v. Lawson, S. P.

4. If the *Plaintiff dies*, the Court will suppose any other Person of the same Name to be the Plaintiff, and they take Notice judicially that the Lessor of the Plaintiff is the Person interested, and therefore they punish the Plaintiff if he *release the Action* or the Damages. Mod. 252. Trin. 29 Car. 2. C. B. Addison v. Otway.

Such Release not allowed. Raym. 93. Hill. 15 & 16 Car. 2. B. R. Keyes v. Bradon.

(T) Abatement.

1. IF Ejectment of Ward be brought *against* two, and the *one dies*, yet the Writ is good against the other, per Thirn, and Hull of the same Opinion; For *this is in Nature of Trespass*; Quod Nota; by which Skrene who pleaded this Matter imparled. Br. Ejectione &c. pl. 2. cites 12 H. 4. 10.

2. Ejectione Custod' *of Land in E.* the *Defendant said that the Land is in C. and not in E.* Judgment of the Writ, and Plaintiff prayed Leave to inquire a better Writ. Br. Ejectione &c. pl. 4. cites 14 H. 4. 16.

3. In Ejectione Firmæ, the *Omission* of this Clause, *Et Bona & Catalla querentis ad valen'* &c. is not material, and the Writ is good without this Clause. Thel. Dig. 94. lib. 10. cap. 6. S. 17. cites Plowden Fol. 199, 228.

4. *Lessee for Years brings an Ejectione Firmæ* ; *The Lessor being but Tenant for Life dies, pending the Writ* ; The Writ does not abate. The Plaintiff may have Judgment and a Writ of Execution. Jenk. 293. pl. 38.

5. If an Ejectment be brought *against two*, and *Issue be joined*, and then *one of them dies*, and a *Venire is awarded as to the two Defendants, and a Verdict against two*, yet upon Suggestion of the Death of one of them upon the Roll, the Plaintiff shall have Judgment for the Whole against the other ; cites Cro. J. 330. 274. 2 Keb. 845. because *this Action is grounded upon Torts, which are several in their Nature, and and one may be found Guilty, and the other acquitted* ; Per Cur. Lord Raym. Rep. 717. Hill. 13 W. 3. in Case of Gree v. Rolle and Newell.

(U) Verdict. How the Jury may find.

1. EJectione Firmæ ; The Plaintiff *declared of Ejectment of* 100 *Acres* of Land, and *in Evidence shewed a Lease of* 40 *Acres only* ; It was ruled to be good for so much as was comprized in the Lease, and for the Residue the Jury may find the Defendant not guilty. Cro. E. 13. pl. 4. Hill. 25 Eliz. C. B. Guy v. Rand.

2. In Ejectment, *supposing the Ejectment of ten Acres*, and the *Jury find the Circumstance but of four Acres*, the Plaintiff recovered those four Acres. D. 115. b. Marg. pl. 67. cites it as adjudged Trin. 43 Eliz. B. R. Meredith v. Brown.

But where an Assise was brought *of a Park containing* 60 *Acres*, and the *Jury found* the Disseisin *of* 30 *only*, it was adjudged against the Plaintiff for the Whole. But the Reporter says nota here, that the Park was a Thing intire. D. 115. b. Marg. pl. 67. cites 29 Eliz. Lady Baskervill's Case.

3. In Ejectment the Plaintiff declared on a *Lease of a Messuage, ten Acres of Land,* 20 *Acres of Meadow,* 20 *Acres of Pasture, by the Name of one Messuage and* 10 *Acres of Meadow, be it more or less*, and upon Not Guilty pleaded had a Verdict, but Nil capiat per Billam entered, cause upon the Matter disclosed by the Plaintiff himself in the Declaration he cannot have his Execution of the Quantity found by the Verdict ; For in the Lease there are only 10 Acres demised, and those Words (more or less) cannot in Judgment of Law extend to 30 or 40 Acres, it being impossible by common Intendment, and the rather be-because the Land demanded by the Declaration is of another Nature than what is mentioned in the Per Nomen, which goes only to the Meadow, and the Declaration to the Arable Land or Pasture. Yelv. 166. Mich. 7 Jac. B. R. Anon.

4. The *Declaration was of a fourth Part of a fifth Part in five Parts to be divided* ; and *the Title of the Plaintiff upon the Evidence was only of the third Part of the fourth Part of the fifth Part into five Parts to be divided*, which is only a third Part of that which is demanded in the

the Declaration, and it was said that the Plaintiff could not have Verdict, because the Verdict in such Case ought to agree with the Declaration. But per Cur. *the Verdict may be taken according to the Title*; and so it was. Sid. 229. pl. 26. Mich. 16 Car. 2. B. R. Abler v. Skinner.

(W) Judgment.

1. JUdgment was forthwith given because the *Lease determined the same Day*, and Execution awarded immediately. Cro. J. 227. pl. 1. Mich. 7 Jac. B. R. Underhill v. Kelsey.

2 Bulst. 186. S. C. but reports that Judgment was given only *for a Moiety*.

2. If one *Coparcener* brings Ejectment *for the Whole*, the Judgment shall be for the Whole. Roll Rep. 386. pl. 6. Trin. 14 Jac. B. R. Cooper v. Franklyn.

3. Judgment in Ejectment in C. B. was *quod Querens recuperet*, and the Words *quod Defendens capiatur* are omitted, and on this Exception Judgment was reversed; for they said in this Judgment so entered, there is no Return of Damages nor a Capiatur, and so the King is cozened of the Fine, and the Defendant barred of bringing his Writ of Error. Sty. 346. Mich. 1652. Acton v. Ayres

4. In Case of Judgment against the casual Ejector there ought to be a *Latitat* sued out against, and common Bail filed for the *casual Ejector*, and *Judgment* was set aside for want of it. 2 Show. 249. pl. 253. Mich. 34 Car. 2. B. R. Bouchier v. Friend.

5. *Affidavit* of the Delivery of a Copy of a Declaration in Ejectment to A. and B. *Tenants* in Possession of the Premisses, or *of Part* thereof; Ruled that there should be *Judgment for so much as* was in their Possession. Comb. 102. Pasch. 1 W. & M. B. R. Anon.

6. To have *Judgment* signed *against the casual Ejector* all Things must be very fair of the Plaintiff's Side; for the Defendant loses his Possession by a fictitious Proceeding; Per Cur. 7 Mod. 150. Hill. 1 Ann. B. R. Anon.

7. Ejectment to recover the Possession of the *Quakers Meeting-House*. None of them would receive the Declaration, and the House was open only on *Sundays*, and Delivery is not good on that Day, so the Plaintiff took a *Judgment by Confession of the nominal Lessee*; but it was set aside because it cannot be entered on his Confession, which, in Fact, is the Confession of the Plaintiff himself. 8 Mod. 109. Mich. 9 Geo. Cooper v. Beale.

8. If *Tenant in Possession appears and pleads*, and afterwards *withdraws* his Plea, and *confesses Judgment*, the Plaintiff may enter Judgment against the Tenant in Possession; Per tot. Cur. But whether he may in this Case enter it against the casual Ejector the Court was divided; Adjornatur. 8 Mod. 118. Hill. 9 Geo. Smith v. Jones.

9. *Error* in Cam. Scacc. will not lie upon a *Judgment* in Ejectment *against the casual Ejector*. 8 Mod. 118. Hill. 9 Geo. Smith v. Jones.

10. Judgment was in Ejectment *of two several Demises of two several Tenements*, and the Entry was *Quod recuperet Terminum suum in Tenement' prædict'*. It was urged that it should be taken Reddendo Singula Singulis; But if the Plaintiff had two several Terms in one and the same

ſame Land, then poſſibly the Judgment might not be right; and the Judgment was affirmed. Gibb. 83. pl. 11. Trin. 2 & 3 Geo. 2. B. R. Anon.

(X) What ſhall be recovered, and the Effect thereof.

1. IN Writ of *Ejectione Cuſtodiæ*, the Plaintiff ſhall not have Judgment to recover *the Ward and Damages where the Heir is within Age, but* to recover *all in Damages, and ſhall have Seiſin of the Land*; but at this Day he ſhall recover Poſſeſſion of the Land. Br. Ejectione, pl. 13. cites 30 E. 3. 11.

2. In Ejectment *of a Term for Years*, the *Term expired before Judgment given*. Though the Plaintiff cannot have Judgment to recover the Land, yet he ſhall have *Judgment of Damages*; but otherwiſe it is in Actions where Franktenement is to be recovered; And Plaintiff had Judgment. Sav. 28. pl. 66. Trin. 24 Eliz. Booth v. Ld. Cromwell.

Co. Litt. 285. a. S. P.

3. By a Recovery in an Ejectment the *Poſſeſſion is bound.* 3 Le. 194. pl. 242. Mich. 29 Eliz. C. B. Anon

It binds the Right, and makes a Title in the Plaintiff. 1 Salk. 258. Mich. 1 Ann. B. R. Withers v. Harris.

4. Ejectment for 10 *Acres*, and the Jury find but of *four*, Plaintiff ſhall recover the four Acres. D. 115. b. pl. 67. Marg. cites 43 Eliz. Meredith v. Brown.

5. A. ſeiſed of Land purchaſes a Houſe and other Land, and pulls down the Houſe, and builds it ſix Feet bigger, which ſix Feet is *upon his own Land*, though the Demandant has Title but to part of the Houſe, Part only being on the Land demanded, yet Judgment was that he ſhall recover the Houſe. Lat. 62, 63. Paſch. 1 Car. Hems v. Stroud.

Cro. E 234. S. C. Meſuagium prædict', viz. ſo much in Length, and ſo much in Breadth, according to the Verdict. —— Poph. 14. S. C.

6. If *Tenant in Common* ſeals a Leaſe in Ejectment, he ſhall recover but a Moiety; Per Hale Ch. J. Mod. 102. pl. 9. Mich. 25 Car. 2. B. R. Anon.

He ſhall only recover his *Purparty pro Indiviſo*, and ſhall be put in Poſſeſſion of no more, and in ſuch Caſe the Sheriff ſhall give the ſame Execution as he would do of Rent upon Aſſiſe. 12 Mod 657. Hill 13 W. 3 in Caſe of Johnſon v. Allen.

7. Ejectment for an Acre of Land *in D. and S.* and it *lies only in D.* yet Plaintiff ſhall recover; if it be for an *Acre in D.* and *Part of it lies in S.* he ſhall recover what lies in D. If *for a whole Acre, and he has Title only to the 4th Part*, he ſhall recover the 4th Part; Arg. and not denied by the Court. 3 Lev. 334. Trin. 4 W. & M. in C. B. Goodwin v. Blackman.

8. Holt Ch. J. ſaid, that it was held in this Court in the Caſe of **Badger v. Lloyd**, that the *Plaintiff might enter pending the Writ of Error upon the Judgment in Ejectment, if he could find the Poſſeſſion empty*; For the Writ of Error binds the Court, but not the Right of the Party; But he muſt take Care that he do not enter with Force. 2 Ld. Raym. Rep. 808. Mich. 1 Ann.

(Y) Judgment ſtayed.

1. JUdgments in Ejectment againſt caſual Ejectors for want of an Appearance ſhall be ſet aſide, and Reſtitution granted if no Latitat hath been ſued out againſt, *nor Common Bail filed* for ſuch caſual Ejector, or nominal Defendant, *within* 14 *Days after ſuch Appearance*; Per Cur. L. P. R. 85. cites Trin. 4 W. & M.

This Caſe was denied, per Cur. Mich. 12 Geo. 2. B. R. in Caſe of Sir William Clayton v. Boone.

2. If Notice in Ejectment be *given to an Under-Tenant*, and he does *not acquaint his Landlord* therewith, but ſuffers Judgment to go againſt him, the Court upon Motion will not ſuffer Execution to be taken out till the Right be tried. 12 Mod. 211. Mich. 10 W. 3, Anon.

3. If Judgment be againſt the caſual Ejector, and it be made appear that *no Declaration* was *rightly ſerved*, the Court will ſet it aſide; And if at Common Law an Ejectment had been againſt one that had nothing in the Land, and upon Judgment againſt him another is turned out of Poſſeſſion, there was no Remedy for the right Owner but Treſpaſs or a Writ of Deceit, and this ſtill is all the Certainty a Man has of his Poſſeſſion, and now all we can do is to ſet ſuch Recovery aſide, and to puniſh the Offender; Per Holt Ch. J. 12 Mod. 655. Hill. 13 W. 3. in Caſe of Gree v. Rolle.

4. *But* upon *Affidavit that Defendant was a Soldier*, and ſo intitled to *Protection* by Law, it was ordered that he ſhould *give Security for Payment* of the Rent for the future. 10 Mod. 383. Hill. 3 Geo. 1. B. R. Smith v. Parkes.

5. The Court uſually *ſtays Proceedings* in Ejectment on reaſonable Terms at any Time before Execution executed, and where the Ejectment was for *Nonpayment of Rent* the Plaintiff had Judgment, but the Proceedings were ſtay'd on *bringing in the Rent and Coſts* within three Days. 8 Mod. 345. Hill. 11 Geo. Philips v. Doelittle.

(Z) Writ of Error.

Cro. E. 290. pl. 10. Hill. 34 & 35 Eliz. B. R. S. P. in Caſe of Warnford v. Haddock.

1. IN Ejectment the Plaintiff declared of a *Leaſe of the 4th Part of an Houſe in N. in four Parts to be divided, by Force of which he entered into a Tenement Parcel' prædict', and was inde Poſſeſſionatus till the Defendant did eject him de Tenementis prædict'*, whereas he ought to ſuppoſe the Entry in the fourth Part, and the Ejectment of the 4th Part; The Court ſaid, De Tenementis prædict' ſhall not be intended the whole Tennement, but of the 4th Part, and the Judgment affirmed. Cro. E. 286. pl. 3. 34 Eliz. B. R. Rawſon v. Maynard.

2. A *Writ of Error* may be brought before the *Writ of Inquiry* be returned in an Ejectment, for in that Action the Judgment is compleat at the Common Law before it be returned, for the Judgment is but to gain Poſſeſſion, and ſo it is in Dower; But otherwiſe in Treſpaſs, where Damages only are to be recovered, for in ſuch Caſe the Judgment

ment is not perfect till the Writ of Inquiry is returned, nor can be made up before, as in the principal Case it may; Per Roll Ch. J. Sty. 109. Trin. 24 Car. Glede v. Dadeney.

3. In an Ejectione Firmæ, if the Writ of *Habere facias Possessionem contains more Acres of Land than* are expres'd *in the Declaration* it is Error; Per Roll Ch. J. Sty. 238. Mich. 1650. Lumley v. Nevil.

4. 16 & 17. *Car.* 2. *cap.* 8. *S.* 3, 4. *Execution shall not be stay'd by Writ of Error upon any Judgment after Verdict in Ejectione Firmæ, unless the Plaintiff in such Writ become* bound to the Defendant in such a Sum as the Court, *to whom the Writ is directed, shall think, fit, that if the Judgment be affirmed, or the Writ discontinued in his* Default, *or he be* Nonsuit, *he will pay such* Damages *and Sums of Money, to ascertain which a* Writ of Inquiry *shall issue to inquire of the mesne Profits and Damages by Waste done after the first Judgment as shall be awarded, and* Costs *of Suit.*

5. A had Judgment in Ejectment in C. B. and *Execution of his Damages and Costs.* B. brings Error, and the *Judgment is affirmed.* Whereupon A. prays his *Costs for his Delay and Charges*, but could not have them; For no Costs were in such Case at Common Law, and the Statute 3 *H.* 7. 10. *gives Costs only where Error is brought in Delay of Execution.* So 19 *H.* 7. 20. and here, tho' he had *not Execution of the Term, yet he had it of his Costs.* Vent 88. Trin. 22 Car. 2. B. R. Foot v. Berkley.

The Court said, that there was no Reason for such Distinction Hill. 2 Geo 2 B. R. Ferguson. v. Rawlinson.

6. After a Recovery in Ejectment the bringing a Writ of Error is *no Bar to* an Action of *Trespass for the mesne Profits*, but that it may be brought pending such Writ of Error. 12 Mod. 138. Mich. 9 W. 3. Donford v. Ellis.

(A. a) Of Confessing Lease Entry and Ouster.

1. IF the *Lease is defective*, we can give no Judgment, and the Rule of Court does not bind the Defendant to confess the Lease otherwise than you have made it; Per Roll Ch. J. Sty. 343. Mich. 1652. Theobald v. Conquest.

2. In Ejectment the Lessor of the Plaintiff had Title to enter for a *Condition broken for Non-Payment of Rent.* Lease, Entry and Ouster was confess'd, and the Court was mov'd, that in regard the Lessor had such a special Title, and no Estate until Entry, whether such an *Entry* should be *supply'd by the General Confession*, or that there should be an actual Entry; and held that it should be supply'd by the General confession. Vent. 248. Mich. 25 Car. 2. B. R. Anon.

Vent. 332. Trin. 30 Car. 2. the Court inclin'd to the contrary, tho' Ld. Hale was said to be of another Opinion.——

1 Salk. 259. pl. 13. March 26. 1702. held by Holt Ch. J. at the Assises, that in such Case Entry and Ouster is not necessary, tho' it had been held otherwise before the Time of Hale Ch. J. ——2 Ld. Raym. Rep. 750 S. C. ruled by Holt Ch. J. accordingly, tho' he said he formerly doubted of it, and reserved it as a Point for his Opinion, and caused it to be mov'd in B. R. where the other Judges held that the General Confession of Entry by the Defendant was good enough.

3. If A. lets to B. and B. lets to C. to try the Title, the Confession of the Lease Entry and Ouster *extends only* to the Lease made to

This Rule does not extend to con-

fefs actual Entry upon a Leafe which is the Title, to C. and not to that to B. Per Hale. Vent. 248. Mich. 25 Car. 2. B. R. Anon.

but per Cur. it fhall be *intended* that they entered till the Contrary be prov'd of the other Part. Sid. 223. pl. 12 Mich. 16 Car. 2. B. R. Langhorne v. Merry.

4. Where the *Defendant in Ejectment appears, and confeffes Leafe Entry and Oufter*, that fhall be fufficient to prove an actual Entry in any Cafe where an actual Entry is required; and fo Scroggs faid it was always held by Ch. J. Hale, becaufe it fhall be taken an Entry to all Intents. Freem. Rep. 468. pl. 643. Trin. 1678. Winch v. Huddlefton.

2 Vent 195. Trin 2 W. & M in C. B Fagg v. Roberts S.P. and Cofts tax-ed for the Defendants.

5. In an Ejectment, where there are *divers Defendants* which are to confefs Leafe Entry and Oufter, if every one do not appear at the Trial, the Plaintiff, cannot proceed againft the reft but muft be *Nonfuit*. Vent. 355. Trin. 33 Car. 2. B R.

6. For not appearing at the Trial to confefs Leafe, Entry and Oufter, there was *Judgment* againft the Cafual Ejector, but *fet afide, becaufe no Bail was filed*. 2 Show. 201. Pafch. 34 Car. 2. B. R. Honor v. Gale.

7. Where an Entry is required, and even neceffary, the *Confeffion* of Leafe Entry and Oufter does *fupply* it, (tho' no *Actual Entry*,) Per Scroggs Ch. J. who faid it was the Opinion of all the Judges. 2 Show. 201. pl. 204. Pafch. 35 Car. 2. B. R. Honor v. Gale.

8. Eyres J. much doubted whether the Rules of confeffing Leafe Entry and Oufter, be good in an *Inferiour Court*, but they fhould proceed the antient Way. Cumb. 208. Trin. 5 W. & M. in B. R. Anon.

9. Ejectment for two Mefuages, two Gardens, 70 Acres of Land, 15 of Meadow, and 30 of Pafture, in D. The Plaintiff deliver'd Declarations to two Tenants only, and as to the Lands in their Poffeffion the Defendant entred into the Common Rule, but becaufe he had made feveral fmall Purchafes in that Parifh, and the Plaintiff claim'd only 20 Acres lately granted to him by Leafe from the Bifhop of Gloucefter, therefore he mov'd by his Counfel, that *the Plaintiff might give a Note in Writing* before the firft Day of the next Term, *what Lands in particular he claimed*, and where fuch lay, and in whofe Poffeffion &c. or otherwife that he might not proceed to Tryal at next Affifes; for Defendant not knowing what Lands Plaintiff would claim, could not tell what Purchafe Deeds to produce at the Trial; Sed non allocatur. 4 Mod. 214. Pafch. 5 W. & M. in B. R. Gwynn v. Pie.

10. In *Ejectment* the *Demife* by the Leffor of the Plaintiff to the Plaintiff *was laid to be the 27th of April* 1697. *which Time was not come at the Time of the Trial*; but the *Tenant had entred into the common Rule to confefs Leafe Entry and Oufter*; And the Court compell'd the Defendant to confefs Leafe Entry and Oufter, otherwife the Plaintiff would have been nonfuit, and then he would have had Judgment againft the cafual Ejector, although it was objected, that the Plaintiff could not have Judgment though the Verdict were found for him. Ruled by the Court of B. R. upon a Trial at Bar. Ld. Raym. Rep. 728, 729. Anon. cites Mich. 8 Will. B. R.

Per Cur. S. P. *But if one enters only upon another claiming only as Tenant in Common*,

11. In Cafe of *Tenants in Common* there muft be an actual Oufter of one by the other, or elfe he fhall not be compell'd to confefs Leafe Entry and Oufter. Per Holt. 7 Mod. 39. Trin. 1 Ann. B. R. Anon.

and the other brings an Ejectment, it will be hard to enforce the Defendant

Defendant who has done nothing, but as Tenant in Common, to confeſs Leaſe, Entry and Ouſter Per Cur. 12 Mod. 657. Hill. 13 W. 3. in Caſe of Johnſon v. Allen.

12. In Ejectment if Defendant has *not Regular Notice of Trial* the way is not to confeſs Leaſe Entry and Ouſter but to oppoſe Judgment againſt the Caſual Ejector 7 Mod. 118. Mich. 1 Ann. B. R. Anon.

13. If *Defendant will not appear*, and confeſs Leaſe Entry and Ouſter, the *Courſe is* to call him and his Attorney, if he be within the Rule, and then to call the Plaintiff himſelf and nonſuit him, and then upon Return of the Poſtea Judgment will be givnn againſt the caſual Ejector; and the Maſter will tax Coſts upon the Rule for confeſſing Leaſe Entry and Ouſter, and if theſe are demanded of the Dafendant and not paid, the Court on Affidavit will grant an *Attachment*. 1 Salk. 259. pl. 14. Trin. 2 Ann. B. R. Turner v. Barnaby.

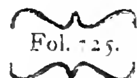
14. In Ejectment againſt ſeveral if *ſome confeſs Leaſe Entry and Ouſter, and others do not*, the Plaintiff may go on as to to the former, and be nonſuit as to the latter, but the Cauſe of the Nonſuit muſt be expreſſed in the Record, viz. becauſe thoſe Defendants would not confeſs Leaſe &c. and on the Return of the Poſtea the Court would be informed what Lands were in the Poſſeſſion of thoſe Defendants, that the Judgment might be entered againſt the caſual Ejector as to them. 2 Salk. 456. pl. 6. Paſch. 4 Ann. B. R. Greeves v. Roll

If Plaintiff ſhews Title he ſhall recover the Whole againſt the other; Per Holt Ch. J. 12 Mod. 655. —— If one confeſs Leaſe Entry and Ouſter *for as much of the Premiſes as are in his Poſſeſſion*, the Jury ſhall inquire againſt him alone for ſo much, and *if the other will not* appear, or not confeſs &c. there ſhall be Judgment for ſo much of the Premiſes as are in his Poſſeſſion; Judgment againſt the caſual Ejector; Per Holt Ch. J. 12 Mod. 656. Hill. 13 W. 3. in Caſe of Gree v. Roll. ——— C. brought an Ejectment againſt *S. F. and G. F. appeared, and confeſſed* Leaſe Entry and Ouſter; S. and G. did not appear nor confeſs Leaſe Entry and Ouſter, upon which, by the Direction of Holt Ch. J. at the Summer Aſſizes at Horſham in Suſſex, 12 W. 3. a *Verdict was given* by the Jury *for the Plaintiff againſt F. generally*; and Verdict was given againſt the Plaintiff for S. and G. and Indorſement was made upon the Poſtea, that this Verdict was for S. and G. becauſe they did not appear and confeſs Leaſe Entry and Ouſter; and for this Reaſon that they ſhould not have Coſts againſt the Plaintiff, and that the Plaintiff ſhould have Judgment againſt the caſual Ejector for ſuch Lands as were in the Poſſeſſion of S. and G. Lord Raym Rep. 729. Claxmore v. Searle & al'.

For more of Ejectment in General, See other Proper Titles.

Election.

(A) *In what Caſes* an Election is given by Law.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1. If A. ſeiſed in Fee of 100 Acres, enfeoffs B. of 18 of the 100 **Acres**, (without aſſigning which **of the 100 Acres he enfeoffed him of**) to hold to B. and his Heirs at Election of B. and his Heirs when he pleaſe; **this is a void Feoffment ſo that this cannot be made**

Mo. 81. pl. 215. Bullock v. Burdett, S. P. adjudg-

ed —— And. 11. pl. 24. S. C. adjudged. — Bendl. 148. pl. 206. S. C. adjudged. —— S. C. cited per Curiam 2 Rep. 36. b. —— Hob. 174. cites S. C.

made good by any Election, because a Livery cannot operate in Futuro, but ought to pass the Freehold presently or never, and therefore the Feoffment void. Dy. 11 Eliz. 281. 19. adjudged.

But if such Grant be made by the King it is utterly void for the Uncertainty. Ibid —— If the King grants 120 Acres of his Waste in D. and the Ad Quod Damnum returns, that it is not to his Damage, and that the Waste contains 300 Acres, there nothing passes, for it is uncertain which 120 Acres were intended, and the Party shall not have any Election against the King; All which was agreed upon Evidence to the Jury. Noy 29. Brand v. Todd. —— 12 Rep. 86. Trin. 9 Jac. in the Court of Wards in Stockdale's Case, S P.

2. If a common Person grants to the Mayor and Burgesses of C. *the Moiety of a Yard Land in a Great Waste without Certainty* in what Part of the Waste they should have the same, or the special Name of the Land, or how it was bounded, or without any certain Description of it, so as the same ought to be reduced to Certainty by Election, the Corporation must not make their Election *by Attorney*, but after they are resolved upon the Land they *must make a special Warrant of Attorney, reciting the Grant to them, and in what Part of the said Waste their Grant should take Effect, East, West &c. or by Buttals &c.* according to which Direction the Attorney is to enter &c. Le. 30. pl. 36. Trin. 27 Eliz. B. R. in Sir Walter Hungerford's Case.

2 And. 202. pl. 19. S. C. adjudged; and though by the Death of Sir R. H. their Power to take the Land in Lease by Attornment be determined, yet now they shall take as they may. — Poph. 95. pl. 2. S. C. & S. P. held accordingly by Popham and Anderson, and therefore if the Bargainees after Sir R.'s Death would elect to take it by Way of Bargain and Sale, they shall have all the Reversions, Remainders, Rents, and Services, as well as the Land in Possession executed to them by the Statute of Uses; And of the same Opinion were all the Justices in Trin. Term following upon their Meeting at Serjeant's Inn for another great Cause. —— Hob. 159. S. C. cited by Hobart Ch. J. as resolved. —— Lutw. 803. Trin. 10 W. 3. S. C. cited by Powell J. that *when an Election is coupled with an Interest, such Election is descendible.*

3. Sir R. H. *bargains and sells* to three Persons *several Manors*, (which are *Part in Demesnes, Part Copyhold, and Part in Lease for Years with Rents reserved*) *and the Reversions and Remainder* of them with all Rent reserved *Habend. to them and their Assigns after the Death of Sir R. H. for 17 Years &c. Afterwards Sir R. H covenants to stand seised of the Premisses to the Use of himself for Life, and to the Heirs of his Body*, and dies; *no Attornment is made to the Bargainees.* Resolv'd, the Bargainees have an Election to take this as a Demise at the Common Law or by Bargain and Sale by 27 H. 8. without Attornment; and though the Lessees or Bargainees have entered generally, yet their Election remains to them still notwithstanding the Death of the Lessor and the Alteration of the Estate by the second Indenture; for they had an Interest in them presently. 2 Rep. 35. b. 36. a. Pasch. 37 Eliz. in the Court of Wards. Sir Rowl. Hayward's Case.

4. If the Tenant in *Socage holds by Fealty and* 10 *s. or a Pair of Gilt Spurs*, if the Heir be not, *so soon as conveniently* he may, all Circumstances considered, after the Death of his Ancestor *ready upon the Land to pay his Relief*, the Lord may distrain for which of them he will; for upon Default of the Tenant the *Election* is given to the Lord. 2 Roll Tenure (L. a) pl. 7. cites Co. Litt. 91.

(A. 2) Rules and Notes, as to Election.

1. IF your *Act may work two Ways*, both *arising out of your Interest*, Election is given to the Patient to use it either Way but not both Ways to one entire Thing and one entire Act. Hob. 159. cites 2 Rep. 35. 37 Eliz. Sir Rowland Heyward's Case.

2. If the Act will work two Ways, *the one by an Interest, and the other by Authority* or Power, and the Act be indifferent, the Law will attribute it to the Interest and not to the Authority. Hob. 159. in pl. 193. Mich. 10 Jac.

3. But where *Interest and Authority meet*, if the Party declares clearly that his Will is that this Act shall take effect by his Authority or Power, there it shall prevail against the Interest, for Modus & Conventio vincunt legem. Hob. 160.

4. And though the Party doth not make an *express Declaration*, yet if his Act do import a Necessity to work by his Power, or else to be wholly void, the Benignity of the Law will give Way to effect the Meaning of the Party. Hob. 160. in Case of Colt v. Glover.

5. When Election creates the Interest nothing *passes till* Election, so where no Election can be, no Interest can *arise*. Hob. 174. Hill. 12 Jac. in Case of Stukely v. Butler.

(B) *Who* shall have it.

1. IF a Man leases Land for Years, reserving weekly nine Quarters of Wheat, or the Value thereof as it shall then be sold in the Market of D. if the Lessee pays neither of these at the Time appointed, the Lessor may have his Action at his Election for the Wheat only, or for the Value only, for though the Lessee might have paid any of them at his Election at the Day, yet after the Day the Law gives the Election to the Lessor. Tr. 3 Ja. B. R. between Lord *Denny and Parnell*, adjudged.

2. If a Man bargains and sells 300 Cords of Wood out of his Woods to another and his Assigns, to be perceived by the Appointment of the Bargainor, if the Bargainor does not assign it within a convenient Time after Request made by the Bargainee or his Grantee, they may take it without Appointment. Co. 5. Palmer 24. b. resolved. P. 43 El. B. R.

Mo. 607. pl. 955. Maynard v. Basset, S. C. but S. P. does not fully appear. —— Cro. E. 819. pl. 14. Basset v Maynard, S. C. adjudged for the Assignee of the Bargainee; For the Bargainee had an Interest before the Appointment by the Bargainor, which Interest he may assign. —— Noy. 32. Basset v. Baynard S. C. but not clearly reported —— S. C. cited Jo. 276. that there is *no Diversity where the Wood is to be taken per Visum, or per Visum & Allocationem*; For in both Cases upon Request made and Refusal the Party may take them without View or Delivery.

3. When a Thing is granted, or concludes conditionally, as 20 s. per Ann. or a Robe Price 20 s. to be paid at such a Day, there *at the Day* the Debtor may pay the one or the other at his Election; but if he does not pay at the Day, the Creditor, or the Grantee, after the Day, has Election to demand the one or the other; Per Catesby, quod

quod Moyle and Littleton J. concesserunt. Br. Dette, pl. 112. cites 9 E 4 36.

Dal. 73. pl 55. S. C. in totidem Verbis.

4. A Man *has three Daughters, and covenants with J. S. that he shall have the Disposition in Marriage of one of them*; the Election is in the Father of which of the Daughters the other shall have the Marriage, and he is not to deliver the Daughter till Request; but upon Request he is to deliver the Daughter to J. S. otherwise he cannot have the Effect of the Covenant; Held by all the Justices. Mo. 72. pl. 197. Trin. 6 Eliz.

S. C. cited Vent. 271. Trin. 27 Car. 2. B. R. in Case of Morteram v. Jolly, where the Case was that A. covenanted with J. S. that J. S. should elect 20 of the best Trees out of his Wood to be taken within 11 Years; And the Breach was assigned, that the Defendant had cut Trees within the Time; upon which it was demurred and relied upon the second Resolution in 5 Rep. Sir Thomas Palmer's Case. But here the Court were of Opinion for the Plaintiff, for by the Covenant he has 11 Years Time to elect, And by cutting any Trees in the mean Time, the Latitude of his Election is abridged. And Hale said that the Case in 5 Rep there if the Grantee can have the Number of his Cords of Wood, he has the Effect of his Grant; But Trees differ in Value exceedingly from each other.

5. If *A. grants* 1000 *Cords of Wood to J. S. to be taken at the Election of J. S.* and the Grantor or a Stranger cuts any Trees, J. S. the Grantee cannot take them, but must supply his Grant out of the Residue. 5 Rep 25 a. Pasch. 43 Eliz. B. R. the second Resolution in Sir Tho. Palmer's Case.

2 Rep. 36. b. 37. a. Pasch 37 Eliz. in the Court of Wards in Sir Rowland Heyward's Case. S P. in a Nota by the Reporter.

6. Note, as to Elections these *Diversities* following; 1st. *When nothing passes to the Feoffee or Grantee before Election* to have the one Thing or the other, the Election ought to be made in the Life of the Parties, and the *Heir or Executor cannot make Election. But when an Estate or Interest passes immediately* to the Feoffee, Donee, or Grantee, there Election may be made by them, or by their Heirs or Executors. Co. Litt. 145. a.

2 Rep. 37. a S. P.

7. 2dly, *When one and the same Thing passes to the Donee or Grantee, and the Donee* or Grantee *has Election in what Manner or Degree he will take* this, there the Interest passes immediately, and the Party, his Heirs or Executors may make Election when they will. Co. Litt. 145. a.

2 Rep. 37. a. S. P.

8. 3dly. When *Election* is *given to several* Persons, there the first Election made by any of the Persons shall stand. Co Litt. 145. a.

* 2 Rep. 37. a. S. P. cites 9 E. 4. 36. b L. 5 E. 4 6. b. 11 E. 3. Annuity. 27. and 11 Ass pl. 8. 29 Ass. 55. 3 E. 3 tit. Assise 175. 43 E. 3. tit. Barr. 194.

9. 4thly, In Case an *Election* be *given of two several Things* always *he which* is the first Agent, and which *ought to do the first Act, shall have the Election. As* if a Man grants a *Rent of* 20 *s. or a Robe* to one and to his Heirs, the Grantor shall have the Election; for he is the first Agent by payment of the one, or delivery of the other. So if a Man makes a *Lease rendring a Rent or a Robe*, the Lessee shall have Election, causa qua supra, and with this agree the Books in the * Margin. *But if I give* unto you *one of my Horses in my Stable*, there you shall have the Election, for you shall be first Agent by taking or Seisure of one of them. And if one grant to another 20 *Loads of Hazil*, or 20 Loads of Maple *to be taken in his Wood of D.* there the Grantee shall have Election, for he ought to do the first Act, viz. to fell and take the same. Co. Litt. 145. b.

2 Rep 37. a. S. P.

10. 5thly. When the Thing granted is *of Things annual, and are to have continuance*, there the Election remains to the Grantor, (in Case where the Law gives to him Election) as well after the Day as before, otherwise it is when the *Things* are *to be performed unica vice*; And therefore if *I grant to another for Life an Annuity or a Robe at the Feast of Easter, and both are behind*, the *Grantee ought to bring his Writ of Annuity*

nuity in the Disjunctive; for if he brings his Writ of Annuity for one only, and recovers, this Judgment shall determine his Election for ever; for he shall never have a Writ of Annuity afterwards, but a Scire Facias upon the said Judgment. Which Reason Fitzherbert in his Natura Brevium not observing, held an Opinion to the contrary. But *if I contract with you to pay unto you 20 s. or a Robe at* the Feast of *Easter*, *after the Feast you may bring an Action of Debt for the one or for the other.* Co. Litt. 145 a.

In Marg. cites. F. N. B. 122. (E)

11. 6thly, The *Feoffee by his Act and Wrong may lose his Election*, and give the same to the Feoffor; *as if one infeoffs another of two Acres, to have and to hold the one for Life, and the other in Tail, and he before Election makes a Feoffment of both*, in this Case the Feoffor shall enter into which of them he will for the Act and Wrong of the Feoffee. Co. Litt. 145. a.

2 Rep. 37. b. S. P.

12. If a Man gives to another *the best Horse in his Stable*, the Donor here shall have the Election. In Case of a *Heriot*, the same is to the best Beast, here he who is to have the Benefit of the same, is to have the Election, and that shall be said to be the best, which he thinks to be the best. Per Fleming Ch. J. 2 Bulst. 9. Mich. 10 Jac. in Case of Billingsly v. Hornby.

13. If a *Sale be of 500 Stacks of Wood out of* 700. the Buyer in this Case may choose; But if it be of 500 to be set out by the Seller, the setting out would be a Condition precedent; per Cur. 7 Mod. 88. Mich. 1 Ann. B. R. in Case of Grips v. Ingledew.

14. A Man *owes Money by Bond, and also by Award*, suppose 20 *l. by each*, and he pays one 20 l. it shall be upon which of both he pleases; for he, and not the Receivers, is the first Agent. Quære. 7 Mod. 123. Hill. 1 Ann. B R. Stracey v. Saunders.

(C) Who may elect, [and *when*].

1. **If a Man levies a Fine come ceo que il ad de son done** of an House and 100 Acres of Land in D. **where** he hath there an House and 118 Acres, **the Conusee may elect which** 100 **Acres he will have, for the Election is given to him by the Fine. M.** 37 **El. B. R. between** *Morris and Levesay*, **agreed.**

Mo 102. 16 & 17 Eliz. S. P. per Curiam. — D. 280. b. Marg. pl. 17. cites Mo. 84 S. P.

S. P. ruled in the Court of Wards 21 Eliz. in the Case of Evans v. Mitton.——— Mo. 84 S. P. accordingly by Weston, but Dyer denied this Case, and vouch'd 12 H. 7. and the Case of the Manor of Sour for his Purpose, which was prov'd according to the Intention of the Party by Circumstances; But Weston put this Diversity, that if Lessee for Life be of 100 Acres, and the Lessor grants the Reversion of 20 of those Acres by Fine, the Grantee shall compel the Lessee to attorn for which 20 Acres he pleases by Quid Juris clamat; But if the Grant be by Deed, then it is in the Lessee's Election to attorn for which 20 Acres the Lessee pleases.——— Mo. 602. pl. 832 Hill. 41 Eliz. C. B. Marshall v Marshall adjudg'd, that where a Fine was levied of five Yard Land, with a Proviso, that if the Feme surviv'd her Baron she should have a Yard and half thereof for her Life without shewing what certainly, after the Baron's Death she, being Cesty que Use, shall have Election.

2. But **in the said Case,** if **the** Conusee renders it back to the Conusor for certain Years, **the** Conusor **hath the Election given him which** 100 **Acres he will have, and he may elect. M.** 37 **El. B. R. between** *Morris and Levesay*, **per Curiam.**

3. **If a Man** gives two Acres **to one,** to hold one for Life the other in Fee, **the** Donee **hath Election. Com.** *Renegar and Fog.* 6. **b.**

4. If a Man levies a Fine Come ceo &c. of an House and 100 Acres of Land in D. (where he hath there 118 Acres,) and the Conusee renders to the Conusor for 100 Years, and after the Conusor dies, his Executor may elect which of the 100 Acres he will have, because this was a Thing in Interest in the Testator. M. 37 El. B. between *Morris and Levesay*, agreed per Curiam.

5. If a Man gives one of his Horses to A. and B. and after A. dies, yet B. may elect, because this was a Thing in Interest in them, and no express Election limited. Mich. 37 El. B. between *Morris and Levesay*, per Curiam.

Fol. 726.

6. But if a Man gives one of his Horses to be elected by A. and B if A. dies before Election B. cannot elect. M. 37 El. B. between *Morris and Levesay*, per Curiam.

7. In Case of two Grantees the *first named* shall have Election Mo. 85. in pl. 215. Pasch. 7 Eliz. C. B.

8. Feoffment of a House and 17 *Acres of Land*, *Parcel of a Waste*, the Feoffee, and not his Heirs, must make his Election, or else the Grant is void. Hob. 174. cites D. 281. 10 Eliz. Bullock's Case.

Bendl. 148. pl. 2?6. S. C adjudged. ——— Mo. 81. pl. 215. Bullock v. Burdet, S. C adjudged. ——— And. 11. pl. 24 S. C. agreed that the Election by the Heir was not good. ——— S. C. cited 2 Rep. 36 b. per Curiam.

9. Upon *Estates executed to Uses of a Thing uncertain*, the Court thought that the Election ought to be made by the Feoffee or Conusee to the Use, and this as well since the 27 H. 8. as before; because Elections being given to the Grantees for their Benefit, the Feoffee before the 27 H. 8. was the sole Party who was intended to be benefited by the Grant in Judgment of the Common Law, and Cestuy que Use had no Interest but such as the Chancery allowed in Conscience, and now since 27 H. 8. Cestuy que Use has the Possession in such Quality and Form as he had the Use, and if he had not the Use till Election, he shall not have the Possession till Election, and if the Election was not incident to his Use before 27 H. 8. it is not given to his Possession since 27 H. 8. But Quære, for in the principal Case the Election is limited to the Use, and so that the Possession of all passes to the Feoffees, and the Use is distributory by Election, and therefore it *seems reasonable that he, who is to take the Use, is to make the Election.* Mo. 102. pl. 247. Mich. 16 & 17 Eliz. in Calthrop's Case.

10. Sir T. S. was seised of a Manor, and *aliened the Manor except one Close, Parcel of the said Manor, called N.* and there *were two Closes, Parcel of the said Manor, called N.* the one containing nine Acres, the other three Acres. The Court held, that the Alienee should not chuse which of the said Closes he would have, but the Alienor or Feoffor should have the Election which of the said Closes should pass. Le. 268. pl. 360. 20 Eliz. C. B. Sir Thomas Lee's Case.

11. If a Man devises *two Acres of Land out of four* Acres lying together, the Devisee shall have Election. D. 280. b. Marg. pl. 17. cites 40 Eliz. Marshal's Case.

12. If a Man *sells Trees* growing upon his Land, *excepting six Oaks*, the Exceptor is to have the Election, and if there be a *Time limited*, he must do it during such Time, but if he slip the Time, then the other shall elect; But where *no Time is limited*, and Vendor does not elect which he will have left standing, it is doubtful if the other may elect; But it is clear, that if the Grantee *requests* Vendor to make his Election, and *Vendor refuses to elect*, the Vendee shall elect, leaving the Number of Trees excepted for the Vendor; But where no Request is, nor Time limited, it is doubtful if Vendee may do so; agreed by the Justices. 2 Bulst. 7. Mich. 10 Jac. in Case of Billingsley v. Hersey.

13. A.

13. A. *leases to B.* 40 *Acres*, *Parcel of* 60, and *before B. makes his Election B. dies*; And the Question was, Whether this Lease was not void by the Death of B. or whether his Executor might make his Election? The Court held, that an Election might be made by the Executor, *and distinguished between* the Case of *a Lease for Years and a Feoffment*; for in Case of a Feoffment it is void, because a *Livery cannot operate in futuro*. Freem. Rep. 530. pl. 713. Mich. 1680. Jones v. Cherney.

14. Election is *descendible or Not*, according to the Nature of the Thing, if it be merely Personal it cannot descend; Per Powel J. Lutw. 803. Trin. 11 W. 3. in Case of Eastcourt v Weekes.

15. Where an *Eligible Estate* passes the *Heir* cannot make Election, As Feoffment of two Acres, habend' the one for Life, and the other in Fee, the Heir shall not make Election, but the Lessor shall have all; Per Doderidge J. 2 Roll Rep. 485. Mich. 22 Jac. B. R. in Case of Hurd v. Foy.

(D) *What* shall be said *an Election.*

1. If a Man gives two Acres to another, to hold the one for Life, and the other in Fee, and the Donee after makes a Feoffment of one Acre, this is an Election to have the Fee in that. Com. 6. b.

2. If a Man leases two Acres for Life, the Remainder of one Acre in Fee, and after licences the Lessee to cut Trees in one Acre, this is an Election that he shall have the Fee in the other Acre. Com. 6. b.

3. Devise was that *he see A. well provided for*, *or else give her* 20 *l.* A. lived with the Devisee two Years, and then went away; his keeping A. two Years is an Election. Palm. 76. Hill. 17 Jac. B. R. Shaw's Case.

4 A Reservation was of Money or Turkeys on a Lease for Years, *Lessor's bringing an Action* for the Money is an Election. Lutw. 655. Mich. 9 W. 3. Letten v. Winne.

(E) Where the Election shall be *perpetual*; [Or is determined or not.]

1. If a Man delivers Obligation to A. to the Use of B. and B. when he hears of it refuses it, he cannot after by Agreement make this a good Deed; for the Refusal is peremptory. H. 5 Ja. B. per Curiam.

3 Rep. 26. b. S. P. accordingly, per Curiam, but says, that perhaps in such Case the Obligor, in Action brought upon this Obligation, cannot plead Non est Factum, because it was once his Deed, and cites Bendl 75. in Tawe's Case, and D. 1 Eliz. fol. 167.

2. Trespass

Br Relation, pl 4. cites S C accordingly. —— S. C. cited by Hobart Ch. J. Hob. 174. and says, so note that the Vendee in this Case had no Property till Election or Default made by the Vendor, which was supplied and made certain by the Vendee, and yet the Vendee could not have made the Choice in Default of the Vendor till the Time incurred so near that he must needs, and that must be put upon Judgment of Jury or the Court upon special Declaration of the Time, and Number of the Trees, and the like. —— S C. cited 5 Rep 25. a and says that the Issue was taken upon the Request, which Case Ld Coke says is not well abridg'd by Brook, Tit Reservation 3. for there he has * omitted the Request; But says, that Fitzh. Tit. Barre, 204. has abridged it truly

* Brooke says (ut supra) that Vendee warned the Vendor to chuse his Trees, and he would not.

2 Trespass quare Vi & Armis Arbores succidit, the Defendant said, that the *Plaintiff sold* to him *all his Wood in such a Vill except* 40 *of the best Oaks, to be abated in two Years*, and said that he *came to abate them, and warned the Vendor to chuse* his Oaks, *and he would not*, by which the Defendant, when he could no longer stay, abated the Trees except the 40 Oaks, and admitted for a good Justification. Br. Reservation, pl. 3. cites 44 E. 3. 43.

3. If a Man grants *to pay to me* 10 *l. at Christmass, or to attend upon me at Christmass*, there if he does not do the one nor the other, the Money shall be paid afterwards &c. for now the Election is determined; For he cannot attend at Christmass when the Feast is past, therefore then the Sum is due, and it shall be paid &c. Br. Dette, pl. 112. cites 9 E. 4. 36.

Bendl 149. pl. 206. S. C.

4. A Grant is made by a *Bishop*, Election cannot be made by Grantee in time of *Successor*. Mo. 86. in pl. 215. Pasch. 7 Eliz. C. B. Bullock v. Burdet.

Adjudged Le. 69 Basset v. Basset. S C.

5. Condition of a *Bond* was *to pay* 20 *Kine or* 30 *l in Money within a Month at Election*. The Obligee makes *no Election in the Month*. Per tot. Cur. Election must be made within the Month, and Convenient Time allowed for Provision of one of the Things. Mo. 241. pl. 377. Mich. 29 Eliz. Kernet's Case.

2 Rep. 37. S. C.

6. When an Election is *coupled with an Interest*, such Election is *descendible*. Per Powel J. Lutw. 803. Trin. 11 W. 3 cites Sir Rowland Heywood's Case.

7. Grantor cannot by his own Act or Default either Subvert or *derogate from his Grant*. 5 Rep 24. b Sir Thomas Palmer's Case.

In what Cases Grantee has Election to make it a Rent or Annuity. See tit Annuity (F. 2) What shall determine such Power of Election. See Ibid. (F. 3)

For more of Election in General, See other proper Titles.

Emblements.

(A) *Who* shall have them.

Cro. E. 460. (bis.) pl 10. Pasch. 38 Eliz. B. R. S. C. & S. P. per Popham, to which Fenner agreed —— Gouldsb. 100 pl 136 S. C. & S. P. per Popham —— If *Tenant at Will* sowes the Land and then determines his own Will, he cannot break the Hedges to carry the Corn away. Vent. 222. Trin 24 Car. 2. B. R. in the Case of Perrot v. Bridges.

1. IF Lessee at Will sows the Land, and after determines his Will, the Lessor shall have the Corn. Co. 5. *Oland* 116. agreed. Co. Litt. 54. b. because he loses his Rent.

2. [So] If a Copyholder durante Viduitate sows the Land, and after before severance takes Husband, the Lord shall have the Corn, because her Estate determines by her own Act. P. 38 El. B. R. between *Oland v. Burdwick*, adjudged. Co. *5*. 116. same Case. Co. Litt. *55*. b.

Cro. E. 460. (bis.) S. C, & S. P. adjudg'd by Popham and Clench, Contradicente Fenner, and Absente Gawdy. ——Gouldsb. pl. 189. pl. 136. S. C. & S. P. adjudged.——Mo. 394. pl. 512. S. C. & S. P. adjudg'd.——2 Bulst. 213. S. C. & S. P. cited per Cur. Pasch. 12 Jac. B. R. ——2 Inst. 81. cites S. C.

3. If there be Lessee for Years, upon Condition that if he does Waste, or such-like &c. that his Estate shall cease; if he sows the Land, and after does Waste, the Lessor shall have the Corn, P. 38 El. B. R. held by Clinch. Co. *5*. 116. b. Co. Litt. *55*. b.

Cro. E. 461 (bis) S. P. in S. C. by Clench, to which Popham and Fenner agreed.——It he commits a Forfeiture the Lessor shall have the Corn; Per Popham. Gouldsb. 189. pl. 126. in S C——Where the Lessor enters for a *Tort*, or by *Title Paramount*, or by *Limitation* of the Estate, the Lessor shall have the Corn. Cro. E. 461. (bis) in the Case of Oland v. Burdwick.——He that *enters* for *Condition broken* is by relation in of his first Estate, and as if the Possession had never been out of him, and so he that enters shall have the Emblements; Arg. and to this Opinion the Court seem'd to incline. 2 Roll R. 468. Mich. 27 Jac. B. R. Nicholas v. Simmonds.

4. [So] If there be Lessee for Life, upon Condition that if he doth such an Act, he shall have it but for two Years, and he sows the Land, and after forfeits the Condition, by which his Estate for two Years is ended before the Severance of the Corn, he shall not have the Corn, but the Lessor. P. 38 El. B. R. by two against one.

If a Lease be made for seven Years upon a *Condition* on the Part of the Lessee, *to be performed at the End of the Term*, to have it for Life, and Lessee sows the Land the last Year, but performs not the Condition, Per 2 J. contra one, Lessee shall not have the Corn. Cro. E. 461. (bis) in Case of Oland v Burdwick——Gouldsb. 189. pl. 126. S. C. & S. P. by Fenner.

5. So if Lessee for Years or Life sows the Land, and after surrenders before Severance, the Feoffor shall have the Corn. P. 38 El. B. R. by Popham.

Cro. E. 461. (bis) in Case of Oland v. Burdwick S. P. agreed by all.

6. So. if Lessee for Life or Years sows the Land, and after aliens in Fee before Severance, the Lessor entring for a Forfeiture, shall have the Corn. P. 38 El. B. R. per Popham.

Cro E. 461. (bis) S. P. in Case of Oland v. Burdwick; Agreed by all——In Trespass it is not denied but where *my Tenant for Life aliens in Fee*, and I enter, that *I shall have the Emblements* upon the Land which were *sown mesne between the Alienation and the Entry*. Br. Emblements, pl. 3. cites 40 E. 3. 5.

7. [But] If a Lease be made to Baron and Feme during the Coverture, and the Baron sows, and after they are divorced Causa Præcontractus, the Baron shall have the Corn, because the Judgment is the Act of Law. Co. *5*. *Oland* 116. b.

S. P. by Fenner to which Popham and Clench agreed. Cro. E. 461. (bis) in S. C.——Mo. 395. pl. 512. S. C. & S. P.——Gouldsb. 190. pl. 136. S. C. & S. P. by Fenner, to which Popham agreed.

8. And in this Case if the Divorce be at the Suit of the Baron, yet he shall have the Corn, because the Judgment is the Act of Law. Co. *5*. 116. b. But see the Case in the Report, and there Popham doubted thereof.

S. P. by Fenner, to which Popham and Clench agreed. Cro. E. 461. (bis) in Case of Oland v. Burdwick.

9. If

Hob. 132. pl. 174. Trin. 13. Jac. S. P.

9. If Tenant for Life, or for the Life of another, sows, and after his Estate determines by the Death of Cestuy que vie before Severance, the Lessee or his Executors shall have the Corn. Co. Lit. 55. b. For the Corn is Fructus industrialis, and this is given to encourage Industry, and Charge for the Publick Good. Hobert's Reports 178.

Fol 727.

Cro. E. 460. 461. (bis) S. C. & S P Per Clench, to which Popham agreed.

10. If a Copyholder durante Viduitate leases for one Year, and the Lessee sows the Land, and after the Copyholder takes Husband, yet the Lessee shall have the Corn; for her Act shall not prejudice a third Person. P. 38 El. B. R. between *Oland and Burdwick*, agreed.

11. If Tenant at Will sows the Land, and after surrenders the Land to the Lessor before Severance, and the Lessor accepts it, the Lessor shall have the Corn, and not the Tenant at Will, though this is not properly a Surrender for the Weakness of his Estate, yet this is a Relinquishment of his Estate, and so it is determined by his own Act. M. 31. 32 El. B. R. between *Weeper and Handall*, admitted.

12. If Tenant for Years, si tam Diu vixerit, sows, and dies before Severance, yet the Executor of the Lessee shall have the Corn for the Uncertainty of the Determination of his Estate, and it would be inconvenient that the Land should not be manured.

I do not observe this Point in 5 Rep. 116 or in Cro. E. S. C. —— Gouldsb. 144. in pl 60. Arg. S P. the Lessee for Years shall have the Corn by reason of his Right to the Land at the Time of his sowing, and never lawfully devested by any Act done by himself; and Gawdy held accordingly.

13. If Lessee for Life leases for Years, and the Lessee for Years sows, and after the Lessee for Life dies before Severance, yet the * Executor of the Lessee for Years shall have the Corn for the Uncertainty of the Determination of his Estate, Co. 5. *Oland* 116.

* It seems that the Words (Executor of the) are Surplusage.

14. If A. seised in Fee has Issue a Daughter, his Wife privement enseint with a Son, and dies, and the Daughter enters, and sows the Land, and before Severance a Son is born, yet the Daughter shall have the Corn because her Estate was lawful, and defeated by the Act of God, and it is for the Good of the Commonwealth that the Land be sowed. Co. Litt. 55. b.

Went. Off. Ex. 59. S. P.

15. If the Baron be seised in Fee or for Life in the Right of his Feme, and sows the Land and dies, or his Wife dies before Severance, yet he or his Executor shall have the Corn. Co. Lit. 55. b.

Noy 149. Arnold v. Skeale, S. C. but the Court was divided.— D. 316. a. Marg. pl. 2. cites 5 Jac. B. R. Arnold v. . . . . . that the Ch. J. and two Justices were of Opinion that the Feme should have the Emblements, but two Justices e contra —— Cro. E. 61. pl. 3. Mich. 29 & 30 Eliz. B. R. the S P. cited by Wray to have been adjudged in B. R. that the Feme shall have it.— The Wife shall have the Emblements, per Coke Ch. J. obiter. Godb. 189 pl. 272. Trin. 10 Jac. C. B. —— Went. Off. of Ex. 59. S. P. accordingly. —— D. 316. pl 2. in the principal Case, the Court proposed for the Executor to take a Quarter Part in Recompence of the Seed.

16. If there be Baron and Feme Jointenants for Life, and the Baron sows the Land, and dies before Severance, his Executor shall have the Emblements and not the Feme, for it seems there is no Diversity between this and where the Baron is seised in the Right of the Feme. Dubitatur, M. 5 Ja. B. between *Skell and Arnold*. Dy. 15 El. 316. 2. Contra Co. Lit. 55. b.

17. If

17. If a Feme seised in Fee or for Life of, Land, and sows it, and after takes Husband, who dies before Severance, it seems the Wife shall have them, and not the Executor or Administrator of the Baron, because the Baron did not sow them.

18. If the Baron seised of a Copyhold in Fee sows it, and after surrenders to the Use of the Feme, who is admitted accordingly, and after the Baron dies before Severance, it seems that the Wife shall have the Emblements, and not the Executor or Administrator of the Baron, because the Baron passed the Emblements with the Land to the Feme, as annexed to the Land, and therefore the Privilege which the Law gave to him which sowed is taken away by the Surrender, and so all one as if the Feme had sowed it, or purchased the Land sowed of a Stranger.

19. If the Baron sows the Land, and dies before Severance, and his Wife is endowed of this Land, so sowed, for her third Part, she shall have the Emblements, and not the Heir nor Executor, for she is to have the Land, fuerit culta sive inculta cum Fructibus & Redditibus. Bracton, Lib. 2. Fol. 96. S. 2.

2 Inst. 81. cites same Book. —— Brownl. 44. Trin. 15 Jac. Anon. S. P. where the Feme recovered Seisin in Dower. —— So if assigned to her for Dower by the Heir. D. 316. a. pl. 2. by 5 Justices; but 4 e contra.

20. If Tenant by Statute Merchant sows the Land, and before Severance a casual Profit happens, by which he is satisfied, yet he shall have the Corn. Co. Lit. 55. b.

A. is bound in a Statute to B and sows the Land; B. extends the Lands which are delivered unto him in Execution; It was adjudged in this Case, that the Conusee should have the Corn sowed 2 Le 54. pl. 75. Trin. 29 Eliz. C. B. Burden v. Withington. —— The same in Case of a Recognizance. Ibid.

21. If A. seised in Fee of Land sows it with Grain, and after grants it to B for Life, the Remainder to C. and after B. dies before Severance, C. shall have the Corn, and not the Executors of B. for the Reason of Industry and Charge in B. is wanting. Hobert's Reports 178. per Curiam.

Hob. 132. pl. 174. Trin. 13 Jac. —— Cro. E. 464. Arg. and agreed by Popham and Gawdy Justices, in Case of Knevett v. Poole. —— S. P. Arg. Gouldsb. 144. and agreed by Gawdy J.

So if A. had devised it to B. for Life, the Remainder to C. for Life, and B. dies before the Corn is severed, Wray and Shute held that C. should have the Emblements, for by the Devise of the Land they pass with it; But if B had granted them to another it had been otherwise; For by the Grant they are Quasi Chattels severed from the Land; but Clench doubted; For he conceived that the Executor of the first Tenant for Life shall have them as Chattels vested in him; And he said, if Land be sown, and then the Land is devised to J. S. for Life only, and before Severance the Devisee dies, his Executor shall have the Corn, and not the Reversioner, which Case Wray and Shute denied, but said if it were so, it is like the Case of a Remainder, and Popham Attorney being demanded his Opinion, agreed with Wray. Cro. E. 61. pl. 3. Mich. 29 & 30 Eliz. Anon.

22. If Lessee at Will sows the Land with Grain, Roots, Flax, Hemp, or other annual Profit, and the Lessor enters before Severance, yet he shall have it. Co. Lit. 55. b.

Fol. 728.

23. But if the Lessee plants young Fruit Trees, or young Oaks, Ashes, or Elms &c. or sows the Land with Acorns, and after before Severance the Lessee at Will is put out of the Land by the Lessor, yet the Lessee shall not have these, because they render not any annual or present Profit. Co. Lit. 55. b.

24. If Lessee at Will by good Husbandry or Industry, either by overflowing or making of Trenches, or compassing of Meadows, or by digging out of Bushes or such like, makes the Grass to grow in greater Abundance, yet if the Lessor enters and ejects him, the Lessee shall not have the Grass, because the Grass is the natural Profit of the Land. Co. Lit. 56.

25. So

25. So **if Lessee at Will sows the Land** with Hay-Seed, **and by this increases the Grass, and the Lessor enters and ejects him, yet the Lessee shall not have it. Co. Lit.** 56.

26. *Termor and Tenant in Dower may devise* their Emblements. Br. Emblements, pl. 22. cites 8 H. 3. and Fitzh. Devise 25.

27. If a *Villein leases his Land*, and the *Lessee sows* the Land *and dies*, the *Lord of the Villein enters*, he shall have the Emblements. The Reason seems to be inasmuch as the Lord enters by Title; For *he who recovers Land or enters by Title shall have the Emblements.* Br. Emblemems, pl. 25. cites 30 E. 1. and Fitzh. Villenage, pl. 45.

28. *Baron seised in Jure Uxoris leased the Land for seven Years and died within the Term.* The Wife entred and infeoffed G. but did not oust the Termor, and yet this is a good Feoffment; for by his Death the Term is void; but if the *Termor sow'd the Land in the Life-time of the Baron*, and the Baron died before Severance, the *Termor shall have the Emblements.* Br. Leases, pl. 24. cites 7 Aff. 19.

29. *Baron and Feme Tenants in Tail sow* the Land, the *Baron died* before Severance, the *Feme shall have* the Emblements, *and not the Executor of the Baron.* Br. Emblements, pl. 15. cites 8 Aff. 21.

30. *Contra if they had been sever'd in the Life of the Baron*, or if the Baron had sold or devised them in his Life; Quære. For Brook says, it seems to him that the Executor shall have them. Br. Emblements, pl. 15. cites 8 Aff. 21.

Br. Forfeiture de Terres, pl. 109. cites S. C.

31. In Trespass it was adjudged, that where the *Lord seises the Copyhold of his Tenant for not doing of the Services*, that the Tenant shall have the Corn which were sever'd before the Seisure, and the Lord shall have the Corn growing at the Time of the Seising. Br. Emblements, pl. 4. cites 42 E. 3. 25.

32. *Copyholder sowed the Lands*, and afterwards *committed a Forfeiture*; the *Lord* enter'd and adjudged that he *should have the Corn.* 4 Rep. 21. b. in Brown's Case, cites 42 E. 3. 25. a. b.

33. In Trespass it was agreed, that if a Man *leases to two for Life*, the *one dies*, the *Lessor enters and leases to W. who sows the Land*, the other *first Lessee enter'd upon him and took the Goods*, and well. Br. Emblements, pl. 5. cites 46 E 3. 32.

34. If *Baron seised in Jure Uxoris, or a Man seised for Term de auter vie sows* the Land, and the *Feme dies, or Cestuy que vie dies*, he in *Reversion or the Heir enters*, and *he who sows re-ousts him*, and the *other brought Assise and recover'd* his Damages, yet *he who sow'd shall have the Crop*; For the other has recover'd Damages which suffices for the Tort. Br. Emblements, pl. 16. cites 46 Aff. 2.

35. If *Tenant in Dower sows* the Land *and takes Baron, who makes his Executor and dies before Severance* of the Corn, the Feme shall have the Emblements, and not the Executor of the Baron. Br. Emblements, 26 cites lib. Fundamenti Legum. fol. 72.

36. *Contra if the Baron sows* the Land *and dies before Severance*, there the Executor of the Baron shall have the Emblements, the Reason seems to be inasmuch as *he who did the Labour and Costs of the Emblements shall have them.* Br. Emblements, pl. 26.

S. P. Br. Emblements, pl. 14. cites 7 Aff. 19.

37. A Man *seised in Jure Uxoris leased* the Land *for Term of Years*, the *Baron died*, the *Feme entered*, the Tenant shall have the Emblements. Br. Emblements, pl. 6. cites 7 H. 4. 17.

38. *So in all Cases where a Lease is determinable for the Life of a Man.* Br. Emblements, pl. 6. cites 7 H. 4. 17.

39. If *Tenant at Will be ousted* he shall have the Corn, *but if he plows the Land or compestures it, and be ousted before the sowing*, he shall lose the Plowing and the Compesture; quod non negatur. Br. Tenant per Copie, pl. 3. cites 11 H. 4. 90.

40. If

40. If *Tenant at Will sows* the Land *and after is ousted*, he shall have the Emblements. *But if he plows or compestures* the Land, *and is ousted before the sowing*, he *shall lose the Cost of the Plowing and Compesture.* Br. Emblements, pl. 7. cites 11 H. 4. 90.

41. If a *Man makes a Lease at Will* and the *Lessor is outlaw'd*, whereby the Will is determin'd *the King shall have the Profits, but the Lessee at Will shall have the Emblements*; But *if the Lessee at Will be outlaw'd* the King shall have the Emblements. 5 Rep. 116. b. Hill. 44 Eliz. B. R. per Curiam in Oland's Case, and cites 9 H. 6. 20. & 21.

42. In Assise it was said, that he who *recovers Land sown by* * *Assise or other Action* shall have the Emblements, and the Cresture upon the Land; quod nota bene. Br. Emblements, pl. 8. cites 19 H. 6. 45.

* S. P. and therefore the Assise *recouped the Damages to 40 s* and no more, in consideration that the Land was sown. Br. Emblements, pl. 11. cites 24 E. 3. 50.

43. Where a *Man sows* the Land and *dies before Severance*, the *Executor* shall have the Emblements and *not the Heir*; quod nota. Br. Emblements, pl. 9. cites 21 H. 6. 30.

44. It was held for clear Law, that if a Man *disseises me*, and *sows the Land, and after he severs* the Corn, and I re-enter, *I shall have the Emblements.* Br. Emblements, pl. 1. cites 27 H. 6. 1. Paston's Case.

45. *So* of *Trees severed*; for these were once annexed &c. Br. Emblements, pl. 1. cites 27 H. 6. 1.

46. Note for Law in a Quare Impedit, if a *Parson dies before the Conception de Nostre Dame, his Glebe sown*, his Successor shall have the Emblements and the Tenths growing, by the Law of Holy Church; Per Littleton. Br. Dean and Chapter, pl. 1. cites 34 H. 6. 38.

47. In *Trespass* the *Defendant said, that he was seised till by the Plaintiff disseised, who sowed the Land and cut it, and* the *Defendant re-entered upon him and carried it away*; and a good Plea by the Opinion of the Court; *For* per Danby J. *when the Disseisee re-enters he shall punish all Mesne Trespasses*; For the Possession shall be adjudged continued in him Ab Initio. Br. Emblements, pl. 12. cites 37 H. 6. 67.

48. *But per Billing* Serjeant, *if the Disseisee re-enters before the cutting* or Severance of the Emblements he shall have the Emblements; for *they are annexed to the Franktenement*; *But if he enters after Severance* or cutting, the *Disseisor shall have them, for they are Chattels vested in him by the Regress, but* the *Disseisee may take them Damage-Feasant.* And Brook says, it seems to him that what Billing said was good Law; For a Man cannot know one Sheaf of Corn from another. Br. Emblements, pl. 12. cites 37 H. 6. 67.

49. In *Trespass*; a Man *leased Land at Will*, the *Lessee sowed* the Land, the *Lessor enfeoffed B.* the *Lessee severed* the Emblements, and the *Feoffee took them*; or if the Feoffee sever them and take them, yet the Tenant at Will shall have them; for the *Feoffee cannot take them unless for Damage-Feasant.* Br. Emblements, pl. 13. cites 37 H. 6. 25.

50. And per Fortescue and Danby, *Tenant at Will*, and *for Life, pur auter Vie, and* Tenant *in Tail*, shall have the Emblement by the *Statute of Merton cap.* 2. and *Tenant in Fee Simple* shall have it *by Common Law.* Br. Emblements, pl. 13. cites 37 H. 6. 25.

51. If *Lessee at Will be ousted*, and after the *Lessor, Tenant for Life, dies*, the Lessee shall have the Corn; Per Gawdy J. Godb. 145. cites 38 H. 6.

52. If my *Father be disseised*, the *Disseisor cuts Trees*, the *Father dies*, and the *Heir enters and finds the Trees upon the Land*, I shall

have it; Per Townſend; which Catesby and Brian denied. Br. Emblements, pl. 17. cites 2 H. 7. 2.

53. If two *Jointenants* ſow their Land, and *one lets his Moiety for Years*, and the other, that did not let, dies, the other ſhall have the Corn as Survivor. Arg. Ow. 102.

Br. Emblements, pl. 18. cites S. C accordingly, and that it was the Folly of the Diſſeiſee he had not entered before the Severance of them. —— Br. Property, pl. 47. cites S. C. —— S. P. Br. Emblements, pl. 19. cites 12 E. 4. 5. per Fairfax

54. If *Diſſeiſor ſows the Land*, and after *ſevers the Emblements*, and the *Diſſeiſee re-enters*, he ſhall not have the Emblements; for they came of the Manurance of the Party. Br. Chattels, pl. 10. cites 5 H. 7. 16. 17.

S. P. Br. Emblements, pl. 10. cites 15 E. 4. 31. per Littleton; but Choke contra; For by the Re-entry the *Franktenement ſhall be adjudged in him ab initio*, and he ſhall have Treſpaſs againſt every mean Occupier, as if he had continued Poſſeſſion; to which Brian Ch. J. agreed.

S. P. Br. Emblements, pl. 13. cites 37 H. 6. 25. —— Ibid. pl. 17. cites 2 H. 7. 1. contra per Townſend, that at this Day the Diſſeiſee ſhall have the Emblements, as Corn, though they are ſevered, if they are lying upon the ſame Land, and Brian concordat. —— So per Fineux Ch. J. Ibid. cites 12 H. 7. 25. —— S. P. by all the Juſtices of C. B. that the Diſſeiſee ſhall have them. Br. Emblements, pl. 20. cites 14 E. 4. 6. —— Contra if they had been *carried out of the Land*. Ibid.

Br. Property, pl. 18. cites S. C. — The Diſſeiſee may take the Emblements be they ſevered or not; Per Paſton. Br. Emblements, pl. 12. cites 15 H. 6.

55. *Contra* if he had *entered before Severance*. Br. Chattels, pl. 10. cites 5 H. 7. 16. 17.

Br. Property, pl. 18. cites S. C. — S. P. Br. Emblements pl. 13. cites 37 H. 6. 25. —— S. P. by Townſend, Ibid pl. 17. cites 2 H. 7. 1. —— S. P. per Fairfax, Ibid. pl. 19. cites 12 E. 4. 4. 5. —— S. P. Contra if he carries them out of the Land. Br. Emblements, pl. 10. cites 15 E. 4. 31. —— If the Diſſeiſor *cuts Trees and carries them away*, yet the Diſſeiſee may take them; Per Littleton; which Choke denied. Br. Emblements, pl. 20. cites 14 E. 4. 6. —— S. P. Br. Treſpaſs, pl. 202. cites 37 H. 6. 35.

56. *But he ſhall have that which is ſevered* before his Entry *which comes of the Nature of the Land*, as Hay made of the Graſs, and *Trees cut* and made into Bavins. Br. Chattels, pl. 10. cites 5 H. 7. 16. 17.

Br. Property, pl. 18. cites S. C. — S. P. Br. Emblements, pl. 18. cites 37 H. 6. 35. —— Br. Treſpaſs, pl 202. cites S. C.

57. So of *Apples and Nuts* gathered; Per Fairfax and Tremaile, and the other Serjeants. Br. Chattles, pl. 10. cites 5 H. 7. 16. 17.

Br. Property, pl 18. cites S. C.

58. *But* by the Reporter, he cannot take them if they are *carried off the Land*; for one Apple or Nut cannot be known from another any more than Money. Ibid.

Br. Property, pl. 18. cites S. C. — * Br. Emblements, pl. 18. cites S. C.

59. And by him, * *where the Diſſeiſeeenters before Severance, and* the *Diſſeiſor re-enters and ouſts him, and ſevers them*, and the *Diſſeiſee re-enters*, he ſhall have them by Reaſon of his Entry before Severance. Ibid.

Br. Emblements pl. 18. cites S. C. accordingly —— Br. Property, 18. cites S. C

57. *And* if *Feoffee of the Diſſeiſor ſows* the Land he ſhall be in the ſame Plight of it, and no better, as the Diſſeiſor himſelf. Ibid.

Br. Emblements pl. 18. cites S. C accordingly. —— Br. Property, pl. 18. cites. S. C.

58. *And* if *Feoffee upon Condition ſevers the Corn meane between the Condition broken, and the Re-entry* for the Condition broken, he ſhall have the Corn, and not he who enter'd. Ibid.

59. If *Lessor at Will* be *outlaw'd* in a Personal Action, the King shall have the Profits after, but the Lessee shall have the Emblements; But if *Lessee is outlaw'd* in a Personal Action the King shall have the Emblements. 5 Rep. 116. b. Hill. 44 Eliz. R. R. Oland's Case.

60. A Man devised Land, which was sowed, *for Life*, the *Remainder in Fee*, and the Devisor died, and the *Devisee for Life also died before the Severance*, and it was adjudged that the Executor of the Tenant for Life shall not have that, but he in Remainder. Win. 51. cited to be so adjudged 18 Eliz. Allens Case.

61. A. gives *Bond that B. shall enjoy a Lease of Black-Acre immediately after his Death*; The Corn on the Death of A. belongs to A's Executors. 4 Le. 1. pl. 1. Hill. 20 Eliz. Launton's Case.

62. A. lets Land at Will to B. and afterwards B. *agreed to surrender* the Land and his Interest to A. A. enter'd and let it to Defendant, who took the Corn. The Question was, if this was a Surrender, (I agree to Surrender my Land) if it imports an Act to be done in Futuro or in the present Time? Judgment pro Quer.' Cro. E. 156. pl. 39. Mich. 31 & 32 Eliz. B. R. Sweeper v. Randall.

He to whom the surrender is made shall have the Corn; Per Popham Goldsb. 189. pl. 126.

63. A. and B. are *Jointenants*; A. by Consent of B. *occupies the Land alone*, and takes the Profits to his own Use. A. by this is Tenant at Will to B. and if A. dies the Emblements shall go to the Administrator of A. but if B. had only said to A. I will not occupy it, this would be no Assent that A. should have all, nor would it give any Thing to A. Cro. E. 314. pl. 7. Hill. 36 Eliz. B. R. Geanes v. Portman.

Owen. 102. James v. Portman S. C. but somewhat differently reported, as that if B had said that A. should occupy it solely, then the Emblements would not survive.

64. If a *Lease be* made *for seven Years upon a Condition on the Part of the Lessee, at the End of the seven Years to be performed, to have it for Life*, the *Lessee the last Year sows the Land, and performs not the Condition*, it was said, that he shall have the Emblements, but Popham and Fenner denied it. And Judgment was given for the Defendant. Cro. E. 461. (bis) pl. 10. Pasch. 38 Eliz. B. R. in Case of Oland v. Burdwick.

65. *Tenant for Life*, the *Remainder in Fee*; *Tenant for Life made a Lease for Years*; *to H. who is ousted by a Stranger, the Disseisor made a Lease for Years*, his Lessee sowed the Land; Tenant for Life died; It was adjudged, that the Corn belong'd to H. the Lessee for Years of the Tenant for Life. Cro. E. 463. pl. 12. Hill. 38 Eliz. B. R. Knevett v. Poole.

5 Rep. 55. Knivet's Case resolv'd that the mere Right to the Corn was in H the Lessee of Tenant for Life, and he might have Action of Trespass, and recover all the mesne Profits against the Lessee of the Disseisor; And the Reporter adds a Nota, that the Lessee of Tenant for Life had Right to the Land, and consequently to the Emblements, as things annexed to the Land and the Death of Lessee for Life determined his Interest to the Land, but his Right to the Emblements remained, and this was the principal Reason of the Judgment.—Gouldsb. 143. pl. 60. S. C. adjudg'd.

66. When the Estate of him that sows the Land is determin'd *by his own Act by a Casualty*, and when by the *Act of the Law*, or *by another Man*, makes a Difference as to the having the Emblements; Per Clench J. Cro. E. 460. (bis) pl. 10. Pasch. 38 Eliz. B. R. Oland v. Burdwick.

67. If Lessee for Life sows the Land and after *prays in aid of a Stranger*, now if the Lessor enters he shall have the Corn. Per Popham. Godb. 190. in pl. 126. Hill. 43 Eliz.

68. A Man *seised for Life, or in Fee or Tail in his Wife's Right or his own*, and sows it with Corn, or any Manner of Grain, and dies before

fore Harveſt, it ſhall go to the Executor of the Husband, and not to the Wife or Heir that ſhall have the Land; But *Graſs ready to cut, Apples, Pears &c. upon the Trees,* ſhall go to the Wife or Heir. Went. Off. Ex. 59.

69. If Land ſow'd with Corn, Saffron, Hemp &c. or planted with Hops, or having Graſs ready to be cut be *ſold or conveyed*, it ſhall all go to the *Purchaſor of the Land unleſs excepted*, tho' never ſo near Reaping or Cutting, or Gathering. Went Off. Ex. 59.

70. *Roots of Carrots, Parſnips, Turnips,* Skirrets &c. ſown by him that had the Inheritance of the Garden or Land, it ſeems ſhall go to the Heir, and not to the Executors; For the Profitable Part is the Root which is hidden *within the Ground, and cannot be come at without breaking the Soil,* which the Executors cannot lawfully do; But as for *Melons* which are above Ground, the Executors may take them, yet as for *Artichokes*, tho' the Fruit be above the Ground, yet it ſeems they have not ſuch yearly Setting or Manurance as ſhould ſever them in Intereſt from the Soil, therefore they ſhall go with it to the Heir. Went. Off. Ex 63.

71. Albeit the *Leſſor, determines his Will before the Corn &c. be ripe*, yet becauſe the State of the Leſſee is uncertain, and therefore leſt the Ground ſhould be unmanured, which ſhould be hurtful to the Commonwealth, he ſhall reap the Corn, which he ſowed, in Peace. Litt. S. 68. and Co. Litt. 55. a. b.

72. A man *after Judgment given againſt him* ſow'd the Land, and afterwards brought a Writ of Error to reverſe the ſaid Judgment, but it was affirm'd; he ſhall not take the Emblements; Adjudg'd per tot. Cur. 2 Bulſt. 213. Paſch. 12 Jac. Wicks v. Jordan.

73. If *A. ſeiſed of Land ſows it with Corn,* and then *conveys it to B. for Life, Remainder to C. for Life,* and *B. dies before the Corn is reaped,* now C. ſhall have it, and not the Executors of B. though his Eſtate was uncertain; agreed per Cur. Hob. 132. pl. 174. Trin. 13 Jac. in Caſe of Grantham v. Hawley.

74. The *Leſſor covenanted with the Leſſee his Executors &c. that he ſhould carry away to his own Uſe ſuch Corn as ſhould be growing on the Land at the End of the Term*; afterwards he *conveyed the Reverſion* to the Plaintiff, and the *Executors of the Leſſee ſowed the Land, and ſold the Corn growing on it at the end of the Term* to the Defendant; it was objected, that the Leſſor had never any Property in this Corn, and therefore could not grant it away; but adjudged that the very Right was paſſed when it ſhould happen; for though the Leſſor had not any actual Property in the Corn, yet he had a Right in Poſſe, becauſe of the Lands out of which it proceeds, and the Words in the Leaſe are ſufficient to paſs the Property, as ſoon as the Corn is growing on the Land. Nelſ. Abr. 702. pl. 9. cites Hob. 132. [pl. 174. Trin. 13 Jac.] Grantham v. Hawley.

L. P. R. 512. S. P. cited to be ſo held per Saunders Ch. J.

75. A Man was *ſeiſed* of Land *in Fee and ſowed the Land*, and deviſed that to J. S. and before Severance he died, and whether the Deviſee ſhall have the Corn, or the Executor of the Deviſor was the Queſtion; and by Hobert, Winch and Hutton, the Deviſee ſhall have that, and not the Executor of the Deviſor. Win. 51. Mich. 20 Jac. C. B. Spencer's Caſe.

76. If a Man *deviſe Land, and after ſows* it and dies, in this Caſe the Deviſee ſhall have the Corn, and not the Executor of the Deviſor. Winch. J. ſaid it had been ſo adjudged. Win. 52. Mich. 20 Jac. C. B. in Spencer's Caſe.

S. P. and *ſo of Saffron*

77. *Hops* growing out of the old Roots ſhall go to the Executor or Adminiſtrator, becauſe they grow by the Manurance and Induſtry of the

the Owner and so are *like Emblements.* Cro. C. 515. pl. 13. Mich. 14 Car. B. R. Latham v. Atwood.

and Hemp, they shall go to the Executor. Went. Off Ex. 59.

78 If *Sheriff on a Fieri Facias* sells Corn growing, the Vendee cannot justify an *Entry on the Land* to reap it till such time as the Corn is ripe. Per Twisden J. Vent. 222. Trin. 24 Car. 2 B. R. in Case of Perrot v. Bridges.

79. *Tenant at Sufferance* sows the Land, and afterwards *Judgment is recovered against him, and the Corn seis'd thereupon and sold* by the Sheriff (standing) then the Trespass lies for the Landlord against the Sheriff and his Officers. L. P. R. 512. cites 32 Car. 2. Sir John Banks's Case.

80. *Baron and Feme Jointenants for Life*, Baron sows the Land and dies before Severance; The Court propos'd to each to take a Moiety. Per Ld. Somers. 2 Vern. 322. pl. 311. Mich. 1694. Rowney's Case.

81. But where Strangers are *Jointenants* the Emblements will go to the Survivor, it was admitted. Arg. 2 Vern. 323. pl. 311. Mich. 1694. in Rowney's Case.

82. A. *Tenant for Life* Remainder *to B. his Wife for Life* for Jointure, *Remainder to A. in Fee.* A. *devises his Remainder in Fee to B.* and *died in May, leaving Hops in the Ground,* which were *cultured at great Charge in February, and gathered in August.* Quære, Whether they belonged to B. the Wife or to Executor of A. The Master of the Rolls at first inclined to think the Hops belonged to B. in Right of her Rent and Emblements; But in regard of Cases cited as adjudged that In Case of Dower, she shall have the Emblements, because Dower is considered as an Excrescence or Continuance of the Estate of the Husband, but a Jointure is not, he afterwards declared that the Hops and Corn growing at the Testator's Death were Emblements, and *ought to be accounted for as Part of the Testator's Estate.* MS. Rep. Trin. 1734. Canc. Fisher v. Forbes.

For more of Emblements in General, See **Devise**, and other Proper Titles.

Enfants.

(A) *What* Infants in respect of their Office &c. or for other collateral Respect, *cannot avoid their own Acts.*

1. If the King consents to an Act of Parliament during his Minority, yet he cannot after avoid this Act, because the King as King cannot be a Minor; for as King he is Body Politick. Co. Lit. 43. [a. ad finem.]

2. So

Fitzh. Enfant, pl. 15. cites 26 Aff. pl. 54. S. P. as faid by feveral Peers and Sages of the Realm. —— Br. Age, pl. 54. cites S. C. and S. P. accordingly, and fays that concordat 6 E. 3. tit. Age. Fitzh. 89. —— Same Cafes cited Plowd. C. 213. a. —— 7 Rep. 12. a. S. P. in Calvin's Cafe. Trin. 6 Jac. accordingly; For otherwife his Revenue fhould decay, and the King fhould not be able to reward Service, &c.

2. So the *King fhall not avoid Leafes or Grants* in refpect of the Infancy of his Natural Capacity. 5 Rep 27. a. Hill. 26 Eliz. Arg.

3. So the *Mayor, Bailiff, or Head of any other Corporation* fhall not avoid any of their Deeds or Grants by reafon of Infancy of their Natural Capacites; becaufe they do them in another Right or Capacity &c. 5 Rep. 27. a. b. Arg. Hill. 26 Eliz.

(A. 2) Infant. Favour'd.

1. THE common Principle is, that an Infant *in all Things which found in his Benefit* fhall have Favour and Preferment in Law, as well as another Man, but fhall not be prejudiced by any Thing in his Difadvantage. D. 136. b. 137. a. pl. 22. Hill. 3 & 4 P. & M.

2. *Tenant for Life* of full Age, *and Remainder-man an Infant levy a Fine*, and afterwards the Infant reverfeth the Fine as to him for the Inheritance, he fhall not *enter for the Forfeiture* becaufe he join'd in the Fine, and fo affented to it. 2 Le. 108. pl. 139. Trin. 30. Eliz. C. B. Piggot v. Ruffel.

3. Infant *makes a Feoffment*; It is no *Forfeiture*. Noy 92. Trin. 2 Car. B. R. Afhfield v. Afhfield.

It is a defeafible Forfeiture; Arg. admitted. Godb. 364. Trin. 2 Car. B. R. Afhfield v. Afhfield.

4. An Infant was relieved againft a *Slip by his Counfel in Mifpleading*. 3 Ch. R. 24. 20 Car. 2. Savage v. Whitebread.

(B) What *Acts* of an Infant are *void*, and what *voidable*.

Fitzh. Affife, pl 322. cites S. C.

1. IF an Infant in Ward to Guardian in Socage infeoffs the Guardian, this is void for the Deceit that the Law intends in him that hath the Command of him, and the Breach of Truft which the Law repofes in him. 35 Aff. 8. adjudged.

2. If an Infant furrenders a Leafe for Years to him in Reverfion, this is void, and cannot be made good by any Agreement at full Age. Mich. 13 Car. B. R. between *Fludd and Gregory*, per Curiam, refolved upon a Trial at Bar.

Cro. C. 502. pl. 2. S. C. all the Court held that a Surrender by an Infant cannot be by Deed, but it is abfolutely void, and Judgment accordingly. —— Jo. 405. pl. 2. S. C. but not exactly S. P. —— A Surrender made by an Infant is void; Per Cur obiter. 3 Mod. 310. Trin. 2 W. & M. in Cafe of Thompfon v Leech.

3. But

3. But if an Infant being a Lessee for Years, to begin at a Day to come, accepts a new future Interest for the same Term, and at full Age when the Term begins, enters into the Land and accepts the new Lease, and claims in by it, this Agreement to the new Term shall be a Surrender in Law of the first Estate. M. 13 Car. B. R. between *Fludd and Gregory*, per Curiam, upon a Trial at Bar; but a special Verdict was found of this among other Things, and after Tr. 14 Car. B. R. upon Argument at the Bar, adjudged per Curiam upon this Point, because it could not be for the Benefit of the Infant, and therefore the Law adjudged it void ab Initio. Intratur. Tr. 13 Car. Rotulo 1154.

Cro. C 502. pl. 2. S. C. all the Court held that the Surrender by an Infant by Acceptance of a second Lease is void, because it is without Increase of his Term or Decrease of his Rent, and where there is not an apparent Benefit, or the Semblance of a Benefit, his Acts are merely void, and there being no such in this Case, Judgment was given accordingly. ——— Jo. 405, 406. pl. 2. S. C. and the Judges held that the Agreement to the second Lease did not make void the first, because the second Lease was never good. ——— 2 Roll Rep. 408. cites 9 H. 6. 36. and 9 H. 7. 24. that a Surrender of Infant is void.

4. Dum fuit infra ætatem was brought *of Land and Rent against the Alienee of the Father of the Demandant*, and the Writ was *admitted to lie of the Rent*, and yet, by some, the Grant of an Infant was void, and not voidable, which is not so, as appears here; For then Action does not lie, and also the *Delivery of the Deed cannot be void but voidable*. Br. Dum fuit &c. pl. 1. cites 46 E. 3. 34.

5. If an Infant *levies a Fine*, he shall have a Writ of Error during his Nonage, and *assign it for Error*. 12 Rep. 122. Mich. 12 Jac. cites F. N. B. 121.

6. If an Infant makes a *Lease for Years without reserving any Rent*, it is void, and not voidable only, because there is no Consideration, but if any Rent is reserved it is only voidable; Agreed by all except Gawdy. Mo. 105. pl. 248. Pasch. 17 Eliz. B. R. the 7th Resolution in Case of Lane v. Cowper.

7. If an Infant *takes a Lease for Years rendering Rent*, it is only voidable at Election; For if it be to his Benefit, be that Benefit apparent or implied, it shall be void in no Case Prima Facie, as 21 H. 6. b. but he may at his Election make it void; For *before the Rent-Day he may refuse and waive the Land*, and then an Action of *Debt will not lie against him*; Held per Cur. Brownl. 120. Pasch. 11 Jac. Kettlie's Case.

Cro. J. 320. pl. 1. Ketsey's Case, S. C. & S. P. held accordingly. —— 2 Bulst 69. Kirton v. Elliot, S. C. the Court were all clear of Opinion that the Infant Lessee was liable to pay the Rent, and so Judgment was given for the Plaintiff.

8. If an *Infant makes a Lease for Years rendering Rent*, and the *Lessee enters*, it is at the Election of the Infant to charge him in Assise, or to bring Debt for the Rent, or to accept the Rent at his full Age, as 7 Ed 4. 6. and other Books be; Per three Justices. Cro. C. 303. pl. 6. Pasch. 9 Car. B. R. in Case of Blunden v. Baugh, and Ibid. 306. agreed per Richardson Ch. J.

9. If an Infant *makes a Lease for Years rendering Rent*, the Lease is but voidable; But if an Infant makes a Lease for Years *rendering a Rose or a Pepper-Corn*, or any such like Trifle, the Lease is void; Arg. cites Fitzh. Tit. Entry Congeable 26. Mod. 263. Trin. 29 Car. 2. in Case of Barker v. Keate.

10. An Infant's *Deed* is not void, but only voidable, for which Reason an Infant cannot plead Non est Factum to his Deed, as a Feme Covert may. 3 Wms's Rep. 208. Mich. 1733. Nightingale & al' v. Ferrers.

(B. 2) Bound. In what Cases.

1. IN Assise, *Baron and Feme purchased the Land in Fee*, and after the *Baron aliened to his youngest Son in Fee within Age*, and after the *Baron and Feme entered into the Tenements of the Assent of the Feoffee*, who was yet *within Age*, and after the *Feme continued Seisin and died*, and the *eldest Son entered as Heir*, and the youngest, who was infeoffed, brought Assise and recovered by Award; for the Assent was void, because he was within Age, and so the Entry of the Baron and Feme a Disseisin; Quod Nota. Br. Assise, pl. 169. cites 11 Ass. 14.

Pl. C. 375. b S. P. and cites S. C. — 2 Vern. 56. pl. 508. Trin. 1706. Scot & Ux' v. Haughton and Doctor Fuller, S. P ——— All Conditions in Fact shall bind an Infant, but not Condition in Law; Arg. Godb. 365. ——— S P. per Rainsford J. Vent. 200. in Case of Fry v. Porter, cites 8 Rep. Whittingham's Case ——— S. P. per Hale Ch. J. Vent. 205. Pasch. 24 Car. 2 B. R ——— Copyhold surrendered to the Use of an Infant, to the Intent that he should pay an Annuity to another at full Age, which he refused to do, it was decreed he should pay it, and the Arrearages. Toth. 171. cites 9 Eliz. Sawyer v. Gillet.

2. Infant may be *bound* by Law to the Performance of a *Condition*; Per Hale Ch. B. Chan. Cases 143. in Case of Fry v. Porter, cites 31 Ass. 17. Fitzh. Condition 15. Br. 114. and Coverture and Infancy 71.

3. He who *aliens within Age may enter*, *but* he shall *not have* Writ of *Dum fuit infra ætatem till* he comes of *full Age*; Quod Nota. Br. Dum fuit &c. pl. 3. cites 39 H. 6. 42.

4. If an Infant *commands J. N. to make an Obligation in his Name, and to deliver it as his Deed*, this is not his Deed; For the Command of an Infant is void; Contra if he himself delivers it. Br. Coverture, pl. 50. cites 14 E. 4. 3.

5. If an Infant be to make a *Presentation* it shall not be stayed for his Nonage, for the Cure of Souls is to be regarded, and therefore if in such Case he doth surcease in six Months, the Ordinary shall collate; Per Manwood J. 3 Le. 46. pl. 66. Mich. 5 Eliz. C. B. Anon.

* 3 Mod. 222. Arg —Per Eyre J. Show. 83. Contra † Committing Wast by Infant is a Forfeiture because *it is against a Statute*, and if Lessor recovers the Place wasted, the Infant shall not enter again; Arg. Godb. 365.

6. Infant shall be *bound* by the *Statute of* * *Cessavit* and † *Wast* &c. tho' the Statutes are general, for the first is an Injury to the Lord, and the other to the Lessor, and he himself acquires the Estate, and he that hath Policy to acquire is by Law presumed to have Reason to defend the same Thing; Per Walsh. Pl. C. 364. b. Mich. 4 & 5 Eliz. in Lord Zouch's Case.

7. Infant *Lord* has Title to enter for *Mortmain*, but *enters not within the Year*, or does not enter into the Land of the Villein before the Villein has alien'd the Land, he shall be *bound by Laches*, because he had not but Title to the Thing which never was in him; Per Walsh. Pl. C. 364. b. Mich. 4 & 5 Eliz. in Ld. Zouch's Case.

8. Infants are bound by *Laches* in Case of *Waif*, *Estray*, *Wreck*, *Sale in Market Overt* or Acts done by reason of their Office, or for Necessity; Per Walsh. pl. C. 364. b. Mich. 4 & 5 Eliz. in Ld. Zouch's Case.

9. A. of full Age, and B. within Age, *Jointenants*, are *disseised* by C. C. levies a *Fine*, and after Proclamations 5 Years pass. A. dies. B. shall have other five Years after his full Age for the Whole; Per Bendloes. J. Pl. C. 367. Mich. 4 & 5 Eliz. Stowell v. Zouch.

10. Where

10. Where an Infant *made a Conveyance by Bargain and Sale to Queen Eliz.* it was not aided by the Stat. 18 Eliz [cap 2.] Cited by Coke Ch. J. Cro. J. 364. pl. 2. as adjudg'd in 30 Eliz. in Bawd's Case.

11. *Feme Obligor of full Age marries an Infant*, in Debt on the Bond Age was denied. Noy. 69. 39 Eliz. Deeles v. Nokes.

12. Infant keeps an *Hostry*; his Guests are *robb'd*; No Action lies against the Infant, See Actions (D) pl. 3. cites 40 & 41 Eliz. Cross v. Andrews.

13. Tho' a *Feoffment* by Infant Tenant for Life or Years be not such a Forfeiture but that the Infant may enter again upon the Lessor, yet if it be *by Matter of Record*, as if he levies a *Fine*, he shall never enter again; Arg. Godb. 365. cites 8 Rep. 44. [Hill. 45 Eliz.] Whittinghams Case.

14. If an Infant bargains and *sells Lands by Deed indented and inrolled*, he may avoid it any Time. 2 Inst. 673.

15. *Chancery* will decree no *Award* to bind an Infant. Chan. Cases. 280. Trin. 28 Car. 2 Cavendish v. . . . . .

Submission by him not void but voidable. Cumb 318. Hill 6 W. 3. B. R Roberts v. Newbold.

16. *Express Customs* may bind an Infant Copyholder; Per Eyres J. Show. 83. Hill. 1 W. & M. in Case of King v. Dilliston cites Le. 266. Seeme's Case, of the Lords appointing one to receive the Profits during Nonage; and so it is in the Case of *an Office*, a *Condition express* will bind an Infant. Ibid. cites 8 Rep. 44 Whittinghams Case.

But Per Dolben J. contra Ibid. 85 —But a *General* Custom does not bind an Infant; Per Eyre J. Show. 84. in S. C.

(B. 3) Acts of Infant avoided when.

1. IT is a Common known Rule, that *all* such Gifts, Grants or *Deeds* made *by an Infant*, which do not *take Effect by Delivery of his Hand* are void; But such Gifts, Grants or Deed made by an Infant by Matter in Deed, or in Writing, which take Effect by Delivery of his own Hand are voidable by himself, and his Heirs, and by those which shall have his Estate. Perk. 6. S. 12.

2. If an Infant brings Error to reverse a Fine levied by him, if the *Inspection* be had, and Witnesses produced to prove the Infancy, the Reversal may be after full Age, or after his Decease by his Heir. Mo. 844. pl. 1139. Pasch. 13 Jac. Keckwith's Case.

Fine by Infant was vacated on the Inspection. 3 Lev 36. Mich 33 Car. 2. C. B Hutchinson's Case.

3. A *Diversity* is to be observed *between Matters of Record* done or suffered *by an Infant, and Matters en fait*; for Matters en fait he shall avoid either within Age, or at full Age, as has been said; but Matters of Record, as Statutes-Merchants, and of the Staple, Recognizances knowledged by him, or a Fine levied by him, Recovery against him by Default in real Action (saving in Dower) must be avoided by him, viz. Statutes &c. by Audita Querela, and the Fine and Recovery by Writ of Error during his Minority, and the like; and the Reason thereof is, because they are *judicial Acts*, and taken by a Court or a Judge, therefore the Nonage of the Party to avoid

 the

the ſame, ſhall be tried by Inſpection of Judges, and not by the Country. *And for that his Nonage muſt be tried by Inſpection, this cannot be done after his full Age*; and ſo is the Law clearly holden at this Day, though there be ſome Difference in our Books. But if the Age be inſpected by the Judges, and recorded that he is within Age, albeit he come of full Age before the Reverſal, yet may it be reverſed after his full Age. Co. Litt. 380. b.

But a *Common Recovery* may; for this ſhall not be tried by Inſpection as in Caſe of a Fine. Cro. E. 739. pl. 13 Hill. 42 Eliz. B. R. Holland v. Dauntzey —— The bringing a Writ of Error during his Nonage is not ſufficient, but the Fine by Judgment in the Writ of Error muſt be *reverſed during his Nonage*. Godb 120. l. 141. 29 Eliz.

4. A *Fine* was levied *by an Infant Feme, and ſhe and her Husband were examined as to her Age*, and *both anſwered that ſhe was of Age*, and afterwards ſhe was examined privately as to her Conſent, who anſwered, *that ſhe was under no Conſtraint, and was willing to levy the Fine*; but was not queſtioned then as to her Age. About two Years after the Wiſe died without Iſſue; The Court agreed that the Fine cannot be ſet aſide *after her Death.* Mod. 246. pl. 6. Paſch. 29 Car. 2. C. B. Barrow v. Parrot.

(B. 4) Acts of Infants; avoided by whom.

1. IF *two Jointenants* are, and the *one is an Infant*, and *he makes Feoffment* of his Part, the other cannot enter; for none ſhall avoid an Act done by an Infant but he who is *privy in Blood*. Br. Entre Cong. pl. 47. cites 39 H. 6. 42.

2. None ſhall *take Advantage of the Infancy of his Anceſtor*, but he that has Right deſcended to him from the ſame Anceſtor; but the Heir of an Infant may take Benefit of a Condition, though no Right deſcended to him from the ſame Anceſtor. 8 Rep. 44. a. Hill. 45 Eliz. Whittingham's Caſe.

3. *Privies in Blood*, as the *Heir General or Special*, may avoid a Conveyance made by their Anceſtor during his Nonage. 8 Rep. 42. b. Hill. 45 Eliz. in the Star-Chamber, in Whittingham's Caſe.

4. As if an *Infant ſeiſed in Fee makes a Feoffment* and dies, his Heir ſhall enter. 8 Rep. 42. b. in S. C.

5. So if *ſeiſed in Tail Male*, and he *makes a Feoffment and dies*, his Son being Heir General and Special may enter. 8 Rep. 43. a. in S. C.

6. *And* if he has *no Sons*, but only Daughters, *his Brother being his Special Heir per Formam Doni* made to his Father, may avoid the Feoffment, becauſe he is privy in Blood, and has the Land by Deſcent. 8 Rep. 43. a. in S. C.

7. But *Privies in Eſtate cannot* avoid a Conveyance made by an Infant. 8 Rep. 43. a. in S. C.

8. *As* if *Tenant in Tail*, being *within Age*, *makes a Feoffment and dies without Iſſue*, the *Donor ſhall not enter*, becauſe he was privy only in Eſtate, and no Right accrued to him by the Death of the Donee. 8 Rep. 43. a. in S. C.

9. *So* if there be *two Jointenants within Age*, and *one* of them *makes a Feoffment in Fee of his Moiety, and dies*, the *Survivor cannot enter*; For by the Feoffment the Jointure was ſevered ſo long as the Feoffment continued in Force, and therefore the Heir of the Feoffor may

have

have a Dum fuit infra Ætatem, or enter into the Moiety. 8 Rep. 43. a. in S. C.

10. *But if Both had joined* in the Feoffment, *and one had died*, the Right had furvived to the other, and he fhould have had the Land from the firft Feoffor. 8 Rep. 43 a. in S. C.

11. If a Man within Age, *feifed in the Right of his Wife*, *makes a Feoffment and dies*, his Heir cannot enter, becaufe no Right defcends to him, but inafmuch as the Baron, if he had lived, might have entered in the Life of his Wife only, and not in refpect of any Right which he himfelf had, *the Wife might in fuch Cafe have entered in her own Right.* 8 Rep 43. b. in S. C.

12. *But if the Feme, being only Tenant in Tail, and the Baron within Age had made a Gift in Tail* to another, *by which the Baron gained a new Reverfion in Fee, and died*, the *Wife might enter, or the Heir of the Baron*, who had a new Reverfion defcended to him; *but if the Heir had enter'd, and defeated the Tail given by the Infant*, his Eftate vanifhed, and by Operation of Law *the Feme was immediately feifed of her old Eftate.* 8 Rep. 43. b.

13. *Privies in Law*, as the *Lord by Efcheat*, fhall not avoid a Conveyance made by an Infant. 8 Rep. 44. a.

14. *As* if an *Infant makes a Feoffment and dies without Heir*, the Lord fhall not avoid it; Per Curiam agreed; *but* becaufe it appeared the Feoffment was *executed by Letter of Attorney made by the Infant*, it was refolved to be void, and that the Land fhould Efcheat to the Queen. 8 Rep. 42. 45. Whittingham's Cafe.

15. Where an Incroachment of a *Water Courfe* was made in the Infancy of the Anceftor, who *after full Age acquiefced* under it 21 Years, tho' fuch Infancy was urged, yet Ld. Cowper took no Notice of it for the above reafon. G. Equ. R. 4. Hill. 6 Ann. in Canc. Ld. Guernfey v. Rodbridges.

(B. 5) How Relievable after Age, and in what Cafes.

1. IF an Infant within Age *feifed of Rent purchafes the Land*, and *aliens the Land within Age* he fhall have Election if he will demand the Land or the Rent; Per Kyrton, quod non negatur. Br. Coverture pl. 12. cites 46. E. 3. 33, 34.

2. If an Infant be *bound in a Recognizance* he *has no Remedy to avoid it* by his Nonage; but the Court ought not to take him to be bound, if they can perceive it, quod nota. Br. Coverture pl. 23. cites 8 H. 6. 30.

3. If an Infant *makes* a Gift or *a Leafe rendering Rent, and accepts the Rent at full Age*, this is a good bar in Dum fuit infra ætatem. Br. Dum fuit, &c. pl. 8. cites 22 H. 6. 24.

4. If a *Guardian pleads an ill Plea where he might have pleaded a good one, by which the Infant lofes*, the Infant fhall have Writ of Difceit at his full Age, and *recover all in Damages* againft the Guardian; and therefore the Court cannot accept a Guardian but fuch as is fufficient to render the Infant Damages at his full Age. And in this Cafe the Infant here is at no Mifchief; For he fhall recover in Value againft the Vouchee, and the fame Law where the Guardian vouches illy, he fhall

ſhall render Damages to the Infant. Br. Droit de Recto. pl. 15. cites 9 E. 4. 36.

5. Where an Infant *aſſigns Dower* to his Mother *more than the third Part*, he cannot enter into the Surpluſage at full Age, but is *put to his Writ of Admeaſurement of Dower*. Per Kingſmill J. but per Rode Ch. J. he may enter as upon *Partition* made within Age which is equal, Quære. Br. Entre Cong. pl. 44. cites 21 H. 7. 29.

6. If an Infant *makes a Feoffment*, he *may enter either within Age or at full Age*; and if he dies, *his Heir may enter or have a Dum fuit infra Ætatem* &c. Litt. S. 406. and Co. Litt. 247. b. 248. a.

7. An Infant who is *bound in a Statute Staple* or the like ſhall reverſe it by *Audita Querela* at full Age, or within Age. Br. Coverture pl. 64. cites F. N. B. 104.

8. Infant is not relievable by Audita Quærela after full Age againſt a *Statute* by him entred into. Mo. 75. pl. 206. Mich. 7 & 8 Eliz. Worſley's Caſe.

Godb 149. pl. 52.

9. Infant *acknowledged a Recognizance*, and upon *Audita Querela upon Inſpection he* was adjudged within Age, and had Scire Facias againſt the Conuſee, and upon one Nihil returned Judgment was that Recognizance be diſcharged where two Nihil's ought to be returned or Scire Feci, and for this *Judgment was reverſed for Error*, and now the Infant is of full Age and cannot have a new Audita Querela; But he ſhall *have a ſpecial Writ reciting all the Matter*, and ſo be relieved; tho' Judgment be reverſed, yet the Depoſitions of Witneſſes remain. Jenk. 322. pl. 30. cites 2 Jac. Randals Caſe.

10. Lands of an Infant was charged by his Father's *Will for payment of Portions* to younger Children, who bring a Bill praying that the Truſtees may be Decreed to ſell &c. The Infant, while a Minor deſired that the Truſt Eſtate might not be ſold, and *offered to ſubject other Lands not within the Truſt*, by which means a Sale was delayed; Decreed per Lords Commiſſioners to hold him to his Offer, for if he would have departed from it he ſhould immediately on his coming of Age have *applied to the Court to have retracted his offer* and amended his Anſwer, but now he had Acquieſced under the Anſwer about four Years. 2 Vern. 224 pl. 206. Paſch. 1691. Cecil v. E. of Saliſbury.

(C) *What Act* done by an Infant *ſhall bind him.*

Contract.

1. If an Infant in Reverſion accepts a Leaſe for Life of Tenant in Dower, but never takes the Profits, and at full Age diſagrees to the Leaſe, (*) this ſhall not bar him of his Action of Waſt, for Waſt done in the mean time. 30 E. 3. 16.

* Fol. 729.

2. If a Man lends an Infant 10 l. to Pay at a certain Day, this Contract ſhall not bind him. 39 E. 3. 20. b. admitted by the Iſſue.

3. If a Infant makes a Contract pro Victu & Veſtitu, this ſhall bind him.

Fitzh. Arbitrement, pl. 4. cites S. C. & S. P admitted.

4. [So] If an Infant makes a Contract for his Table he may be charged in an Action upon this Contract. 18 E. 4. 2. 10 H. 6. 14.

5. So

5. So if he buys a Coat or Cloth for Apparel, this shall bind him, for he cannot live without Meat, Drink and Cloths. 18 E. 4. 2. 10 H. 6. 14.

Fitzh. Arbitrement, pl 4 cites S. C. & S. P. admitted. — But where an Infant buys Silks and Velvets, which appear to be above his Degree, the same is void, they being Things of Superfluity and not of Necessity. Lat 22 in a Nota says it was adjudged — So for Gold Lace to trim his Suit. 2 Roll Rep 45 cites it as the Lord of Essex's Page's Case — Ibid 144. S. C cited by the Name of Price's Case. —— S. C. cited by Vaughan Ch. J. Cart. 216. Trin. 22 Car. 2. C. B.

6. If an Infant is a Mercer and hath a Shop in a Town, and there buys and sells, and he contracts to pay a certain Sum to J. S. for certain Wares sold to him by J. S. to re-sell, yet he is not chargeable upon this Contract, for this trading is not immediately necessary ad victum & vestitum. Trin. 10 Ja. B. R. between *Hill and Whittingham*, in a Writ of Error per Curiam, and the Judgment given before e contra reversed, for if he shall be bound thereby, Infants might be infinitely prejudiced, and buy and sell and live by the Loss.

Cro J. 494 pl. 15 Trin. 16 Jac. S. C adjudged and the first Judgment reversed.— 2 Roll Rep. 45 S. C. adjudged and the former Judgment reversed accordingly. —— D. 104. b. Marg. pl. 13. cites S. C. adjudged and Judgment reversed accordingly —— Noy 21, 22. S. P. obiter, accordingly that the Infant is not bound. —— S. C. cited by Crooke 2 Roll Rep. 271.

7. If an Infant makes a Contract pro Victu or Vestitu, and enters into a single Bill for Payment thereof, this shall bind him, though he be ousted of his Law thereby.

Lev. 86. Mich. 14 Car 2. B R. Russell v Lee, S. P. where it was for Victuals and Clothes necessary, delivered to him and suitable to his Quality, and they shall be intended to be for his own Use though not so alleged.

8. But if the Infant enters into an Obligation with a Penalty for Payment thereof, this Obligation shall not bind him. Pasch. 32 Eliz. B. R. by three Justices. Mich. 11 Ja. *Cupworth's* Case, per Curiam.

Co. Litt. 172 a. S. P. — Lev. 86. Mich. 14 Car. 2. in Case of Russell v. Lee, S. P. Arg. cites Co. Litt. ut supra, and Cro. E. 920. S. P. held accordingly, and the Court in the principal Case was of the same Opinion. Godb 219 pl. 316. Mich. 11 Jac. C B. Rearsby v. Cuffer, S. P. agreed per Cur. But it is said there that If when he comes to full Age he enters into an Obligation for Necessaries which he had when he was within Age, the Law is now taken to be that the same shall bind him —— But Ibid. cites Randall's Case 44 Eliz. adjudged, that an Obligation with a Penalty for Money borrowed within Age is absolutely void. —— But per Wray if an Infant had been bound in an Obligation with a Surety, and afterwards at his full Age he in Consideration thereof promises to keep his Surety harmless, an Action lies on such Promise; For the Infant cannot plead Non est Factum. Le. 114. in pl 156. cites Mich. 28 & 29 Eliz. Edmonds's Case.

9. But an Infant may bind himself in an Assumpsit for Payment thereof, and an Action upon the Case lies against him upon the Promise; for this is but in Nature of an Action of Debt, and therefore where Debt lies, an Action upon the Case lies against him, (but perhaps it would be otherways upon a Collateral Promise) for Wager of Law is not to be regarded; for a Man of full Age shall by such Action be ousted thereof. Trin. 15 Ja. B. R. between *Tillet and Buckstone*, Rot. 1374. adjudged, that an Action upon the Case lay against an Infant upon Promise of Payment for Beer and Billets. Mich. 2 Car. Regis, between *Delavall and Clare*, agreed per Curiam. Contra, Mich. 11 Ja. B. per Curiam.

An *Infant having a Family buys Bread*, and afterwards *makes up an Account with the Baker*, he is not *chargeable in an Assumpsit upon this Account*, because it is founded upon the Account in which an Infant is not chargeable, for the Law allows him not such Discretion, but he may be mis-reckoned. 2 Roll Rep. 271. Mich. 20 Jac. B. R. Tirrill's Case

10. If an Infant promises another, that if he will find him Meat, Drink and Washing, and pay for his Schooling, that he will pay 7 l. yearly, an Action upon the Case lies upon this Promise, for Learning is as necessary as other Things, and though it is not mentioned what Learning this was, yet it shall be intended what was fit for him, till it be shewn to the contrary on the other Part; and though he to whom the Promise was made does not instruct him, but pays another for it, the Promise of Re-payment thereof is good; and it appears that the Learning, Meat, Drink and Washing could not be afforded for a less Sum than 7 l. Mich. 4 Car. B. R. between *Pickering and Gunning* adjudged, this being moved in Arrest of Judgment, which Intratur. Trin. 3 Car. Rot. 918.

Palm. 528. S. C. held accordingly. —— Jo. 182. pl. 4. S. C. adjudged that the Action lay. —— Co Litt 172. a. S. P. —— An Action *on the Case* lies against an Infant upon an Assumpsit by him for Necessaries, though it was objected that Damages are to be recovered in it, and that Debt only would lie. Lat. 169. Trin. 2 Car. Wood v. Witherick. —— Noy 87. S. C. & S. P. agreed per Curiam.

11. If an *Infant binds himself* he shall not avoid it; Per Markham. Newt. said this is by Custom; But per Markham, this is by the Common Law; For it *is for his Benefit* to be instructed to gain his Living. For as the Master may have Action of Covenant against the Apprentice to serve him, so shall the 'Prentice have against him to instruct him. But per Newton, Covenant by an Infant is void by the Common Law. But per Ascue J. an Infant may be an Apprentice *by Indenture*; for it is for his Benefit. But Paston J. denied these Cases. So Newton and Paston against Ascue and Markham. And it was agreed, that an Infant may be constrained to serve but not to be an Apprentice. Br. Coverture, pl. 25 cites 21 H. 6. 31.

12. *Account* does not lie against an Infant clearly Per Newton Ch. J. quod non negatur. Br. Coverture, pl. 24. cites 19 H. 6. 5.

13. If an Infant be at *Table* with me *for* 12 *d. for the Week*, or *buys Cloth* of me for his Robes, Debt lies, and Nonage is no Plea; for those are Necessaries; for he cannot live without Meat, Drink and Vesture. Br. Coverture, pl. 51. cites 18 E. 4. 12.

14. An Infant had taken so much for *necessary Apparel and Diet* as *amounted to* 50 *l. A. paid the Money for the Infant and took an Obligation of him with a Penalty*. Adjudged that it did not bind him in Regard of the Forfeiture. Arg. Hutt. 107. cites it as 25 Eliz. Aleph's Case.

Gro E 920. pl. 16. Hill. 45 Eliz. B. R. Ayliff v. Archdale, S. C. the whole Court held it to be void; *But* if he had taken an *Obligation of the very Sum which he laid out* for his necessary Maintenance it had been otherwise —— Mo. 679. pl. 920. S. C. adjudged in C. B. for the Defendant. —— Godb. 364. pl. 456. Arg. cites S. P. adjudged 5 Jac. B. R. in Case of Bendlose v. Holiday. —— Resolved that a Bond taken for Necessaries of an Infant is good. Mar. 145. cited by Bramston Ch. J. as Trin. 4 Car. Pickering v. Jacob.

15. Infant has Estate on *Condition* to be performed by him; if the Condition be broken during his Minority, the Land is lost for ever. 8 Rep. 44. b. Hill. 45 Eliz. Whittingham's Case.

See 1 Mod. 86. 300. 2 Lev. 21. 3 Mod. 28.

16. *Debt on Escape against an Infant Gaoler* that suffers a Prisoner to escape out of Execution, will lie upon the Statute of W. 2. 11. 2 Inst. 382.

If *Conditions* in Law annexed to *Offices* founded on Confidence and Skill, be broken by Infant or *Feme Covert*, this shall bar Infant and Feme Covert for ever. 8 Rep. 44. b. Hill. 45 Eliz. Whittingham's Case.

17. Infant *Ideot* (so found by Office) *levies a Fine* to A. and declares the Use of it by Indentures, and good. 10 Rep. 24. b. Mich. 10 Jac. B. R.

18. An Infant shall not be charged upon his *Promise for the Board of a Stranger*, though otherwise it shall be for his own Board; Agreed by Coke and Crooke. 3 Bulst. 118. Trin. 14 Jac. in a Nota.

Roll Rep. 281. in pl. 2. S. P. by Coke and Crooke agreed.

19. *Assumpsit* by Executor, in Consideration the Testator *would buy and pay for the Defendant 24 Yards of Lace, 11 Yards of Velvet, and three Yards of Broad-Cloth, and make him a Cloak*, Defendant promised to pay so much as he should pay for the Wares, and also so much as he should deserve for the making of the Cloak; and further declared that the Defendant was *indebted* to the Testator 27*l. for a Doublet and a Pair of Velvet Hose made for him*, which he promised to pay but had not. The Defendant said, that at the Time of the several Promises he was within Age; adjudged for the Defendant, because it does not appear, that this Cloak, Doublet and Hose were for the Defendant himself, nor if it had been so averred, yet it not being averred that it was *necessary and convenient Apparel for him to wear according to his Estate and Degree*, therefore the Promise did not bind him. Cro. J. 560. pl. 8. Hill. 17 Jac. B. R. Ive v. Chester.

2 Roll. Rep. 144. Green v. Chester. S. C. & S. P agreed.——Palm. 561. Cheve v. Chester. S. C. adjudg'd against the Plaintiff for not averring that it was for necessary Apparel——Poph. 151, 152. Jene v. Chester. S. C. adjudged.——Lev. 87. Mich. 14 Car. 2. B. R. cites S. C.

20. *Infant and another of full Age covenanted the one with the other*, though the Infant is not bound, yet the other is. Sid. 446. pl. 5. Pasch. 22 Car. 2. B. R. Farnham v. Atkins.

21. Where it has been held that the *Deeds of* Infants are not void but voidable, the Meaning is, that *Non est Factum cannot be pleaded*, because they have the Form though not the Operation of Deeds, and therefore are not void upon that Account, without shewing some special Matter to make them of no Efficacy; per Curiam. 3 Mod. 310. Trin. 2 W. & M. in B. R. in Case of Thompson v. Leach.

Therefore if an Infant makes a *Letter of Attorney* though it it is void in itself, yet it shall not be avoided by pleading Non est Factum, but by shewing his Infancy. 3 Mod. 311. Trin. 2 W. & M. in B. R. in Case of Thompson v. Leach.——But he may say, Non concessit &c. per Wray Ch. J. 2 Le. 218. in Humfreston's Case.

22. If one deliver Goods to an Infant on a *Contract* &c. knowing him to be an Infant, the Infant shall not be charg'd in *Trover* and Conversion for them; for by such Way all the Infants in England should be ruined. Sid. 129. Pasch. 15 Car. 2. in the Exchequer Chamber, in Case of Manby v. Scott.

23. *But* if the *delivery of Goods* be to a Feme, not knowing her to be a Feme Covert, or to an Infant *not knowing him to be an Infant* it will be otherwise. Sid. 129. in case of Manby v. Scott.

24. Some have endeavoured to *distinguish between a Deed which gives only Authority to do a Thing, and such which conveys an Interest by the delivery of the Deed itself*, that the first is void and the other voidable. But the Reason is the same to make both void, only where a Feoffment is made by an Infant it is voidable, because of the Solemnity of the Conveyance; Per Curiam. 3 Mod. 311. Trin. 2 W. & M. in B. R. in Case of Thompson v. Leach.

25. An Infant *being Bail and taken in Execution* it is discretionary to discharge him on Bail or not. Carth. 278. Trin. 5 W. & M. in B. R. Loyd v. Eagle.

26. A. *lends* an Infant *Money* and Infant lays it out *in Necessaries*, yet the Infant is not liable; per Treby Ch. J. 1 Salk. 279. pl. 4. Pasch. 5 W. & M. in C. B. Darby v. Boucher.

1 Salk. 387. Earle v. Poole. S. P.

27. Covenant lies not against *Apprentice* being an Infant. 7 Mod. 15. Pasch. 1 Ann. B. R. Lylly's Case.

Unless by Custom. Mod. 271.

28. William

28. William Pengelly an *Infant Apprentice in Exeter goes to the Angel in Taunton* with one R. D. *and there abides for several Days* together *on Pretence of a Courtship* &c. In an *Action brought* by one Periam, *the Landlord, for the Provisions and Necessaries found* for Pengelly the Plaintiff was nonsuited, for it was at his Peril to entertain another Man's Apprentice, and he might have had an Action for it; besides the ill Consequence this would bring if such Things should be allowed to Infants, *these Things not being for Necessaries, though it was objected the Plaintiff was an Inn-keeper*; But it was made out that the Plaintiff was privy to the Courtship &c. Devonshire Assizes in the Summer. 1708.

(D) *Acts* done by an Infant.

What Acts are *void.*

1. If an Infant leases for Years, and the Lessee enters, the Infant may have Trespass against him. 18 E. 4. 1. b. 4. b.

For being *without Livery* is void, so that the Entry is not necessary. Br. Trespass, pl. 338. cites 18 E. 4. 1. 2.
Quære, If *Lease for Years without Rent* be not void. 2 Sid. 110. Davis v. Mannington.

2. If he leases for Years, rendring Rent, it is at his Election to (*) affirm the Lease, or to have Trespass against the Lessee for the Occupation. 18 E. 4. 2.

* Fol. 730.

An Action of *Debt for Rent upon a Lease made to an Infant*, and Judgment pro Quer' against the Infant 2 Bulst. 69. Kirton v. Elliot. ——— Such Lease is not void but voidable, and may be affirmed by Acceptance, and that though it was made by an Infant Copyholder of his Copyhold Lands without Licence. Noy 92. Trin. 2 Car. B. R. agreed per Cur. Ashfield v. Ashfield. ——— Jo. 157. S. C. adjudg'd, that the Lease shall be good as to Strangers.

3. If an Infant exchanges with another, if the other enters the Infant may have an Assise. 18 E. 4. 2.

Contra if it be *by Deed and Livery* of Seisin made by *himself*, but otherwise if by Attorney. Br. Trespass, pl. 338. cites 18 E. 4. 1. 2.

4. If he sells Goods, it is at his Election to make it void, for he may have Trespass, or Debt for the Money. 18 E. 4. 2.

Br. Trespass, pl. 338. S. C.

5. If a Trespass be done to an Infant, and he submits to an Award, the Award made by them shall not bind but at his Election. Contra. 10 H. 6. 14.

Fitzh. Arbitrement, pl. 4 cites S. C. & S P.——Br. Arbitrement, pl. 43. 10 H. 6 14. is of a Trespass done *by an Infant, and* that Award in such Case shall bind him, because it is for his Advantage to excuse him of a Trespass of which he is impeachable by Law. But Brooke says Quære.

6. If a Man makes a Deed of Feoffment to an Infant, and the Infant makes a Letter of Attorney to another to take Livery for him, this is good, because it is for his Benefit. Dubitatur, * 21 H. 6. 31. But Brooke in abridging it, Title Faits, 31. seems that it is good, Mich. 11 Car. B. R. between *Palfryman and Groby*, per Curiam, upon Evidence at the Bar, resolved, upon a Trial which concerned Sir Sidny Mountague and Dame Gorges, she being but of the Age of 11 Years at the making of the Letter of Attorney.

* Br. Faits, pl. 31. cites S. C. and Ascue J. held it good because it is for his Advantage; But Paston J. e contra. But Brooke says that the Law seems to be with Ascue. —— S. C. cited Noy 120.

7. If

7. If the King *aliens Land, Parcel of his Dutchy of Lancaster, within Age*, there he may void it by Nonage, for he has the Dutchy as Duke, and not as King; *Contra of the Land which he has as King*; For the King cannot be disabled by Nonage as a common Person shall be. Br. Prerogative, pl. 132. cites 1 E. 6. & concordat Anno 6 and 26 E. 3. tit. Age 8.

8. If a Man *infeoffs an Infant, and after enters* into the Land *by the Assent of the Infant*, and *continues Seisin*, and *dies seised*, yet the Entry of the Heir of the Feoffor is not lawful, for his Father was a Disseisor, and the Assent of the Infant was void. Br. Coverture, pl. 34. cites 11 Ass. 14.

9. In Mortdancestor it was held clearly, that *Release of an Infant of all the Right in Lands of which he was never seised* is void, so that another who is of half Blood shall have the Land as Heir of their common Ancestor, if he who released dies without Issue; But *otherwise* it is said *of a Feoffment*; the reason of the Diversity seems *by reason of the Livery* of the Land this is only voidable, and the other is void. Br. Coverture, pl. 40. cites 34 Ass. 10.

10. If an Infant *accounts before Auditors of Receipt*, he shall be bound, Per Newton; Quære. But note, that this is Matter of Record. Br. Arbitrement, pl. 43. cites 10 H. 6. 14.

11. In Præcipe quod reddat, Nonage at the Time of the Devise is a good Plea where a Man *claims by Devise* by Testament *of J. N.* if he was *within Age* at the Time of the Devise; For an Infant *cannot devise*. Br. Coverture, pl. 30. cites 37 H. 6. 5

12. If an Infant makes a Deed of *Feoffment and a Letter of Attorney* to a Stranger *to make Livery* of Seisin, and he makes Livery of Seisin by Force thereof, he shall be taken for a Disseisor. Perk. S. 13. cites P. 18 E. 4. 2.

S. P. Arg. 2 Roll Rep 242.

13. If an Infant *commands W. to make a Bond* for him, *and to deliver it as his Deed*, which he does, this is not the Deed of the Infant. Br. Obligation, pl. 53. cites 14 E. 4. 2.

14. *Contra* where he *himself delivers it*, Quod fuit Concessum; For the Command is void. Ibid.

15. If an Infant *delivers a Horse, or bails* Goods, Trespass does not lie for him. Br. Trespass, pl. 338. cites 18 E. 4. 1, 2.

16. If an *Infant* makes *Grant of an Advowson by his Deed, and at his full Age he confirms* the same Grant, yet it is not good, for the first Grant was void. Br. Coverture, pl. 1. cites 26 H. 8. 2.

17. *But* if he *gives Goods, and delivers them with his Hands*, Trespass does not lie. Ibid.

S. P. Br. Coverture, pl. 26. cites 22 H. 6. 3. But contra if the Donee takes them by Virtue of the Gift.

18. *So of Feoffment* and *Livery made by the Infant himself*, and *not by Attorney, this is voidable*, and not void; Note the Diversity. And so see that Livery of a Deed of an Infant is not like to the Livery of Land or Goods by him. Ibid.

Br Feoffment de terres, pl. 48. cites 18 E. 3. pl. 27. S. P. accordingly. —— S. P. Br. Coverture, pl. 26. cites 22 H. 6. 3. But if he makes Letter of Attorney to one to make Livery, who does it, Trespass lies.

19. Infant *makes a Will*, and publishes it, and dies at full Age, it is of no Effect. Pl. C. 344. Trin. 10 Eliz. in Case of Brett v. Rigden.

Mo. 103. 105. pl. 248. Lane v. Cowper S. C. & S. P. held by all but Gawdy to be void ——Such Leafe by Infant is good enough, becaufe it *is for his Advantage* Noy. 133. Rames v. Machin.

20. *Leafe to try a Title in Ejectment* made by an Infant *without Rent*, Profit, or other Recompence, but only to try the Title, being made upon the Land, it is not *void*; Per Gawdy, J. but per Wray and Southcot contra. 2 Le 216, 217. pl. 275. Pafch. 16 Eliz. B. R. Humlrefton's Cafe.

21. *Surrender of Copyhold* was made by Infant to the Ufe of a Stranger, who was admitted; The Infant fhall enter at full Age; For this is no Bar nor Difcontinuance. Mo. 597. pl. 814. Hill. 35 Eliz. Gooles v. Grane.

Infant Surrenderor, may enter at full Age. Poph. 39. Mich. 35 & 36 Eliz. in Cafe of Bullock v. Dibler.

22. *Surrender of a Copyhold* by Infant of five Years of Age allowed by this Court, tho' Lord of the Manor infifted he never heard of any Admittance in that Manor at fuch an Age. 2 Chan. Rep. 392. 2 Jac. 2. Naylor v. Strode.

23. If an Infant *bargain and fell his Land for Money for Commons, or Teaching*, it is good with Averment; if for Money otherwife, if it be proved, it is avoidable; if for Money recited, and not paid, it is void; and yet in the Cafe of a Man of full Age the Recital fufficeth. Ld. Bacon on the Statute of Ufes, 355.

24. If a *Leafe for Life* be made *to an Infant*, and *he by Charter of Feoffment aliens in Fee*, the Breach of this Condition in Law is no abfolute Forfeiture of his Eftate. Co. Litt. 233. b.

25. *So* of a *Condition in Law given by Statute*, which gives an Entry only; As if an Infant *aliens* by Charter of Feoffment *in Mortmain*, this is no Bar to the Infant. Co. Litt. 233. b.

26. *Exchange* by Infant of Lands is not void, but voidable only. Co. Litt. 51. b.

27. *Leafe of Land to an Infant* if for his Benefit is voidable only at his Election; But he may make it void by refufing or waving the Land before the Rent Day comes; For then no Action of Debt will lie againft him; But the Infant *coming to Age before the Rent-Day*, and it not being fhewed that the Rent was of greater Value than the Land, in Debt for Rent againft Leffee it was adjudged for the Plaintiff. Cro. J. 320. pl. 1 Pafch. 10 Jac. B. R. Ketfey's Cafe.

28 *Money paid by an Infant* with his own Hands, in Confideration of an Horfe agreed to be fold him for that and a further fum, is but voidable to be recovered again by an Action of Account; Per Hobert Ch. J. Hob. 77. pl. 98. Auftin v. Gervas.

No Stranger fhall avoid it. Ibid. 44, 45 cites the Cafe of Lord Brook v Ld. Latimer.——Arg Bridgm. 75. S P.——The Lord by *Efcheat* fhall not take Advantage of the Infancy becaufe a Stranger, and if Infant *Tenant in Tail* makes Feoffment and dies *without Iffue*, no Stranger in Blood fhall take Advantage of the Infancy; Per Holt Ch. J. Show. 87. Hill. 1 W & M in Cafe of King v. Dilliflon.

29. If Infant *makes Feoffment in Fee and dies without Heir*, the Feoffment is unavoidable; Per Bridgman. Bridgm. 44. Mich. 13 Jac. cites 49 E. 3. 13 6 H. 4. 3. 7 H. 5. 9. 39 H. 6. 42.

But they muft fue feveral Writs of *Dum fuit infra Ætatem*; For the Nonage of the one is not the Nonage of the other. Ibid ——* Becaufe the *Jointenancy is fevered*. But 35 Aff. pl. 15. where the Jointenancy is not fevered it is otherwife; Agreed. Roll. R. 442. in Cafe of Smallman v. Agburrow.

30. *Two Jointenants in Fee, one* of them being an *Infant makes a Feoffment in Fee* and *dies*, the Survivor fhall * not enter; But if *both within Age make Feoffment*, one Joint Right remains in them, and therefore if one dies the Right will furvive, and the Survivor may enter into all; Arg. Bridgm. 44. Mich. 13 Jac.

31. If an Infant *grants a Rent-charge* out of his Land, it is not voidable, but ipso facto void; for if the *Grantee distrains* for the Rent, the *Infant may have an Action of Trespass* against him; Per Curiam. 3 Mod. 310. Trin. 2 W. & M.

Perk. S. 17. cites Pasch. 18 E. 4. 2 S. P.

32. A *Lease of Land* by Infant rendering Rent is good till Disagreement, but if without Render it is void; Arg. Show. 299. Mich. 3 W. & M.

It is not in the Election of the Lessee to avoid it for the Infancy of his Lessor; Per Twisden J Sid. 42. in pl. 8. Pasch. 13 Car. 2. B. R.

33. The *Difference* taken that the Deed of an Infant (as *Letter of Attorney*, whereby he gives an Authority,) is *void*, but where he passes any Interest, (as *Bond &c.*) is *only voidable*, is not agreeable to Reason; For by that means the Infant would be more prejudic'd in passing his Estate than he would in giving a bare Authority which cannot be maintain'd; Per Holt Ch. J. Cumb. 468. Hill. 10 W. 3. B. R in Case of Thompson v. Leach.

(E) What [*Acts* are] *voidable*.

[*As to Chattles.*]

1. AN Infant delivers Goods to his own Use, this is only voidable, for he shall not have Trespass against the Bailee. 18. H. 6. 2.

2. If an Infant *gives a Horse, and does not deliver* the Horse *with his Hands*, and the Donee takes the Horse by Force of the Gift, the Infant shall have an Action of Trespass; But if an Infant be an Executor, the Payment of the Debt of the Testator by him is good and effectual. &c. Perk. S. 14. cites Trin. 15 E. 345.

If an Infant delivers *Money* with his Hands, it is only voidable to be recovered back in an Action of Account; Hobart Ch. J. Hob. 77. in Case of Austen v. Gervis ——If an Infant delivers Goods with his own Hands Trespass does not lie. Lat. 10 cites it as adjudged Pasch. 32 Eliz —S. P. Mod. 137. by Hide J. cites 21 H. 7. 39. 26 H. 8. 2. But if an Infant gives or sells Goods, and the *Vendee or Donee takes them by Force of the Gift or Sale*, the Infant may have an Action of *Trespass* against him.

(F) What shall *bind* him.

1. IF an Infant Administrator, being above 17 Years of Age, by the Assent of his Friends, sells a Lease for Years that he hath for Lands as Administrator, to the Intent with the Money to pay the Debts of the Testator, and discharge the Debts of the Infant himself, which were for his Apparel and Diet, this shall bind the Infant. Mich. 14 Ja. in Camera Stellata, resolved by Hobart and Canfield, and decreed by the Court between two *Snows* Plaintiffs, and *Barraden* and *Watkins* Defendants; But it would have been otherwise, as they agreed, if the Infant had been under 17 Years of Age, for before this Age he cannot administer by the Civil Law.

2. If

Cro. C. 490. pl. 15, Kniveton v. Latham, S. C. adjudged. — Jo. 400. pl. 8. Kniveton v. Katham, S. C. adjudged Nisi by three Justices, but Crooke e contra.

2. If A. be bound to B. in 100 l. for Payment of 52 l. at the End of one half Year after, and after B. dies, making three Executors, and after the Obligation is forfeited one of the Executors comes to the Age of 18, and then accepts the 52 l. in full Satisfaction of the said Obligation, and makes a Release of the said Obligation, yet this does not discharge the Obligation, because the Release is made by an Infant, and by the Forfeiture the 100 l. was a Debt of the Testator, and the 52 l. cannot be a Satisfaction of the 100 l. and in Equity there may be a good Cause to take the Forfeiture, and in an Action of Debt against an Executor he may plead a Judgment upon an Obligation forfeited in Bar, ultra quæ he has not Assets, which shews that the Sum forfeited is the Debt, and an Infant Executor cannot release the Debt of the Testator without a Satisfaction. Mich. 13 Car. B. R. between *Knyveton and Statham* adjudged upon a Demurrer, Intratur Trin. 13 Car. Rot. 962. but this was against the Opinion of Croke.

Jo 389. pl. 10. S. C. adjudged and Judgment affirmed. — Win. 103, 104 Cooper v. Edgar, S. C. and Ibid. 115. to near the End of 120. S. C. debated by several Serjeants in C. B.

3. If an Infant covenants by Indenture to levy a Fine, and that it shall be to certain Uses, and after he levies the Fine, and dies within Age, the Limitation of the Uses shall bind the Heir of the Infant, as well as the Infant himself, so long as the Fine continues not reversed. Trin. 13 Car. B. R. between *Spring and Sir Julius Cæsar*, Master of the Rolls and others, in a Writ of Error upon a Judgment in Banco in a Quare Impedit, adjudged per Curiam, without Question as to this. Intratur, Mich. 11 Car.

Fol. 731.

(G) What *judicial Acts* done *by an Infant* shall bind him.

See Tit. Recovery Common (D) per totem.

1. If an Infant by his Guardians suffers a Common Recovery, he being Tenant to the Præcipe, this shall bind him, so that he shall not avoid it in a Writ of Error, for by Intendment he shall have Recompence in Value; and if this be not for the good of the Infant, he may have his Recompence over against his Guardians. Pasch. 9 Car. B. R. between the Earl of *Newport* and G. Duke of *Buckingham*, adjudged in a Writ of Error to reverse such a Common Recovery suffered in Banco, and then several Precedents were cited of such Common Recoveries suffered by Infants, and then said, that much Land depending upon such Recoveries, and all the said Precedents are in nature of Judgments.

Sty. 246. Ailet v. Watless, S. C. adjudg'd accordingly for the Defendant nisi. — A Common Recovery was suffered, in which a Feme Covert was vouchee, and under Age, and appeared by Attorney, and the same was reversed in a Writ of Error Nisi Causa at the End of the Term. 5 Mod 209, 210. Pasch. 8 W. 3. Stokes v. Oliver.

2. [But] if an Infant suffers a Common Recovery, in which he comes in as Vouchee in proper Person, and not by Guardian or Attorney, this is erroneous, and may be reversed for this Cause in a Writ of Error, for this is more strongly Error than if it had been by Attorney, inasmuch as he cannot have any Remedy against any if he be deceived. Hill. 1650 between *Aylet and Walker*, per Curiam resolved, that this shall not bind the Infant, and that he may reverse it for this Cause in a Writ of Error; but it was adjudged that he could not avoid it himself by Entry without a Writ of Error. Intratur Trin. 1649. Rot. 200. upon a special Verdict in Effect.

3 It was said for Law, that if *Possession* be *in an Infant Plaintiff in Assise*, the Assise shall be awarded, because he cannot know nor chuse his Possession and Title &c. Br. Coverture, pl. 29. cites 24 E. 3. 24.

4 *But* if *Recovery* be *pleaded against him without Possession*, this is also as strong as against a Man of full Age. Ibid.

5. *So* of a *Fine if he shews Part* of the Fine. Ibid.

6. Note per Finch in Præcipe quod reddat, that if an *Infant* be *nonsuited in Writ of Right*, yet he *may have Writ of Possession after*, by reason of his Infancy. Br. Droit de Recto, pl 2. cites 41 E. 3. 12.

7. If an Infant *be barred in Assise upon Verdict at large, because they did not find a Divorce* which was not given in Evidence, yet the Infant shall be bound by it; For *Matter of Record* shall bind an Infant who has appeared to it, the Record being in Force, as strong as it shall bind a Man of full Age. Br. Coverture, pl. 15. cites 7 H. 4. 23.

8. In *Scire Facias ad Cognoscend' Fact'. After a Judgment of Debt upon a Release thereof*, it was agreed that none shall be bound by a Recognizance, as Mainpernor thereof, if he be within Age; For if he was bound he has no Remedy. Br. Age, pl. 20. cites 8 H. 6. 30.

9. If an *Infant does Trespass, and puts himself in Arbitrement* &c. who give their Award that &c. this shall bind the Infant, for this is for his Advantage to excuse him of the Trespass of which the Law charges him; Per Strange. Brook says Quære inde; For it may be that the Award is of greater Recompence than the Law will give in the Action. Br. Coverture, pl. 62. cites 10 H. 6. 14.

10. *And* per Newton, if an Infant *be Receiver, and enters into Account before Auditors*, he shall be charged in Debt upon Account, Per Newton, which Brooke says he believes is Law; For it does not appear of Record now if he was within Age or not, and it seems that he cannot have for Plea in Debt upon Account, that he was within Age at the Time of the Account; For it is a Judgment passed before against him; Quære. Br. Coverture, pl. 62. cites 10 H. 6. 14.

11. To avoid *Recognizances* or *Statutes* entered into by an Infant, he must bring his *Audita Querela* during his Infancy, for there is no Remedy after; Arg. 2 And. 158. in pl. 87. Pasch. 42 Eliz. But he may avoid a *Bond* after full Age, by pleading Infancy at the Time. Ibid.

12. In Writ of Right, an Infant may *join the Mise and try it by Battel*, for he may perform it by Champion, and not in proper Person; *But in Appeal* he shall not join Battel; For this shall be done in proper Person. Br. Droit de Recto, pl. 15. cites 9 E. 4. 36.

13. An Infant is not bound by *Failure of Record pleaded in Assise* to be Disseisor as another Man is, and yet the Statute is general, but it ought to have a reasonable Construction; Per Hawes, quod non negatur. Br. Coverture, pl. 44. cites 4 H. 7. 11.

14. The Justices seemed to incline that if *Judgment by default of a real Action* of Land, be given against an Infant, that it shall bind him. But no Rule was given in the Case. Godb. 80. pl. 94. Mich. 28 & 29 Eliz. Anon.

15. S. Tenant in Tail covenanted in Consideration of the Marriage of his Eldest Son, to stand seised to the Use of himself for Life, and after to the Use of his Eldest Son for Life, and after to the Use of the first Son of his eldest Son which should be in Tail; and afterwards his Eldest Son had Issue G. S. his Eldest. The Grandfather would sell Part of the Land, and assure more in Recompence to the Son, and the Purchasors would not take any Assurance unless the Infant who was but four Years old would suffer a Recovery, and to satisfy the Purchasors it was prayed that a *Guardian* might be *allowed the Infant*, and *that a Recovery might be had against him as Vouchee*, which the Court agreed unto, and admitted two Gentlemen there present to be Guardians for him, (the Infant being brought into Court,) and *he by his Guardians*

 appeared

appeared and vouched the common Vouchee; and the Recovery had accordingly. Cro. E. 471. pl. 24. Hill. 38 Eliz. B. R. Stapleton's Case.

16. Infant *confessed a Judgment*, and an Action of *Debt in B. R.* was brought against him, and now he brought Audita Querela during his Nonage. Popham Ch. J. was clear that *Audita Querela* does not lie upon Action of Debt in this Court, as it would lie upon a *Recognizance* or *Statute* acknowledged, but that the Party *shall have Error*, but not in B. R. but *in the Exchequer Chamber* by the Statute of 27 Eliz. Mo. 460. pl. 642. Mich. 38 & 39 Eliz. B. R. Randal's Case.

17. Judgment *in Dower by Default* against Infant Tenant shall bind. D. 104. a. pl. 10. 104. b. pl. 13. in Marg. cites Mich. 2 Jac. B. R. Smith's Case.

18. An Infant *Tenant in Tail suffer'd a Recovery by his Guardian*; The Court held, that the same should bind him, because he might have *Remedy over against the Guardian by Action upon the Case*; But *otherwise* if he suffer a Recovery *by Attorney*, for that is void, because he has not any Remedy over against him, as it was adjudged 4 Jac. in Case of Holland v. Lee. Godb. 161. pl. 225. Mich. 7 Jac. C. B. Zouch v. Michil.

19. An *Infant*, *who wanted only nine Weeks to be of full Age*, *acknowledged a Fine before Commissioners*, who by the Inspection could not tell whether he was of Age or not; the Fine was reversed. 2 Bulst. 320. Hill. 12 Jac. Requish v. Requish.

20. *In an Assise* the *Defendant pleaded in Bar a Recovery against the Plaintiff in a former Assise*; The *Demandant said he was an Infant, and that he was not Tertenant at the Time* of the said Recovery, *but that J. S. was Tenant*, *and the Recovery was a Recovery by Default*; Resolved, 1st. That a Recovery is not so sacred a Thing but that it might be falsified; 2dly, That because in this Case, the *Infant cannot have Error or attaint, therefore he shall falsify*; and the rather in this Case because *here is a Title and Judgment pleaded against an Infant where his Title is not discovered.* Cro. J. 464. pl. 13. Hill. 15 Jac. B. R. Holford v. Platt.

21. An Infant Widow *brought* Writ of *Error to reverse a Fine levied by her of her Lands whilst she was Covert Baron*, and it was moved that a Guardian be assigned her to prosecute for her, and that she might be inspected by the Court, and the Inspection be recorded; and an Affidavit was made by one in Court, that he knew the Infant there present, and the Time of her Birth and baptizing, and swore the Times precisely; the Church-Book was also produced in Court, and proved by Oath, wherein the Time of her baptizing was entred, and that she was the same Person; upon which she had by her own Election Attwood an Attorney of this Court assigned for her Guardian, and the Affidavits were ordered by the Court to be recorded, and the Inspection to be entred, and a Scire Facias awarded against the Heir. Sty. 457. Trin. 1655. Sherlock's Case.

22. Error to reverse a *Fine* for Infancy; now it was moved, That the *Party being in Court* she *might be inspected and the Inspection recorded*; and there was produced and read a Copy of the Register-Book sworn to be a true one, and several Affidavits of her Age. Curia. Let the Inspection be now recorded; The *Issue of her Infancy may be tried at any Time hereafter, though she comes of Age.* Vent. 69. Pasch. 22 Car. 2. B. R. Cousin's Case.

2 Vent. 30. Perrot's Case. S. C. the *Wife at the Time of levying the*

25. P. married J. B. an Heiress, and afterwards Sir H. P. (Father of P.) and an ignorant Carpenter took the Conusance of a *Fine* of the said J. being under Age, and by Indenture the Use was limited to P. and his Wife for their two Lives, the Remainder to the Heirs of the Survivor; about two Years after the *Wife died without Issue*; and B. as Heir

Heir to her prayed the Relief of the Court. Upon Examination it appeared that Sir H. P. did *examine the Woman whether she were willing to levy the Fine? and asked the Husband and her Whether she were of Age or not? both answered that she was.* She afterwards being privately examined touching her Consent, answered as before, and that she had no Constraint upon her by her Husband, but she was not there questioned concerning her Age. All agreed, that there was no Way to set the Fine aside. Mod. 246, 247. pl. 6. Pasch. 29 Car. 2. C. B. Barrow v. Parrot.

Fine was 20 Years old, so that the Nonage could not be discerned on the View. All the Judges agreed they could not meddle with the Fine; but if the Wife had been alive and still under Age, they might bring her in by Habeas Corpus and inspect her, and set aside the Fine upon a Motion; for perhaps the Husband would not suffer the Bringing or Proceeding in a Writ of Error.

26. An Infant *was Bail and taken in Execution*, whereupon he brought Audita Querela, and Witnesses swore to his Infancy. But per Cur. it is a Matter of Discretion either to admit him to Bail, or refuse it. He being in Execution; But had the Audita Querela been brought before, he must have had a Supersedeas of course, so he was not bail'd then; But afterwards in Michaelmas Term *upon producing a Copy of the Register of his Age* out of Yorkshire, *and examining the Witnesses* again *he was discharged* by the Court. Carth. 278. Trin. 5 W. & M. in B. R. Loyd v. Eagle.

27. A. *devises Lands to Trustees until Debts paid, and then to an Infant and his Heirs. Defendant enters and levies a Fine, and five Years pass:* Infant when of Age brought an Ejectment, but was barred because the Trustees should have entred; Equity will relieve and not suffer an Infant to be barred by *Laches of the Trustees*; nor to be barred of a Trust Estate during his Infancy. The Infant in this Case shall recover the mean Profits. 2 Vern. 368. pl. 331. Mich. 1699. Allen v. Sayer.

28. The *Father Tenant for Life*, Remainder *to the Son in Tail* with *Remainder over.* The *Son is an Infant*, and *on an advantageous Proposal for the Son's Marriage, the Father and Infant Son join in Marriage-Articles*, and the *Father only covenants, that within a Year after the Son's coming to Age the Father and Son will join in a Fine and Recovery* of the Family Estate *to divers Uses.* The *Infant Son seals the Deed*, and *within a Year after he comes to Age, joins with his Father in a Fine and Recovery*; the Infant Son's sealing of these Articles is not sufficient to declare the Uses of the Fine and Recovery. 3 Wms's Rep. 206. pl. 51. Mich. 1733. Nightingale v. Ferrers.

(G. 2) Bound by what Contract.

1. WHERE an Infant was charged for *Apparel* some of which was *beyond his Rank, and some not*, and the Plaintiff in his Declaration confessed that the *Infant had paid Part*, but it did not appear for what Part, whether for the Necessary or Unnecessary; Per Gawdy J. it shall be *intended* for the necessary Apparel. Goldsb. 168. pl. 99. Hill. 43 Eliz. Mackerel v. Batchelor.

Cro. E. 583. pl 11. S. C the Court held that he having acknowledged Satisfaction for 4l. for Part &c. and they did not know for which Part, therefore they could not have Judgment for any Part; But otherwise he should have Judgment for those Contracts which were allow'd of. —— A *Taylor sues* an Infant for the making Apparel *not convenient for the Quality of the Infant.* He need not aver that convenient, because he does not provide the Materials, but only the Making and Necessaries thereto, as Lining &c. See Lat. 157. Trin. 2 Car. Delaval v. Clare —— It will come Time enough in the Replication. Jo. 146. Vere v. Delavall. —— Noy. 85. S. C. adjudg'd for the Plaintiff.

2. An

2. An Action was brought against an Infant who attended the Earl of Essex in his Chamber, and it was for 40 l. for a *Sattin Doublet and Hose, with Silver and Gold Lace*, and a *Velvet Coat and Hose* to his own Use; he pleaded Infancy, and though he was sued by the Addition of *Gentleman*, yet the Court held that these were not proper Cloaths for a Gentleman, but above his Degree, and so the Action would not lie against him for those Things, as not agreeable to his Rank, but for a Fustian Doublet and Cloth Hose it lay, being Necessaries. Goldsb. 168. pl. 99. Hill. 43 Eliz. Mackerell v. Batchelour.

3. Infant buys a Horse and *pays* Part of *the Consideration Money with his own* hand, this is not void but voidable only, (being delivered by his own Hands) and to be recovered again by an Action of *Account.* Hob. 69. 77. Austin v. Jervas.

Lat. 157. cites S. C. & S. P. adjudged maintainable.

4. A Brewer brought an Action against an Infant for *Beer* sold to the Infant, and held maintainable. Noy 85 in Case of Delaval v. Clare, cites M. 17. Jac. B. R Rot. 1574. Blackstones Case.

5. If Infant has Houses it is Necessary to repair them, and yet *Contract for Repairs* will not bind him, for no Contract binds but what concerns his Person; Per Haughton J. 2 Roll Rep. 271. Mich. 20 Jac. B. R. Turell's Case.

6. Single Bill given by Infant *for Necessaries* is good, but Obligation with Penalty is not. 1 Lev. 86. Mich. 14 Car. 2. B. R. Russel v. Lee.

In this Case was cited and admitted Per Cur. as a Case in Point Cart. 215. Trin. 22 Car. 2. C. B. Rainsford v. Fenwick.

7. Case by a Farrier for *Medicines apply'd to Defendant's Horses*, for which Defendant promised to pay. Defendant pleads that at the Time of the supposed Promise he was an Infant under the Age of 21. Plaintiff replied, that the Medecines were necessary for the Defendant's Horses. Defendant demurred, and had Judgment; For tho' the Physick might be necessary for the Horses, yet the Horses were not necessary for Defendant, and as an Infant's Contract is *binding for Things necessary only for his Person*, such Necessity should have been put in Issue that the Court might have judged of it. M. 12 Geo. 2. B. R. Clowes v. Brooks.

8. In an Action upon a Quantum Meruit for *Diet, Lodging, and Apparel*, the Evidence was, that the Defendant being an Infant was sent with a Russia Merchant beyond Sea by his Mother, who did agree to pay him so much for Diet, Washing, and Apparel, and the Merchant in Russia committed the Care of the Infant to the Plaintiff, and promised to pay him for his Diet, Lodging, and Apparel; And Roll directed the Jury, that if an Infant *comes to a Stranger and boards with him*, there is a *Contract in Law* implied that he should pay for his Board, as much as it is worth, but if another undertakes to pay for his Boarding, this Express Agreement takes away the implied Contract, and the Verdict was accordingly found for Defendant. All. 94. Mich. 24 Car. B. R. Duncombe v. Turkridge.

If an Infant should promise to give an *unreasonable Price* for Necessaries, it would not be good to bind him; Arg. 10 Mod. 85. Pasch 11 Ann B. R. in Case of Mitchel v. Reynolds.

9 Assumpsit was brought for *Labour and Medicines in curing the Defendant of a Distemper &c.* who pleaded Infancy; The Plaintiff reply'd, it was for *Necessaries generally*; Adjudged upon Demurrer that the Replication in this general Form without shewing how, or in what Manner, was good. Carth. 110. Hill. 2 W. & M. in B. R. Huggins v. Wiseman.

For here the Infant is a Trader, and the Bill of Exchange was *drawn in Course of Trade, and not for any Necessaries.* Ibid.

10. Infancy is a good Plea in Bar against a *Bill of Exchange.* Carth. 160. Mich. 2 W. & M. in B. R. Williams v. Harrison.

11. Infant

11. Infant keeps a *common Inn*, yet an Action on the Case on the Custom of Inns will not lie against him; Cited per Holt Ch. J. Carth. 161. Mich. 2 W. & M. in B. R. in Case of Williams v. Harrison.

Roll 2. pl 3.

12. No Difference between *Money lent* to an Infant, *and he buys Necessaries*, or if a Stranger buys them for him; for in both Cases it will come in Issue whether the Goods were convenient for his Degree and Quality; But because the Plaintiff had laid the *Venue* where the Money was lent, and not where the Necessaries were bought, Judgment was given against him. Cumb. 482. Trin. 10 W. 3. B. R. Ellis v. Ellis.

5 Mod. 368. S. C. but reported there as not good for the Money lent, but only for what Money Plaintiff laid out for Necessaries for the Infant, who (it says) was dead, and this last is according to 1 Salk. 279 Darbey v. Boucher. 5 W. & M in C B. that of Ellis v. Ellis was Trin. 10 W. 3 B. R.—— Hill 10 Ann. B. R. * a Judgment in C. B agreeing with that of Ellis v Ellis as reported by Cumb 482. was reversed, for that the lender must lay the Money out for the Infant, or see it laid out, and then it is his laying out. 1 Salk. 386. Earle v. Peale.——12 Mod. 197. S. C. and because the Employment of the Money for Necessaries was *traversable*, and no Venue laid, Judgment was given for the Defendant for that Omission.——* 10 Mod 66. S. C. and Per Cur. the Goodness or Badness of a Contract is not to depend on a *subsequent Contingency*.——But tho' the Law be, that if one actually lends Money to an Infant to pay for Necessaries, yet as the Infant in such Case *may waste and misapply it*, he is therefore not liable, as in 1 Salk. 279. It is yet otherwise *in Equity*; For if one lends Money to an Infant *to pay a Debt for Necessaries, and thereupon he actually does pay the Debt*, he his liable in Equity, tho' not at Law; For in this Case the *Lender stands in the Place of the Person paid*, (Viz.) the Creditor for Necessaries, and shall recover in Equity as the other should have done at Law; Per the Master of the Rolls. Wms. Rep. 559 Trin. 1719. Marlow v. Pitfield.

13. No *Contract* binds an Infant but what concerns his Person. 2 Roll Rep. 271. Mich. 24 Jac. B. R. Tirrils Case.

As for Diet, Apparel, or necessary *Learning*, but Covenant to *bind himself Apprentice* does not unless by special Custom. Cro J. 494. pl. 15 Trin. 16 Jac. B. R. Whittingham v. Hill.——Such *Apparel* must be convenient only. 2 Roll. 144. Green v. Chester.——*But* he may be charged for a *Tort*, as in Trover, tho' not on Contract, nor as *Bailiff*, or for Goods to carry on a *Trade*, and therefore when Infants are *Factors* their Friends should give Security for their accounting. Abr. Equ. Cases 6. pl. 3. Trin. 1700. Smalley v. Smalley.

14. Infant made a *Contract with Consent of Friends*, that Interest Money should become Principal, (it being a matter of Extremity) and it was decreed good. 9 Mod. 103. Mich. 11 Geo. cited per Ld. C. as Lady Betty Cromwells Case.

(G. 3) Bound by Forfeiture.

1. IF an *Estate upon Condition descends* to an Infant, *who does not perform the Condition*, he shall lose the Land, notwithstanding the Nonage. Br. Coverture pl. 71. cites 31. Ass. 17.

(G. 4) Bound by what Agreement of him and his Guardian.

1. BILL to have a specifick Performance of an Agreement &c. upon this Case; *Mr. Fuller during his Minority by himself and Guardian enters into Articles with the Defendant to let him a Farm at a certain Rent* &c. The *Defendant enters* upon the Farm, and continues

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the Possession, *and pays the Rent after Mr. Fuller came of full Age.* After that *Mr. Fuller conveys the Inheritance to the Plaintiff*, and then the *Defendant quits the Farm, insisting that he was only Tenant at Will*, and refuses to accept a Lease, or execute a Counter-part, *because Mr. Fuller being an Infant at the Time of making the Agreement was not bound by it, and therefore the Defendant ought not to be bound* by it. It was insisted, that the Defendant was bound by the Articles tho' Mr. Fuller had his Election at his full Age to perform or not perform the Articles; For tho' in such Cases the Infant has his Election at his full Age, the other Party has not his Election, but is bound by such Agreement with an Infant. It was insisted by the Defendant, that this Bill is brought by a Purchasor of the Inheritance, and this Covenant does not run with the Land, nor is transferr'd by the Statute H. 8. But Harcourt C. decreed that the Plaintiff should execute a Lease to the Defendant, and the Defendant execute a Counter-part of such Lease to the Plaintiff in Pursuance of the Articles, and the Defendant to pay Costs. MS. Rep. Trin. 13 Ann. in Canc. Clayton v. Ashdown.

2. If a *Infant seised in Fee, upon a Marriage* with the Consent of her Guardians, should *covenant, in Consideration of a Settlement, to convey her Inheritance to her Husband*; Ld. C. Parker said, that Equity would execute the Agreement if the Consideration was a competent Settlement. 2 Wm's Rep. 244. Mich. 1724 in Case of Cannel v. Buckle.

(H) What *Judicial Privileges* an Infant shall have.

See tit. Age. per totum.

Br. Assize, pl. 298. cites S. C. —— Br Resceit, pl. 126 cites S. C. but Brooke makes a Quære if this Receipt be Ratione Ætatis.

1. IN an Assize against two, of which one is an Infant, if they make Default, by which the Assize is awarded, and after the Assize remains for Default of Jurors, yet the Infant shall be received to plead afterwards. 29 Ass. 36.

Br. Error, pl. 128. cites S. C.

2. In an Assize by an Infant, if the Tail pleads an ill Bar, and the Infant replies, by which he makes the Bar good, if the Plaintiff had been of full Age, yet this shall not make the Bar good against the Infant, but if the Judgment be for the Tenant thereupon, this is Error, for the Court ought to plead for the Tenderness of his Age. 37 Ass. 5. adjudged.

3. If an Infant be *nonsuited in Writ of Right*, yet after he may have Writ De Possess'; and if he prays to be received, and shews Cause, he may after change the Cause. Br. Coverture, pl. 6. cites 41 E. 3. 13. per Finch.

4. If an Infant makes *Default in Præcipe quod reddat*, by which Grand Cape is awarded, he has not lost the Land by his Default by Reason of his Infancy, quod nota. Br. Coverture, pl. 4. cites 3 H. 6. 10.

5. If an Infsnt be *impleaded by any Præcipe* of his Lands, and loses by defending, he shall have a *Writ of Error*, and because he was within Age at the Time of the Judgment it shall be reversed and the Infant shall be restored to all that he lost. Hetl. 65. Mich. 3 Car. C. B. Wilkins v. Thomas.

(H. 2) Action.

(H. 2) Actions. Liable to Actions or Suits in what Cases for Torts &c.

1. ACcount does not lie againſt an Infant *of Receipt during his Nonage.* Br. Coverture, pl 20. cites 21 E. 3. 7. 8.

Co Litt. 72. a. S P.

2. *Agreement of an Infant* to a Tort does not make him a Tortfeaſor, by the beſt Opinion. Br. Aſſize, pl. 46. cites 3 H 4. 16.

3. Infant ſhall not be ſworn within Age, nor ſhall he be charged by *Bailment*; Contra upon *Trover*, as Executor. Br. Coverture, pl. 63. cites 11 H 6. 40.

4. If *Leaſe for Years* be made *to an Infant*, and he *manures the Land*, Debt lies of the Rent; for he has Quid pro quo. Br. Coverture, pl. 25. cites 21 H. 6. 31.

5. If an *Infant* of ſo tender Age that the Juſtices think he cannot conceive Malice, be indicted and *found guilty of Felony*, the Juſtices may diſmiſs him; Per Moil and Billing, quod nemo negavit. And Wangf. who was of the Councel againſt the Infant of four Years in Treſpaſs of putting out the Eyes of a Man conceſſit, becauſe in Felony a Man cannot juſtify, but plead Not Guilty. Br. Corone, pl. 6. cites 35 H. 6. 12.

6. If a Man *leaſes to an Infant of ſeven or eight Years*, and *a Stranger does Waſt*, the Infant ſhall not be thereof charged; contra *of his own Waſt*, and contra of a Man of full Age in the firſt Caſe. Br. Coverture, pl. 68. cites Doct. & Stud. 67.

7. *And* an Infant ſhall be bound by his *Ceſſer in Ceſſavit.* Ibid. cites Doct. & Stud. lib. 2. fol. 113.

8. *So* if he be *Warden of a Priſon and ſuffers a Priſoner to eſcape*; for thoſe Statutes do not except Infants. Ibid.

2 Inſt. 382. S. P. and that the Statute of Weſtm. 2. 13 E. 1. cap. 11. extends to ſuch Infant. ——— 8 Rep. 44 b. S. P. per Curiam.

9. An Infant *ſhall anſwer to the Intruſion or to the Purchaſe by him*; So where he is vouched in Writ of *Dower*; and he ſhall anſwer to Appeal if he be of the Age of 12 Years. Br. Coverture, pl. 66. cites F. N. B. Dum fuit infra Ætatem.

10. *Waſt* done by an Infant ſhall bind, and ſo of *Ceſſavit.* 8 Rep. 44. b. Paſch. 25 Eliz.

11. An Infant and Baron and Feme ſhall be puniſhed for *Waſte done by a Stranger*, and ſo ſhall the Wife that has Eſtate by Survivor for the Waſte done by the Husband in his Life-time, if ſhe agree to the State, though there has been Variety of Opinions in other Books. Co. Litt. 54. a.

12. Action *for Words* lies againſt an Infant of 17 Years of Age; For *Malitia ſupplet Ætatem*; Per Cur. Noy 129. Hodſmam v. Griſell.

13. A *Bill* was exhibited in the Star-Chamber on 27 *Eliz.* 4. *of fraudulent Conveyances* againſt ſeveral Perſons, of whom one was an Infant, and it was reſolved that this Infancy ſhall not excuſe him of the Penalty of the Year's Value of the Land, he being of 16 *Years and privy to the Conveyance, and having juſtified that* fraudulent Deed *to be made Bona Fide*, and therefore ſhall be puniſhed as if he were of Age. Noy 105. Poulton v. Wiſeman & al'.

14. *Account* lies not against an Infant, because the Infant may be mistaken, and in such Action Evidence shall not be upon the Value of the Things, but upon the Account only. Lat. 169. in Case of Wood v. Witherick, says the very same Point was adjudged 19 Jac. B. R. between **Stirrell and Holliday**, and the Reason there was, because the Infant might be mistaken.

Noy 87. S. C. accordingly, and cites the Case of Stirrel v. Holliday. —— 2 Roll Rep. 271. Tirrel's Case, S. C. held accordingly. —— Action lies not against an Infant upon an Insimul Computaverunt for Diet, because Infant may misreckon in the Account. Palm. 528. Pasch. 4 Car. B. R. Pickering v. Gunning. —— Jo 182. pl. 4. S. C. but S. P. does not appear.

15. Action upon the *Case* was brought against an Infant for *affirming a Jewel to be* his own which was not, and the Defendant pleaded Infancy, and the Plaintiff demurred, and adjudged for the Defendant; For be the Jewel his own or not he was not bound; Cited Sid. 258. in Case of Johnson v. Pye, as of Pasch. 16 Car. 2. between Gorve and Nevil.

16. *Case* lies not against an Infant *for affirming himself to be of Age*, and thereby borrowing Money of the Plaintiff; and a *Diversity* was taken between *Torts* and *Contracts* of Infants, for though Infants shall not be bound by Contracts, yet they shall be bound for Torts cites D. 105. But per Cur. though Infants should be bound by *actual Torts*, as Trespass &c. which are *Vi & contra Pacem*, yet they shall not be bound by *those which found in Deceit*. Sid. 258. Trin. 17 Car. 2. B. R. Johnson v. Pye.

Lev. 169. S. C. adjornatur. —— Keb 905. pl 7. S. C. adjornatur. —— Ibid 913. pl. 16. S. C. awarded that the Plaintiff nil capiat per Billam.

17. If an Infant *judicially perjures himself* ***in Point of Age***, or otherwise, he shall be punished for the Perjury; Agreed. Sid. 258. pl. 3. Trin. 17 Car. 2. B. R. in the Case of Johnson v. Pye.

18. But not for barely affirming himself to be of Age in order to borrow Money on a Mortgage; For such *Torts* that must punish an Infant *must be Vi & Armis, or notoriously against the Publick*, but not where the Plaintiff's own Credulity has betrayed him; Per Keeling. And by Windham, the Commands of an Infant are void, and for such he shall never be attainted a Disseisor, much less shall be punished for a bare Affirmation, which Twisden agreed, and that there must be a Fact joined to it, as *cheating with false Dice* &c. Also by this Means all the Pleas of Infancy would be taken away, for such Affirmations are in every Contract. Windham said, that had any other Person affirmed the Infant of Age, an Action would lie, (and cited the Case of **Grove v. Nevil**, where the Defendant pleaded Infancy, to which the Plaintiff demurred in an Action upon the Case, *for falsely affirming a Jewel to be his own which was another Man's.)* The Court awarded, on the Plaintiff's Prayer, a Nil capiat per Billam. Keb. 914. pl. 16. Trin. 17 Car. 2. B. R. in Case of Johnson v. Pie.

19. Infant may be charged for *Trover* because it is *a Tort*, but *not on Contract*, nor as *Bailiff*, or for Goods to carry on a *Trade*, and therefore when Infants are *Factors*, their Friends shall give Security for their accounting. Abr. Equ. Cases 6. Trin. 1700. Smally v. Smally.

(H 3) What Real Actions he may have.

1. INFANT may have *Writ of Right and join the Mise* if he be Purchasor. Br. Coverture, pl. 66. cites F. N. B. Dum fuit infra Ætatem.

2. Infant may have *Formedon* within Age, but *if Deed of Warranty of his Ancestor, whose Heir &c.* be pleaded, the Parol shall demur Ibid.

(H. 4) What Action an Infant may have on his own Contract.

1. IF an Infant *makes* me *Bailiff of his Manor*, Trespass does not lie against me, for he shall have Writ of Account; For it is for his Benefit. Br. Coverture, pl. 25. cites 21 H. 6. 31. per Ascue J.

2. If an Infant makes a Contract for an Horse, and *pays Part of the Money himself*, it is not a void Consideration, for being delivered with his own Hands it is but voidable, to be recovered again by an Action of Account; Per Herbert Ch. J. Hob. 77 Austen v. Gervas.

3. An Infant by his Guardian brought *Assumpsit*, and after Verdict for him it was *moved* in Arrest of Judgment, because *the Consideration of the Promise being made by the Infant to pay a Sum of Money was void.* But per Cur. the Action well lies, for it is only in the *Election of the Infant* to make his Promise void, and not of the other Party. Sid. 41. Pasch. 13 Car. 2. Forrester's Case.

This was on a Promise to the Infant, that on Payment of so much Money by the Infant the Defendant would make an Assurance, and Judgment for the Plaintiff. Keb. 1. pl. 1. Gable v. Foster, S C.

4. An Infant brought an *Assumpsit by his Guardian*, and *declared, that where the Defendant entred into his Close, and cut his Grass, that in Consideration he would permit him to make it into Hay, and carry it away, he promised to give him* 6 *l.* for it. Upon this Declaration the Defendant demurred, supposing it to be no Consideration, because it was *not reciprocal*; For the Infant, was not bound by his Permission, but might sue him notwithstanding; But the Court gave Judgment for the Plaintiff. Vent. 51. Mich. 21 Car. 2. B. R. Smith v. Bowen.

Mod. 25. pl 66. S. C. adjudged Nisi &c. —— 2 Keb. 581. pl 114. S C. adjudged —— If an Infant makes a Lease for Years, rendering Rent, it is not in the Election of the Lessee to avoid this Lease for the Infancy of the Lessor, but the Infant shall have an Action for the Rent; And so on a Promise to an Infant to pay so much, in Consideration he would permit the Defendant to enjoy such a House, it was adjudged a good Consideration, and an Action for it maintainable by the Infant: though the Infant might avoid his Promise if an Action were grounded upon it against him. Mod. 25. in S. C. by Twisden said it had been so adjudged. —— S. P. by Twisden, Sid. 42. in pl. 8.

(H. 5) Actions. When they muſt ſue. Limitations.

1. AN *Aſſumpſit* is made to an Infant, the *Statute of Limitations* is not pleadable if he brings his Action within ſix Years after his full Age, though he was but a Day old when the Promiſe was made. 2 Mod. 71. Paſch. 28 Car. 2. C. B. Croſier v. Tomlinſon.

2. If an Infant *lets ſix Years paſs after he comes of Age*, and then brings a *Bill for an Account againſt the Receiver of the Profits of his Eſtate* during his Infancy; if the Defendant pleads the *Statute of Limitations* it is as much a Bar to ſuch Suit as it would be to an Action of Account at Common Law, and this is not ſuch a Truſt as being a Creature of a Court of Equity the Statute ſhall be no Bar to. Ch. Prec. 518. pl. 320. Trin. 1719. Lockey v. Lockey.

(H. 6) Actions. How they muſt be ſued. By Attorney or Guardian.

1. *Weſt.* 2. 15. 13 *E.* 1. ENACTS that *if an Infant be eſloigned, ſo that he cannot ſue perſonally, his next Friend ſhall be admitted to ſue for him.*

Upon this Statute, whether the Infant be *eſloigned or no* he ſhall ſue by Prochein Amy; For the Eſloignment is put in the Act to ſhew what Miſchief may fall out in this Caſe. If the *Surmiſe* that the Plaintiff is within Age be *untrue*, his *Admittance by Prochein Amy is Error.* 2 Inſt 390.

2. R. brought Aſſize by Prochein Amy, it is no Plea that the Infant-Mother is alive, for the *Statute intends him to be the Prochein Amy who will firſt ſue for him.* Br. Garden and Prochein Amy, pl. 27. cites Temp. E. 3 It. Not.

3. *But* the Iſſue was ſuffered 27 E. 3. who was Prochein Amy, and there it was agreed that *where Land deſcends of the Part of the Father, and other Land of the Part of the Mother*, that *ſuch Amy* of one Part or the other *who firſt gets the Infant ſhall have the Suit.* Brook makes a Quære if this be not ſuch Amy to whom no Land may deſcend. Br. ibid.

4. *But* the Suit is always *in Name of the Heir* by Prochein Amy, as it is in other Caſes by ſuch a one his Attorney &c. which appears in the Book of Entries. Br. ibid.

5. *And* ſee 34 E. 3. that an *Infant who ſues or anſwers by Prochein Amy ſhall not be ſuffer'd to diſallow* the Suit or Plea pleaded by him, nor the Prochein Amy, though the Infant comes in Perſon, neither may a Feme diſallow the Plea of her Baron. Br. ibid.

6. *Scire Facias upon a Fine*, the Defendant made Default, and one came and informed the Court that the *Plaintiff eſloigned the Infant for Fear of a Recovery by the Defendant*, for the Defendant was *Infant*; wherefore he was admitted to anſwer by Guardian ex aſſenſu querentis. Quære if he may not be admitted by Guardian, without his Aſſent, as well as by Prochein Amy. Br. Garden and Prochein Amy, pl. 4. cites * 40 E. 19.

* This is miſprinted, and ſhould be 40 E. 3. 36. pl. 6. and ſo are the other Editions.

7. Infant brought Affife by Guardian and well; and fo it feems that an *Infant may fue as well by Guardian as by Prochein Amy*, for the Statute of Prochein Amy *W.* 2. *cap* 15. *is in the affirmative*, but *where the Suit of the Infant is againft his own Guardian*, as for Waft, Mortdanceftor, Affife &c. there for Neceffity it fhall be by Prochein Amy, and it fhall be by Prochein Amy by the fame Statute where the Infant is efloigned, but *where the Suit is not againft the Guardian, and alfo the Infant is not efloigned, there the Suit may be by Guardian.* Br. Garden and Prochein Amy, pl. 26. cites 12 E. 3. and Fitzh. Aff. 116.

8. *Affife by two Coparcenors*, of which the *one was an Infant*, and appeared by Guardian, and it was demanded where he was made Guardian. Per Stone, he ought not to fhew it, for he may anfwer as Prochein Amy by Statute, and there has been great Debate *where one anfwers as Guardian, and the other as Prochein Amy*, which *Plea fhall be taken.* Per Fifh, *his who beft pleads in Advantage of the Infant.* Br. Garden, pl. 9. cites 28 Aff. 22.

9. *Guardian fhall fhew Warrant*, but *Prochein Amy not*, quod nota; and yet it feems that the Guardian fhall be admitted by the Court, and Prochein Amy not; *but* by 19 *Aff* 10. the *Guardian fhall not have Warrant as Attorney fhall have*, becaufe he is admitted by the Court, and this is the beft Law. Br. Garrant de Attorney, pl. 47. cites 34 Aff. 5.

10. In *Eftrepement againft* an Infant, he *appeared by Guardian*, and well, per Cur. notwithftanding that it be a *perfonal Action* and the Infant in a Manner Trefpaffor. Br. Garden, pl. 20. cites 3 H. 6. 16.

11. Brook makes a Quære if an Infant may fue a *perfonal Action by Prochein Amy.* Br. Garden, pl. 20. 3 H. 6. 16.

12. Writ of *Waft* has been fued by the Infant of the Prochein Amy *againft the Father of the Infant Tenant by the Curtefy.* Br. Garden, pl 3. cites 34 H. 6. 4.

13. *S. brought Action of falfe Imprifonment* againft P. and becaufe the *Plaintiff was efloign'd*, G. came as Prochein Amy, and prayed to be admitted for him and counted by Vavifor, and the Plaintiff was *of the Age of ten Years*, and becaufe G. took upon him to fay upon his Honefty, that the Plaintiff was efloigned, therefore he was *admitted without Oath.* Br. Garden, pl. 14. cites 20 E. 4. 2.

14. *Office may be travers'd* by Prochein Amy of the Infant, where the Tenure is *found in Chivalry* of the King *where it is held of W. N. in Socage.* Br Garden, pl. 13. cites 6 H. 7. 15.

15. Infant may have *Appeal of Murder* of his Anceftor whofe Heir he is, and it fhall be by Guardian and not by Attorney, and the Parol fhall not demur at this Day. Br. Garden, pl. 1. cites 27 H 8. 11.

16. An Infant fhall *fue by Prochein Amy, but if* he be *Defendant* in any Action he *fhall make his Defence by Guardian* and not by Prochein Amy. F. N. B. 27. (H) and in the new Notes there (d) cites 40 E. 3. Stat. Weftm. 2. cap. 15. 27 H. 8. 11. 3 H. 6. 16. 1 H. 5. 6. 29 Aff. 67. 27 Aff. 53.

In our Books the Names of *Guardian and Prochein Amy are fometimes taken the one for the other*, becaufe they are oftentimes all one; As the *Guardian in Socage is alfo Prochein Amy*, and now as well the one as the other are allow'd by the Judges to be fome of the Officers of the Court. 2 Inft. 261.

Guardian and Prochein Amy are diftinct, and either may be admitted for the Plaintiff, and the *Prochein Amy* never was till the Statute W. 1. 47 and W. 2. 15. And he *is appointed in Cafe of Neceffity where an Infant is to fue* his Guardian or be efloined, or that the Guardian will not fue for him. And for thefe Caufes he might be admitted to fue by either where he is to demand or to gain; But when he is *to defend a Suit* in an Action Real or Perfonal *it ought always to be by Guardian*, and the Guardian ought to be admitted by the Court, who ought to anfwer his Mif pleading if there be Caufe; and Defendant ought always to appear by Guardian, and not by Prochein Amy. Per three Judges againft one; and fo a Judgment in Durham was revers'd. Cro. J. 641. pl. 5. Trin. 20 Jac. B. R. Simpfon v. Jackfon. —— 2 Roll Rep. 257. S. C. and Judgment was reverfed —— Palm. 295. S. C. and Judgment reverfed.—S. C. cited accordingly, and fays the Precedent are fo.

Hutt.

Hutt 92. in Case of Young v. Young.——S. P. by Richardson. Litt. Rep. 60.——Cro. J. 441, 442. S. P. —— Cro. C. 161 pl. 2 Goodwin v. Moore. S. P. Mich. 5 Car. B. R. —— Admittance ad prosequend' is good, even where the Infant is Defendant; For it is to prosecute his Plea by which he defends himself against the Plaintiff. 8 Mod. 25. Hill. 7 Geo. 1. Spiller v. Adams.

17. In *Wast by Infant against his Guardian* one came as Prochein Amy by the Statute Westm. 2. and pray'd to be received, for that the Infant was elloign'd; it was replied, that this appeared not judicially to the Court, and that [though] such Suggestion had us'd to be made in Assise and Mortdancestor, because the elloining might be enquired of, there being a Jury the first Day, but that otherwise it was in this Case of Waste; But resolv'd that the Prochein Amy ought to be admitted upon the said Suggestion in this Case, because the Writ is brought against the Guardian, who perhaps had esloin'd the Infant, and he shall not take Advantage of his own Wrong; And the Court awarded the Prochein Amy to be admitted. 2 Inst. 261.

18. An Infant appeared by *Guardian, and coming to Age continued still by his Guardian*, whereas he should then have been by his Attorney, and Judgment was given for him, and the Judgment was affirmed in Error. Bulst. 171. Trin. 9 Jac. Anon.

19. If Infant be Plaintiff he must sue by *Prochein Amy*, and if Defendant by *Guardian* and not in Person, and the Court ought to assign the Guardian. Arg. Roll Rep. 304 Hill. 13 Jac. B. R. in Case of Holland v. Lee.

He may appear and prosecute as Plaintiff or Demandant either by Prochein Amy or by Guardian at his Election Jo. 177. Young v. Young. ——— Infant may sue by Guardian, and the Father not being thought proper, he being a Defendant, the eldest Six Clerk was appointed. N. Ch. R 44 Offley v Jenny and Baker. ——— He shall sue by Prochein Amy, though his Prochein Amy cannot answer for him as a Guardian shall in Case of Infants being Defendants. Sty. 369. Pasch. 1653. B. R.

20. One cannot answer for an Infant as Guardian either in Chancery or any other Court, except he be *assigned Guardian by the Court*; for it he might, that were to make himself his Guardian, and that might prove to the Damage of the Infant, therefore if one will sue an Infant he must *move the Court to assign a Guardian* that may answer for him, but an Infant may sue by Prochein Amy, though his Prochein Amy cannot answer for him. Per Roll Ch. J. Sty. 369. Pasch. 1653. Anon.

21. *Feme Covert* an Infant is *sued with her Husband* he cannot make an *Attorney for her* but she must appear by Guardian. 2 Keb. 878. pl. 52. Hill. 23 & 24 Car. 2. B. R. Freeman v. Bodington.

2 Lev 38. Baddington v. Freeman. S. C. —— Vent. 185. S. C. & S. P. Freeman v. Baddington.

22. The Court will admit one to *sue by Guardian* upon a Motion, though not present nor any Affidavit made. Cumb. 256. Pasch. 6 W. & M. in B. R.

23. The Writ and *Suit of an Infant is subject only to the Direction of the Prochein Amy*, and not of the Infant. 1 Salk. 176. Pasch. 12 W. 3. B. R. Toler's Case.

24. Infant suing by Prochein Amy, and *no Entrance of the Admission*, is not Error. Comb. 330. Trin. 7 W. 3. B. R. Read v. Waldron.

25. Where a Suit was by a Prochein Amy *not sufficient to answer Costs*, the Court ordered another should be named. P. R. C. 296.

It was so said Arg. 2 Wms's Rep. 297. in Case of Turner v. Turner. Trin. 1725.

26. It

26. It should seem that an Infant *may sue* here either *by himself, by Prochein Amy, or by Guardian*, as the Court pleases. P. R. C. 296.

27. And *so* it should seem he *may defend*. And if he is of Discretion, shall answer upon Oath. P. R. C. 296.

28. Any one may bring a *Bill* as Prochein Amy to an Infant without his Consent, because it is at his Peril that he brings it. But none can bring a Bill in the Name of a *Feme Covert* as her Prochein Amy without her Consent, but it will be dismissed on Affidavit. Ch. Prec. 376. Mich. 1713. Andrews v. Cradock.

Mich. 12 Ann. G. Equ. R. 56. S. C.

29. *Outlawry*, or *Excommengement* in a Guardian, or Prochein Amy *cannot be pleaded* or alledged *in Disability*, where an Infant sues or defends by him; because he Acts in Auter Droit. P. R. C. 296.

30. If a Prochein Amy be *Insolvent* the Defendant may apply to the Court in order to have a solvent one named. It was so said by Mr. Talbot Trin. 1725. Arg. in Case of Turner v. Turner.

31. An Infant by Prochein Amy brought *Bill to establish a Will* of Land pretended to be devised to him. The Court directed an Issue, which was found against the Plaintiff. The *Prochein Amy died before the Costs taxed*, and the Infant came of Age and never proceeded one Step. The Register and Clerk in Court informed the Court that the Course was to *dismiss the Bill with Costs Generally* without saying who should pay them. And Ld. C. King said he would dismiss the Bill with Costs, and (as he apprehended) upon a General Dismission the Defendant had Election to sue the Infant or Prochein Amy for such Costs. 2 Wms.'s Rep. 297. Trin. 1725. Turner v. Turner.

(H. 7) Dum fuit Infra Ætatem. Lies in what Cases.

1. WHERE *an Infant seised of Land in Fee, and another, who has nothing* in the Land, *jointly make Feoffment* of the same Land to another, the *Infant* at his full Age *shall have Dum fuit infra Ætatem alone*, without joining with the other or with his Heirs. Thel. Dig. 25. lib. 2. cap. 2. S. 2. cites Mich. 18 E. 2. Brief 831.

2. One Jo. brought Writ of Dum fuit infra Ætatem *of Tenements which he himself leased Dum* &c. The *Tenant said that the Demandant and St. his Father leased* to him &c. Judgment of the Writ, and held no Plea. Thel. Dig. 170. lib. 11. cap 34. S. 52. cites Mich. 18 E. 2. Brief 831. and says see 6 E. 3. 245.

3. If *Baron and Feme within Age alien in Fee*, and the *Baron dies*, the Feme may have Dum fuit infra Ætatem; For it is at her *Election to affirm it to be an Alienation*, and to take upon it or to enter. Br. Coverture, pl. 60. cites 14 E. 3. and Fitzh. Brief 282.

S. P. of a Feoffment in Fee reserving a Rent. Co. Litt. 337. a.

——— *But if she was of full Age*, she shall not have a Dum fuit infra Ætatem for the *Nonage of her Husband*, though they be but one Person in Law. Co. Litt. 337. a.

4. Dum fuit infra Ætatem in the Per against N. *supposing her Entry by the Demandant within Age*, the Tenant *said that he entered by the Demandant and J. G. and not by the Demandant alone*; *Judgment of the Writ*, and no Plea, but he was compelled to answer over by Award; For if he brings Writ of the Moiety, supposing the Entry as above, such Plea may the Tenant have again, and so has not Quantum by which he was compelled to answer, whereupon he *pleaded the Alienation of both in Bar, and as to the Moiety of J. G. Judgment of the Writ*, and

and *to the other Moiety the Demandant was of full Age at the Time* &c. Prist. Br. Enter en le Per. pl. 17. cites 21 E. 3. 50.

If two Jointenants, being within Age make a Feoffment, though they may join in a Writ of Right, yet they cannot in a Dum fuit infra Ætatem, for the Nonage of one is not the Nonage of the other. Co. Litt. 337. a.

5. *Two Infants seised in Fee and purchased jointly*, both *aliened within Age*, and *the one died*, the *other brought Dum fuit infra Ætatem without the other by him alone*; the *Tenant said that he entered by the Demandant and by J. G. the other Infant*; *Judgment of the Writ which supposes the Entry by the one alone*, & non allocatur, but the Writ awarded good. Br. Dum fuit &c. pl. 2. cites 21 E. 3. 50.

6. By which the *Tenant pleaded this Matter in Bar*, *that the Demandant and J. G. purchased jointly and aliened to him in Fee*, *so that for the Moiety of J. G. Judgment si Actio*, *and for the other Moiety*, *that the Demandant was of full Age at the Time* &c. Prist &c. For he cannot have other Form of Writ; But yet it appears that this Infant who survived shall not recover the Whole; for the Action does not survive to the one of the Whole; For it seems if both had been alive they should not have joint *Dum fuit infra Ætatem*, but several Writs; but of Disseisin if the one dies e contra. Br. Dum fuit &c. pl. 2. cites 21 E. 3. 50.

In Dum fuit infra Ætatem, it was *pleaded that the Demandant and another leased to him the Land* &c. Judgment of the Writ, and it was *replied that the Demandant and the other were Jointenants, and that the other is dead* &c. by which Herle held the Writ good. Thel. Dig. 171. lib. 11. cap. 52. S 11. cites Hill. 6 E. 3. 245 & 296. and says see 15 & 21 E. 3. Dum fuit infra Ætatem, 1 & 2 agreeing.

7. Where *two Jointenants within Age alien*, and *one dies*, the *Survivor shall have* Dum fuit infra Ætatem *of the Whole*. But says *Quære*, for it was said there that the Feoffment was *a Severance*, and so it is of a Judgment. Thel. Dig. 25. lib. 2. cap. 2. S. 2. cites Mich. 18 E. 2. Brief 831. and says see Mich. 15 E. 3. and Mich. 21 E. 3. Dum fuit infra Ætatem 1. & 2.

8. Dum fuit infra Ætatem *against Baron and Feme in that they had not Entry unless by R* &c. the *Feme was receiv'd* by Default of the Baron, *and demanded Judgment of the Writ because she was seised before the Coverture*, et non allocatur; For it is no Plea unless it be for Mischief of Warranty or such like; by which he *pleaded that R. was of full Age at the Time of the Demise* &c. Br. Enter en le Per, pl. 7. cites 45 E. 3. 17.

9. Dum fuit infra Ætatem was brought *of Land and Rent against the Alienee of the Father of the Demandant*; and the Writ was *admitted to lie of the Rent*. Br. Dum fuit &c pl. 1. cites 46 E. 3. 34.

Where two Jointenants one within Age, and the other of full Age, makes a Feoffment, the Infant surviving may enter, or shall have a Dum fuit infra Ætatem, but for a Moiety. Co. Litt. 337. b.

10. Where *two Jointenants* are, the *one of full Age*, *the other within Age*, and the *Infant aliens the Whole and dies*, his Heir shall have Dum fuit infra Ætatem for the Moiety, and the other Jointenant shall have Assise for his Moiety only. Thel. Dig. 25. lib. 2. cap. 2. S. 3. cites Pasch. 9 H. 6. 6. and that so it was held Hill. 39 H. 6. 42. per Choke; and says see Littleton in cap. of Discontinuance.

11. If an Infant makes a *Feoffment* he may enter either within Age or at full Age; and if he dies his *Heir* may enter, or have a Dum fuit infra Ætatem &c. Litt. S. 406. and Co. Litt. 247. b. & 248. a.

(H. 8) En Ventre sa Mere. How considered &c.

1. IF Tenant in Tail has Issue two Sons, and enfeoffs the youngest Son of the Land entailed, and the youngest dies seised of the said Land, his Wife being Enfient and Eldest enters into the Land, and then the Issue is born. The Issue *cannot re-enter because the Eldest is remitted*, and in of his Antient Right before the Issue any Thing had, for then there was no Person capable by Descent nor otherwise. And. 31. pl. 76. Hill. 1 & 2 P. & M. Anon.

2. *Feoffment on Condition* that if Feoffor or his Heirs pay 10 l. that he may re-enter. He dies, leaving a *Daughter*, who paid the Money and enters, and then a *Son* is born, yet the Daughter shall retain the Lands; Per Curiam. Hob. 3. pl. 5. Pasch. 11 Jac. cites 9 H. 7. 25. agreed in Shelley's Case.

1 Rep. 95. a. 99. a. ——— Mo 140 in pl 281. cites S C. — S. C. cited Cro C. 87 in pl. 8.

3. A *surrender to the Use of* an Infant en Ventre sa Mere is merely Void; But if a Copyholder says I surrender my Copyhold Estate, and if my Child which shall be born dies before his Age of 21 Years, that then my Brother shall have this, this clearly may be good enough; Per Coke Ch. J. 2 Bulst. 274. Mich. 12 Jac. in Case of Simpson v. Southern.

He may take by way of Remainder, but not by immediate Surrender; Per Coke Ch J. Ibid. 275 ——— Resolved that an Infant en Ventre sa Mere cannot *take an Estate in Possession by way of Purchase*, but he may by way of Remainder. Mo. 637. pl. 877. Hill 37 Eliz. Church v. Wyatt.

4. The Defendant's Wife being privement enfient at her Husband's Death, the Child could not be *provided for* by Law, but the Court ordered the Child should have *sufficient Allowance*. Toth. 157. cites 3. Car. Pope v. Moore.

5. A. *mortgaged Lands* upon a *Conditon*, *that if he or his Heirs repay* 100 *l. at such a Day that he should Re-enter*. He *dyed having Issue a Daughter only*, *his Wife being privement enseint with a Son*, *the Daughter* and Heir *at the Day*, *pays the* 100 *l.* afterwards the Son is born; It was resolved in this Case, that the Sister should retain the Land for ever against the Son born, for in as much as she paid the Money, (and if she had not paid it the Land had been lost,) if she should not retain the Land against the Son, she hath no remedy for the Money, and by the Payment thereof, she hath gained the Land, and is in as a Purchaser, although she was entituled to it by a Condition, and as Heir. Cro. C. 87. pl. 8. Mich. 3 Car. in the Court of Wards, Kirton's Case.

S C cited Cart. 190. that the Sister shall retain the Land.

6. A. conveys a Term on Trust to raise 1500 *l. for such Child as should be living at his Death*. A. dies leaving no Child, his Wife *enseint* with a Daughter, which was afterwards born. Per Somers K. this posthumous Daughter is a *Child living at A's. Death* within the Meaning of the Trust. Ch. Prec. 50. pl. 51. Mich. 1692. Hale v. Hale.

7. A Bond being given to pay 900 l. to a Daughter if there be no Son living at Obligor's Death, the Wife was enseint of a Son at the Obligor's Death. Decreed the Daughter not to have the 900 l. 2 Freem. Rep. 223. pl. 294. Mich. 1698. Gibson v. Gibson.

8. Lands on Marriage are limited to himself and Wife for Life, and to the first &c. Son in Tail Male, Remainder to the Husband in Fee, *provided if Husband and Wife or either of them die without Issue Male living at the Time of his or her Death*, *leaving* only one Daughter unmarried, the Trustees to stand seised till they have raised 1500 l.

for her, and if more Daughters unmarried at the Death of A. and his Wife, or either of them, and no Issue Male living begotten between them, then 3000l. for such Daughters. A. the Father dies, leaving Daughters, and his Wife enseint of a Son afterwards born; It seems the Daughters are intitled to the 3000 l. and if so Ld. Cowper thought that Equity would not take it away, but would be further inform'd as to the Value of the Estate. 2 Vern. 578. pl. 522. Hill. 1706. Palmer v. Cracroft. & al'.

* Chan. Prec 50. pl. 51. one Lutterel's Case was cited in Ld. Bridgman's Time, where a Bill was exhibited on Behalf of an Infant en Ventre sa Mere to stay Waste, and an Injunction was granted upon it.

9. A Child in Ventre sa Mere may be *vouched*, is capable to *take*; A *Bill* may be brought on its Behalf, and the Court will grant an * *Injunction* to stay wast. The Mother may justify *detaining of Writings* on the Behalf of a Child en Ventre sa Mere. A Limitation Hæredibus de Corpore Procreatis shall include Issue after born, and so, e converso, Procreandis includes Issue already born; Arg. 2 Vern. 711. Hill. 1715. and cites the Case of Palmer v. Creaghcroft.

(I) *Of what* Things an Infant is *capable.*

Cro. E. 636, 637. pl. 34. S. C. adjornatur —— Cro C. 556. says that notwithstanding the Opinion cited in Co. Litt. fol. 3. and there said to be resolved 43 & 41 Eliz. betwixt Scambler v Walter, that the Grant of the Office of under Stewardship in Possession, or Reversion to an Infant is void, because he is incapable thereof not having Knowledge to execute pro commodo Regis & Populi, but this Case was denied, unless it be with this Difference, where it is granted with such a Clause to exercise it per se vel Deputatum, and where he is of such a tender Age, that he cannot by Intendment execute it by himself, as being a Infant of 3 or 4 Years of Age, who his not Discretion to execute it; But when there is a Clause to execute it per se vel Deputatum suum sufficientem it is good enough; for he may appoint a sufficient Deputy, and if he does not elect such, it is a Forfeiture of his Office.

1. An Infant is not capable of the Stewardship of the Courts of a Bishop, because by Intendment of Law he hath not sufficient Knowledge, Experience, and Judgment, to use the Office, and also because he cannot make a Deputy, Mich. 40 & 41 Eliz. B. R. between *Scambler and Waters*, adjudged per Curiam.

2. An Infant *shall not be any of the 12 who join with the Defendant in Writ of Debt for waging his Law*, by which one was challenged for his Age and awarded to be of full Age by the Justices by Inspection. Br. Coverture, pl. 22. cites 8 H. 6. 15.

3. If a Man makes *a Feoffment to an Infant*, and he *makes Letter of Attorney to take Livery*, this is good. Br. Coverture, pl. 25. cites 21 H. 6. 31. Per Ascue J.

4. Infant may be a *Mayor*, *Abbot* or *Bishop* without Disability, and if he be Executor he may make Release of the Debt of the Testator. Br. Coverture, pl. 54 cites 21 E. 4. 12, 13.

5. An Infant Monk, or Feme Covert may *cast a Protection*, and Brook says it seems to him that an Infant and those may be *Attorney to make Livery of Seisin*; But it was said that an Infant *cannot* be Attorney in the Law *in Actions or Suits*. Br. Coverture, pl. 55. cites 21 E. 4 18.

S. P. Br. Coverture pl. 57. cites 24 E. 3. 12, 13. —S. P. Ibid. pl. 57. cites 18 H. 6. 4 and Fitzh. Release, 8.

6. If an Infant be made *Executor*, he *may make Release or Acquittance of the Debt of the Testator*, and may *sell the Goods*, and give and distribute them; But a Feme Covert Executor cannot do so without her Baron. Br. Coverture, pl 56. cites 21 E. 4. 24. Per Littleton.

7 Infant

7. Infant Grantee of an *Office* in Reversion (exercisable by Deputy) to exercise the same per se vel Deputatum suum Sufficientem, may *appoint a Deputy*, and if he does not, or the Deputy be not *sufficient*, it is a *Forfeiture* of his Office, and the Approbation of his Sufficiency is to be by the Lord of the Manor, or Judge of the Court &c. and *Misdemeanor of Deputy* at the Infant's Peril. Cro. C. 556. pl. 11. Trin. 15 Car. B. R. Young v. Fowler.

Mar 58. pl. 98. S. C & S. P held by the Court clearly —— Jo. 310. pl. 24. Young v. Stowell S. C. accordingly

8. An Infant may *present to a Church* because the Ordinary gives the Allowance whether the Clerk be sufficient. Cro. C. 556. pl. 11. Trin. 15 Car. B. R. in Case of Young v. Fowler.

Noy 41. S. P. Obiter in Case of Reeve v. Martin.

9. Infant may be a *Trustee*; Per Ld. Chancellor. Vern. 343. pl. 335. Mich. 1683. in Case of Jevon v. Bush.

2 Vern. 561. pl. 508. Trin. 1706. S. P. in Case of Scot v. Haughton and Doctor Fuller.

10. A Petition to the King to direct his Judges to take a *Fine or Recovery* from an Infant referred to the Ld. Chancellor; Per Maynard Serjeant, a Fine cannot be taken from an Infant, nor was it ever done, but a Common Recovery may be had as desired by the *King's special Direction*. Vern. 461. pl. 438. Trin. 1687. Sir Humphry Mackworth's Case.

11. An Infant cannot be an *Attorney* for another; Arg. Show. 167. Trin. 2 W. & M. in Case of Coan v. Bowles.

Cro. E. 637. pl 34. S. P. for he cannot be conceived to be of Discretion to execute it. —— He cannot be Attorney because he cannot be sworn. Mar. 92 pl. 154 Hill 16 Car. C. B. Anon.

(I. 2) Several Ages for several Purposes.

1. A Male at the Age of Seven is married to a Female of 14, and before the Male is 13 she has Issue, this Issue is a Bastard. Jenk. 95. pl. 84. cites 1 H. 6. 3.

If the Feme of an Infant under 14 has Issue, it is a Bastard. Noy 142. Pasch. 2 Jac. C. B. in Case of Strange v. Foot.

2. A Feme has several Ages, viz. *at seven Years to have* * *Aid to be married*, and 9 Years *to deserve Dower*, and † 12 Years *to consent to Marriage*, and ‡ 14 Years *to be out of Ward*, and || 16 Years *for the Lord to tender Marriage*, and 21 Years *to make Feoffment, or to deliver a Deed. But* the *Age of Consent of a Man is* 14 Years. Br. Gard, pl. 7. cites 35 H. 6. 40.

Br. Age, pl. 6. cites S. C. and that there are only two Ages for the Male, viz. 14 and 21.

* Mo. 741. Arg. cites S C & S. P. by Wankford.

† S. P. but those of the Spiritual Law say, that it is not so unless that she be then Apta Viro Br. Age, pl. 41. cites 8 E. 4. 7.

‡ If she attained thereunto in the Life of her Ancestor. Co Litt 78. b cites S C.

|| If she were under the Age of 14 at the Death of her Ancestor. Co. Litt. 78. b. cites S. C.

3. And per Wang. *when the Lord after* 14, *and before* 16, *has married the Daughter, she may enter into her Land*; For the two Years over and above 14 Years is only Time for him to tender the Marriage, and this seems to be Reason; For it is said there, that the Course of the Chancery is to make Livery before 14 Years cum Exitibus, and after 14 but Livery only, and not cum Exitibus; And the Reason seems to be, inasmuch as after the Livery made at such Age which she ought

to have Livery, she shall have the Issues ab illo Die by the Law. Br. Garde, pl. 7. cites 35 H. 6. 40.

4. Infant of the Age of 12 Years, Male and Female, shall be compelled *to serve in Husbandry*. Br. Coverture, pl. 64. cites F. N. B. 190.

5. *A Man*, by the Law, for several Purposes, has divers Ages assigned unto him, viz. 12 *Years to take the Oath of Allegiance* in the Torn or Leet, 14 *Years to consent to Marriage*, 14 Years for the Heir in Socage *to chuse his Guardian*, and 14 Years also accounted his *Age of Discretion*, 15 *Years for the Lord to have Aid pur faire Fitz Chivaler*, *under* 21 *to be in Ward to the Lord by Knight's Service*, *under* 14 *to be in Ward to Guardian in Socage*, 14 *to be out of Ward of Guardian in Socage*, and 21 *to be out of Ward of Guardian in Chivalry, and to alien his Lands, Goods and Chattels.* Co. Litt. 78. b.

6. *A lawful Age*, in general Words, (unless it be in a particular Case, as Guardian in Socage) must be taken and construed 21 Years. Chan. Rep. 100. 11 Car. fol. 341. Hartwell v. Ford.

Toth 174. cites 11 Car. S. C. —— Full Age for Socage is 14 Years. 13 Rep 51. and cites D. 213.

7. Infant makes *his Will, and charges his Personal Estate with Payment of Debts*, his Executor shall pay Bond Debts which he had contracted, there being Assets sufficient. N. Ch. R. 55. 1651. Hampson v. Sydenham.

8. Ecclesiastical Court is the proper Judge of Age *for making Wills*, and whatever our Law says concerning it, is only as directed by their Law. 2 Show. 204. pl. 213. Mich. 34 Car. 2. B. R. Smallwood v. Berthouse.

Agreed that a Female may make a Will at 12, the Male at 17, or if proved to be a Person of Discretion, at 15. 2 Vern. 469. Mich. 1704. in Case of Bishop v. Sharp. —— No Dispute was made but that a Male at 14, and a Female at 12, may make a Will of Personal Estate, and it was said to be so agreed by Ld. Wright in Case of Sharp v. Sharp. Chan. Prec. 316. Mich. 10 Ann. Hyde v. Hyde.

9. A. names B. an Infant *Executor, and then names C. Executor during B's Minority*. C's Executorship ceases when B. is 17, and the Property of the Goods vests then in B. Per Finch C. 2 Chan. Cases 169. Mich. 36 Car. 2. Whitmore v. the Earl of Craven.

And if B. at that Age makes a Will and an Executor, the Executor of B. shall have the Estate devised to B. by A. 2 Ch. R. 386. S. C. —— Vern. 326. Whitmore v. Weld, S. C before North K. but no Decree. —— Vern. 347. decreed per Ld. Jefferies, S. C. —— 2 Vent. 367 S. C. decreed per Ld. Jefferies.

10. *Till eight Years* Children are accounted *Nurse-Children*. 2 Salk. 470. pl. 1. per Cur. Pasch. 7 W. 3. B. R.

11. Infant under 14 not bound by a *Marriage* but may dissent; Arg. Cumb. 457. Mich. 9 W. 3. B. R. in Case of the King v. Thorp.

12. *Administration granted during Minori Ætate of Executor* ceases at 17, but during Minori Ætate *of Administrator* not till 21, because an Executor, by the Civil Law, may take that Office upon him at 17; But an Administrator being created by Statute, the Time of his full Age must be granted by the Common Law. Cumb. 475. Pasch. 10 W. 3. B. R. Atkinson v. Cornish.

1 Salk. 39. Freke v. Cornish, S. P. and says the Spiritual Court will not grant Administration to any under 21 by the Construction of the Statute of Distributions, because they are to give Bond &c.

13. A. was *born Feb. 1. at Eleven at Night*, and *January* 31, *at One in the Morning*; A. makes a Will of Lands and dies; it is a good Will, for

for he was then of Age; Said per Holt Ch. J. to have been so adjudged. 1 Salk. 44 Mich. 3 Ann. B. R. Anon.

41. An *Orphan* of the City *of London* at 17 made a Will of his Share of the legatory Part of her Father's Personal Estate, who was dead Intestate, and held good by the Statute of Distributions, but dying unmarried, and before 21, her Orphanage Part survived, and she could not devise it. 2 Vern. 558. pl. 506. Trin. 1706. Wilcox v. Wilcox.

Infant of 14 may make a Will Comb. 50. Pasch. 3 Jac. 2. B. R. Anon.

(I. 3) Cases wherein a Feme Covert and an Infant differ.

1. THE *Deed of a Feme Covert* with her Baron shall not be inrolled because it is not the Deed of the Feme, and so see that Deed of a Feme Covert is void. Br. Coverture, pl. 47. cites 7 E 4, 5.

2. If an Infant is made *Executor*, he *may make Release or Acquittance of the Debt of the Testator*, and *may sell the Goods*, and give and distribute them; But Feme Covert Executor cannot do so without her Baron. Br. Coverture, pl 56. cites 21 E. 4. 24. per Littleton.

3. *Statute Staple nor Deed inrolled* shall not be accepted of a Feme Covert by the Common Law; Contra by the *Custom in London*, nor *Fine*, *Statute*, nor *Deed inrolled*, shall not be suffered by an Infant. Br. Coverture, pl. 59. cites 32 H. 8.

4. If an Infant *by Indenture bargains and sells* Lands for Money, and after *levies a Fine* come ceo que il ad de son Done &c. this Indenture is not void but voidable, and the Use passes by the Bargain; then the Fine being levied upon it the Bargain is irrevocable unless for Error; As if Baron and Feme bargain and sell their Lands by Indenture, though the Indenture be void against the Feme, yet a Fine and Recovery upon it shall bind her for ever, the Indenture declaring the Will of the Feme how the Use shall pass. Mo. 22. pl. 73. Pasch. 2 Eliz.

5. An Infant and J. S. were bound in a *Bond for the Debt of the Infant*; The Infant *at full Age promised to save harmless* J. S. and died; An Assumpsit lies against the Executor of the Infant; But if a Feme Covert being so bound had, *after her Husband's Death, promised* to save her Surety harmless against such Bond, such Assumpsit should not have bound the Wife. Godb. 138. pl. 164. Mich. 27 Eliz. B. R. Barton v. Edmunds.

3 Le. 164. pl. 215. Edmond's Case, S. C. and per Curiam clearly, tho' here was no present Consideration upon which the Assumpsit could arise, yet upon the whole Matter the Action lies, and Judgment was given for the Plaintiff. —— 4 Le. 5. pl. 22 S.C. adjudged. —— Cro. E. 126, 127. in pl. 7. S.C. cited as adjudged.

6. If Feme Covert *delivers Goods Trespass lies*, but it is otherwise of an Infant if he delivers them *with his own Hands*; Arg. Lat. 10. cites it adjudged to this Purpose, Pasch. 32 Eliz. Rot. 1017.

7. An Infant may do *any Act to his Advantage*, which a Feme Covert cannot, As a *Lease* made by Infant is voidable only, but by Feme Covert is void; So of a *Bond* by Feme Covert, she may plead Non est Factum, but so cannot an Infant, but he must plead the Special Matter that he was within Age.

8. *Lease*

8. *Leafe by* Infant *referving no Rent* is void; But otherwife of Baron and Feme; For Baron has Power, and the Feme joining in the Leafe it is not void, for the may affirm the Leafe by bringing a Writ of Wafte, or by Acceptance of Fealty; Adjudged. Hutt. 102. Hill. 4 Car. Anon. cites 2 Rep. 61. in Wifcott's Cafe.

9. A Feme Covert is not capable to *make a Contract*, becaufe fhe is fub poteftate Viri, and though it be for Neceffaries of Diet and Apparel, that fhall not charge the Husband, but an Infant's Contract for fuch Things is good; Arg. Hutt. 107. Mich. 5 Car. in Cafe of Bill v. Lake.

10. Feme Covert *Executor* cannot *affent to a Legacy*, but an Infant of 18 may. Sid 188 pl. 14. Pafch 16 Car. 2. B. R. Cookes v. Bellamy.

5 Rep. 27. Ruffel's Cafe. S. P.— But not before 17; Arg Roll Rep. 248. cites 5 Rep. Prince's Cafe, 29. b.

11. Infants and Feme Coverts may *execute Powers*; Admitted, Arg. 9 Mod. 17. Mich. 9 Geo.

Contra as to Infants, per the Mafter of the Rolls, becaufe they are only Inftruments. 21 Mar. 1738. in Cafe of Colton v. Hoskins,

(K) *What* Things fhall *bind* an Infant by Agreement *at* his *full Age*.

1. If a Leafe for Years **be made** to an Infant rendering Rent, **the** Rent is arrear, **and after the** Infant comes of full Age, and **afterwards** continues the Occupation **of the Land, this will make him chargeable with the Arrears incurred during his Infancy. Pafch. 11 Ja. B. R. between** *Kettle and Elliot* **adjudged.**

Cro. J. 320. pl. 1 Ketfey's Cafe, S. C. adjudged that he was chargeable, becaufe he was of full Age before the Rent Day came ——— Brownl. 120. S. C. adjudged accordingly ——— 2 Bulft. 69 Kirton v Eliot, S. C. adjudged againft the Infant, but no Notice is taken there of his having attained his full Age.

2. *Exchange* of an Infant is good by Agreement at full Age. Br. Coverture, pl. 17. cites Hill. 12 H. 4.

3. If an Infant *makes an Indenture*, and *at the full Age binds himfelf to perform it*, he fhall not avoid the Indenture. Br. Coverture, pl. 28. cites 14 H. 8. 29. per Brudnell.

4. *And* if an Infant *fells a Horfe for* 10 *l* and *brings Debt* of the 10 l. *at full Age*, he fhall not avoid the Contract. Br. Coverture, pl. 28. cites 14 H. 8. 29. per Brudnell.

5. *So* if he makes a *Leafe* referving Rent within Age, and *accepts Rent* at full Age. Br. Coverture, pl. 28. cites 14 H. 8. 29. per Brudnell.

When he came to full Age he faid, "God give "you Joy "of it." It was held by Mead J. that thereby the Leafe was affirmed and made good. 4 Le. 4. pl. 15. Mich. 24 Eliz. C. B. Anon.

6. If an *Infant poffeffed of a Term for Years fells it for Money, and after he comes of full Age receives Part of the Money* for it, he fhall avoid the Grant notwithftanding; for the Contract being void in the Commencement it cannot be made good by any fubfequent Act; per totam Curiam. Dal. 64. pl. 25. 6 Eliz. Anon.

7. Father

7. Father of Infant leafed the Son's Lands for 20 Years; at full Age the Son, upon the Back of the Indenture, *releas'd to the Defendant all his Right*; Per Wray, this Leafe by Father, as Guardian, was voidable only by the Son, and then fuch Indorfement is a good Affignment. 2 Le. 220, 221. pl. 278. Pafch. 18 Eliz. B. R. Anon.

8. If Infant makes a Deed of *Feoffment*, or Leafe for Life, *to commence in Futuro*, and *at full Age makes Livery*. G. Crook holds clearly that this is good Feoffment; Quære of *Feme Covert*, for her Deed is void. 2 Roll Rep. 109 Trin. 17 Jac. B. R. Anon.

9. Infant, *Reverfioner in Fee of an Advowfon*, during the Eftate for Life *grants next Avoidance*, and at full Age reciting the faid Grant conceffit & confirmavit prædictam Advocationem Habend' quando contigerit vacare. This is a Confirmation during the Life of the Tenant for Life. Hetl. 20 Trin. 3 Car C. B. Stevens and Crofs v. the Bifhop of Lincoln, Holmes and Halworth.

If an Infant grants an Advowfon, and at full Age confirms it, all is void Arg. Godb. 364. cites 26 H. 8. 2.

10. Affumpfit was againft an Infant that *contracted for a Coach and Horfes and gave his Obligation* for the Money; afterwards, *on his coming to full Age, he promis'd Payment.* Per Cur. The *Obligation is only voidable and extinguifhes the Contract*, and fo the Affumpfit at full Age is without Confideration. And by Wilde J. the Infant may *plead non affumpfit*, and his Infancy is fufficient Evidence; And Judgment for the Defendant Nifi. 3 Keb. 798. pl. 55. Trin. 29. Car. 2. B. R. Tapper v. Davenant.

(L) Offence in Cheating or Impofing upon Infants. How punifhed.

1. H. Knowing that S. was within Age *procur'd him to acknowledge a Recognizance of Debt to him for Wares fold*; for which after the Death of S. he was fined 100 l. and imprifoned. And note other fuch Cafes, viz. **Calmadey's Cafe** and **Herlakendon's Cafe** were cited for Precedents of the Court, that they being Infants were inticed to enter into Recognizances and Statutes by thofe who knew them to be within Age. Mo. 555. pl. 752. Pafch. 41 Eliz. in the Star-Chamber. Strangewayes v. Hicks.

Noy 96. S. C accordingly.

2. A *Fine* was levied *by an Infant of the Age of* 13. The *Court fined* Sir Nich. Roe and the other *Commiffioners, and threatned all that had a Hand* in the promoting it. Freem. Rep. 78. Trin. 1673. C. B. Petty's Cafe.

(M) Pleadings.

1. *Confeffion* of an Infant *of a Plea in Formedon which abates the Action of the Infant* was taken; quod nota. Br. Coverture, pl. 81. cites 3 E. 3. and Fitzh. Enfant 14.

2. An Infant who is *vouch'd* may *appear the firft Day, and render the Action.* Br. Coverture, pl. 58. cites 18 E. 3. and Fitzh. Voucher 12.

3. In Affife Infant *pleaded Ne unques Accouple* &c. *againft the Plaintiff*, and certified it againft him by the Ordinary, and yet the Affife was awarded in Point of Affife, becaufe the Infant cannot be convicted Diffeifor by his Confeffion or Nient Dedire, but by Verdict or the like. Br. Coverture, pl. 38. cites 28 Aff. 52.

4. *Assise* is brought *by an Infant by Guardian*; the Infant came and *disavow'd the Suit*, and was of the Age of 17 Years. Persey said this shall not be accepted; for it may be that it is by Duress, and this is a Retraxit which is a Bar; Shard dubitavit et adjornatur. Br. Coverture, pl. 39. cites 28 Ass. 52. Brooke makes a Quære and says, see 34 Ass. 5. that in such a Case Thorp would not suffer the Infant to disavow, but awarded the Defendant to answer, quod nota.

5. An Infant who brought *Mortdancester* by Prochein Amy would have *disavow'd his Suit*, and was not suffered; for Infant. Br. Coverture, pl 73. cites 34 Ass. 5.

6. An Infant Plaintiff *shall not confess Deed of Lease for* Term of *Life without Impeachment of Wast* pleaded against him in Quid Juris clamat, but it shall attend till his full Age. Br. Coverture, pl. 7. cites 43 E. 3. 5.

7. In Assise it was agreed, that *nothing shall be said to be Nient dedit of an Infant*, so that where Release of the Ancestor of the Plaintiff in Assise with Warranty was pleaded to be made to J. and his Heirs, que Estate the Tenant has, and the Plaintiff says that J. had nothing but for Term of Life, Remainder in Tail to the Plaintiff, and that the said J. is dead, and he entered as in his Remainder, and the Tenant said that the Remainder in Fee was to the right Heirs of the said J. for Default of Issue of the Plaintiff, and thereupon they were adjourn'd; and at the Day of Adjournment the Tenant, who was an Infant, said that at the Time of the Release J. was seised in Fee, which Matter he cannot say after Adjournment; yet it was held that the Assise shall be at Large thereof in Advantage of the Infant, because nothing shall be held to be Nient dedit of him; quod nota. Br. Coverture, pl. 8. cites 44 E. 3. 10.

Br. Coverture, pl 14 cites 48 E. 3. 34.

8. *Scire Facias to execute a Fine* levied *by R. M. to W.* sur Conusance de droit come ceo &c. and *W. rendered to R. M. for Life, the Remainder to the Father of the Plaintiff whose Heir he is* &c. and that *R. is dead*, and the *Plaintiff as Heir in Tail pray'd Execution*, and the *Tenant said that R. M. who levied the Fine* had no such &c. *but for Life*, the *Reversion to him, and this Estate continued and R. M. died, and he enter'd*, and the *Plaintiff who was an Infant*, and *by Guardian confess'd it*, and it was held by the best Opinion that the Confession shall not be taken, by Reason that he is an Infant. Br. Confession, pl. 8. cites 48 E. 3. 33.

Br. Coverture, pl. 14. cites S. C.

9. For per Belk. an Infant shall *not be bound by for Nihil dicit when he is Plaintiff*; *contra* where he is *Defendant*; For there the Plaintiff ought to be answered. Br. Confession, pl. 8. cites 48 E. 3. 33.

10. And per Kirton and Belk where an Infant *avows for Rent* &c. and the *Plaintiff pleads Release of the Father of the Infant*, there he shall answer to the Deed, Contra Wich. Br. Confession, pl. 8. cites 48 E. 3. 33.

Br. Coverture, pl 14 cites S. C.

11. But it was agreed, that in *Assise* brought *by an Infant*, and *Recovery is pleaded against him* he shall answer to it. Br. Confession, pl. 8. cites 48 E. 3. 33.

Br. Coverture, pl 14 cites S. C.

12. *But* if *Deed with Warranty and Assets* be *pleaded*, the Assise shall inquire of the Circumstances for the Infant. Br. Confession, pl. 8. cites 48 E. 3. 33.

Br. Coverture, pl. 14. cites S. C.

13. *But* if such Deed and Assets be pleaded *in Formedon* on *Præcipe quod reddat*, Parol shall demur. Br. Confession, pl. 8. cites 48 E. 3. 33.

14. And per Belk. in Scire Facias *Deed of the Ancestor inroll'd with Assets descended* is pleaded against an Infant Plaintiff, and the Infant pleads, that Riens per Descent the Plea shall not be taken, but the Parol shall demur. Et adjornatur. Br. Confession, pl. 8. cites 48 E. 3. 33.

15. An

15. An Infant *might join the Mise by Battel*; For it shall be tried by Champion; but he cannot be try'd by Battel in Appeal; For this shall be done in proper Person, and therefore the Defendant *shall not join Battel* against an Infant in Appeal. Br. Coverture, pl. 79. cites 9 E. 4 34.

16. In a *Writ of Right* it was agreed by Danby and Moyle, that an Infant shall *not be permitted to confess the Action* by reason of his Infancy, quod nota. Br Coverture, pl 79. cites 9 E. 4. 34.

17. Where a Man *prescribes that an Infant may alien when he can measure an Ell of Cloth*, he ought *to shew of what Age the Infant was when he aliened*, and that he then could measure an Ell of Cloth. Br. Coverture, pl. 66. cites F. N. B. Dum fuit infra Ætatem.

18. Against a *Deed inrolled* a Man may plead *Infancy*, though none can plead *Non est Factum*. Per Manwood Ch. B. 2 Le. 65. in pl. 89. Pasch. 31 Eliz. in the Exchequer, in Sir Wm Pelham's Case.

19. Error upon a Judgment in C. B. in an *Ejectione Firmæ* brought *by a Guardian in Socage*, because he has *not shewn in the Writ that the Heir was within Age at the Time* &c. But by the Court it is yet good, and Judgement affirmed. Noy 135. Trin. 7 Jac. B. R. Symonds v. Barham.

20. In *Replevin against three*, they all made Cognizance by Attorney, and Judgment being given for the Plaintiff a Writ of Error was brought in B. R. and the *Error assigned* was, *that one of the three Defendants was an Infant*, but it was disallowed; for per Holt Ch. J. *this Matter was pleadable in Abatement, and therefore not assignable for Error.* 3 Salk. 197 pl. 13. Mich. 2 W. 3. Score v. Bowles.

21. In *Assumpsit for Money lent, and* for Money *laid out to the Use of* the Defendant's Wife dum sola. Upon non Assumpsit pleaded it was on a Reference agreed by the Judges, that *the Infancy* of the Feme at the Time of the Promise *might be given in Evidence* as it usually hath been of late. 1 Salk. 279. Pasch. 5 W. & M in C. B. Darby v. Boucher.

(N) Cases in Equity as to Infants.

1. A. Being to convey Lands to B. he *between the Date and Execution of the Conveyance to B. conveyed the Lands to J. S. an Infant*, wherefore B. had an Order against A. and the Infant was concluded. Toth. 172. cites 11 Nov. 6 Eliz. Altham v. Ld. Morley.

And Ibid. cites 6 Jan. 36 Eliz Preston v. Trinity (College) and Wood.

2. An Infant *Plaintiff* was *committed to the* Prison of the *Fleet for not obeying a Decree.* Toth. 172. cites 11 & 12 Eliz. Oliver and King v. Challoner.

3. The Defendant made *secret Conveyances (pending the Suit to defraud the Plaintiff* being *an Infant*; The Defendant was bound by Recognizance to discharge all Estates so made. Toth. 172. cites 12 Eliz. Digman v. Hamon.

4. A Bill of Review because the Decree was against an Infant; My Lords Declaration was, that it shall *bind an Infant* as well as at full Age. Toth. 133. cites Mich. 7 Car. Cromwell v. Carey.

5. A. died leaving a Widow and a Son. The Widow being about to Marry J. S. she and the Son and J. S. agreed by Articles that J. S. should

should take Administration, and should enter into a Statute to pay so much Yearly till he should come of Age. J. S. entred into the Statute and took Administration, and with the Personal Estate purchased Lands in Fee, but died much indebted, and in Arrears to the Plaintiff, and because the *Estate* could not be *during the Minority* of the Son and Heir of J. S. who was an Infant, it was *decreed against the Infant and his Guardian*, that the Plaintiff, the Conusee, should hold till he is satisfy'd his Debt and Arrears. N. Ch. R. 45. Anno 1649. Morton v. Kinman and Poplewell.

6. If an Infant *suffers a Decree* against him by Consent, he may at any Time reverse it for that Error of his being an Infant; Otherwise if he be *Defendant by an Adversary Bill*, and a Decree be pronounced; Per Ld. K. Bridgman 3 Ch. Rep. 21. 10 Nov. 1666 Anon.

7. A Messenger of the Court may be sent to bring in an Infant, and when he comes in the *Court may assign one of the Six Clerks* as a *Guardian to appear and answer*; Per Sir John Churchill, but not approved of Per Ld. Keeper. 2 Chan. Cases 164. Trin. 36 Car. 2. Anon.

8. It was said that there was no Precedent in Equity that the Parol should Demur, but that Infants were Suable there, and Ld. North cited the Case of Baron Weston v. Dandy, which was thus, viz. Baron Weston had a *Debt* due to him *by Bond*, *wherein the Heir was bound*, but it happened that for *three Descents the Heir was still an Infant*, and so the Parol demurred at Law, till the Interest much exceeded the Penalty of the Bond; And Mrs. Danby having been all along *Guardian to these Infants* and *received the Profits* of the Estate, and converting them to her own Use, the Baron therefore brought an Action against her, and called her Admistratrix to these Children; but the Baron's Policy did not prevail. Vern. 173, 174. Trin. 1683. in Case of Creed v. Covile.

9. Whether Chancery will *decree Satisfaction of a Bond-Debt of the Ancestor's* out of the Profits of the Real Estate, *during the Minority of the Heir*, where there is a Deficiency of Personal Assets; Master of the Rolls declared he thought such a Decree just, and if such Case came before him he would decree accordingly; Sed dubitatur. Vern. 428. pl. 403. Hill. 1686. March v. Bennet.

10. An Heir, together with other young Heirs, is *drawn in to buy Goods at extravagant Prices, and to accept of Assignments of bad Securities, joined in giving Securities for the Monies agreed on.* He shall be relieved on paying the Value of the Goods which came to his Hands, and *shall not be Answerable for his Companions.* 2 Vern. 77. pl. 71. Trin. 1688. Lampiugh v. Smith.

The Plaintiff was likewise a young Heir, and had been drawn in to buy Ribbands and braided Wares &c. at an extravagant Price &c. the Case being the same in Effect with the Case immediately preceding, had the like Rule. 2 Vern. 78. pl. 72 Trin 1688. Whitley v. Price.

11. This Court has often decreed *building Leases* for 60 Years of Infants Estates where it is for their Benefit; Per Cur. 2 Vern. 225. in pl. 204. Pasch. 1691. in Case of Cecil v. Salisbury (Earl of).

12. A. seised of *Freehold and Copyhold* Land surrenders to the Use of his Will, and then devises to B. *all his Goods, Chattels and Estate whatsoever, upon Condition* that she pay his Debts and Legacies, and makes B. Executrix and dies. On a Bill by the Creditors for Sale of the Estate, the personal Estate being deficient, the Court thought the Words, with other Circumstances of the Case, would pass the Lands, and decreed a Sale, and the Heir to join when he comes of Age, but he being an Infant, Day was given him to shew Cause after he comes to Age. Ch. Prec. 37. pl. 38. Mich. 1691. Lumley v. May.

13. *A*

13. *A. agreed to give her Son other Lands in lieu of Lands intailed*, and gives the intailed Land by Will to her Daughter, and the *Son gives Bond to suffer the entailed Lands to be enjoyed as she by Will had devised them.* The *Son dies, and leaves D. his Son an Infant*, who brought Ejectment; The Bond was not suable against him because an Infant; Per Cur. the Infant being in Possession of the Lands that came in Recompence, we will at present only *quiet the Plaintiff's Possession* in the entailed Lands *till six Months after the Infant comes of Age*, and then *he may shew Cause* if he thinks fit. 2 Vern. 232. pl. 212. Trin. 1691. Thomas v. Gyles.

Equ. Ab. 281. (B) pl. 5. S. C.

14. The King as Pater Patriæ has the Directions of Charities, Infants, and Ideots, Lunaticks &c. and so fall under the Directions of Chancery, where the Interest of Infants is so far regarded that no *Decree against an Infant* shall be made without having a Day given him to *shew Cause after his full Age.* By his *Prochein Amy* he may *call his Guardian to Account*, even during his Minority. If a Stranger enters and receives the Profits of an Infant's Estate he will in Equity be looked upon as Trustee for the Infant; Per Ld. Somers. 2 Vern. 342. Hill. 1697. in Case of Cary v. Bertie.

In Cases of *Trusts* Infants are always bound to the Decree of this Court, and so where the *will of the Ancestor is contested*; and there is *scarce any Case where an Infant has Time to shew Cause but where it is necessary he should join in a Conveyance* to compleat the Estate, and where such Conveyance is of the Inheritance, as Foreclosures &c. Per Cur. 9 Mod. 128. Hill 11 Geo. in Case of Whitchurch v. Whitchurch.

15. Lands *devised to be sold for Payment of Debts* may be decreed to be sold without giving the Heir a Day to *shew Cause*, tho' an Infant, for in this Case nothing descends to him; Per Wright Keeper. 2 Vern. 429. pl. 391. Hill. 1701. Cook v. Parsons.

But if he had been decreed to have *joined in Conveyance*, there he must have had a Day after he came of Age. Ibid ——Chan. Prec. 37. Lumly v. May.——An Infant Heir, in Case of a Will devising the Lands to Trustees to pay Debts, who sold the same was decreed to *relinquish his Right* to the Purchasor and his Heirs when he shall come of Age. Fin. R. 380. Trin. 30 Car. 2. Travel v. Danvers

Tho' the Trustees in the Case above of Cook v. Parsons might have sold without coming to the Court for the Directions, yet if they do come it may be a Question, if the Infant Heir ought not to have a Day to shew Cause; Per Ld. K. Ch. Prec. 185. S. C.

16. The Effects of an Infant's *Answer to a Bill in Chancery* is to no other Purpose than to make proper Parties so as to have an Opportunity to take Depositions, and to examine Witnesses to prove the Matter in Question, and an Infant is never concluded by any Matter contained in his Answer by his *Guardian*. Carth. 79. Mich. 1 W. & M. in B. R. in Case of Eccleston v. Speke.

If an Infant puts in an Answer by Guardian and there is *a Decree* against him, *without any Day* given him *to shew Cause*, such Answer shall not be read or admitted as Evidence against him when he comes of Age; *But* if *a superannuated Defendant* puts in an Answer by his Guardian it shall be read against him at any Time after, for he is supposed to grow worse, and is not to have a Day to shew Cause; Per Lord Keeper. Abr Equ Cases 281. Trin. 1704 Sir Richard Leving v. Lady Caverley.——Chan. Prec. 229 S. C. & S. P. agreed per Curiam accordingly.

17. An *Estate is given to B. and the Heirs of her Body, and if she left no Sons and only two Daughters, the Eldest to pay the Younger* 300 *l. and to have the whole Estate.* She leaving only two Daughters, and the *Eldest neglecting to pay the* 300 *l. the Younger brought a Bill for an Account of Profits, and for Possession of half the Estate*; and at the Rolls obtained a Decree, that the Defendant should pay the 300 l. with Interest from the Mother's Death in six Months, or in Default thereof, to account for Profits of a Moiety; and the Moiety to be set out by Commissioners, and the Plaintiff to hold and enjoy it accordingly. Upon an Appeal to the Lord Keeper the Decree was to stand as to the Account of Profits and Partition; But the Defendant being an Infant,

 the

the Words *hold* and *enjoy*, which amounts unto a Foreclosure, to be struck out, or Defendant to have a Day after she comes of Age to shew Cause. 2 Vern. 479 pl. 434 Hill. 1704. Gundry v. Baynard.

Infant is not *concluded* by any Thing contained in the Guardian's Answer. Carth 79. Eccleston v. Speke —— A. seised in Fee devised his Land to his Wife for payment of his Debts and dies, leaving an Infant his Heir. The Creditors brought a Bill and the Infant was made Defendant, who answer'd by Guardian, and the Estate decreed to be sold. The Infant was allowed to *put in a new Answer upon her coming to Age*, (the Decree not being made absolute) and the Master of the Rolls said, he understood that this was a Matter of Course, and that when the Court gave him Liberty to shew Cause, it was not Reason to tie up his Hands from shewing Cause Wms's Rep. 504 Mich. 1718. Fountain v Cain and Jefts. —— S. P. by the Master of the Rolls, and said he had granted the same upon a Petition Ex Parte. 2 Wms's Rep 403. Hill. 1726. and same Point then decreed by Ld. C. King, assisted by his Honour. Sir John Napier v. Lady Effingham. And a Note is added by the Reporter; that the *Consequence of putting in a new Answer is*, that he may examine Witnesses de Novo to prove his Defence, which may be different from what it was before. Ibid.

18. Regularly an Infant's *Answer by his Guardian* shall not be *read*, but if the Cause be brought to Hearing *at his Request* after his full Age it may. But the Infant at his full Age might (as his right Way is) have applied to the Court, and set forth how he is grieved by the Decree, and might have had Leave to *amend or alter his Answer* or any Part of it, or put in a new One, but he not having done so, it shall be presum'd that he abides by that Answer, and so it was read against him; Per Ld. Cowper. Gilb. Equ. Rep. 4. Hill. 6 Ann. Ld. Guernsey v. Rodbridges.

An Executor or Overseer who has Power by the Will to act in every Thing for the Advantage of the Infant, may lay out Part of the Personal Estate in a Purchase of Lands in the Infant's Name. But if he lends the Money on a bad Security he must answer it out of his own Pocket. Chan. Prec. 273. pl. 222. S. C.

19. Chancery may *decree an Executor or Trustee to purchase* Lands for an Infant, and consequently may confirm a Purchase made by them for an Infant without a Decree. Gilb. Equ. Rep. 11. Hill. 7 Ann. in Chancery. Terry v. Terry and Ragget.

20. If a Man during a Person's Infancy *receives the Profits of an Infant's Estate, and continues to do so for several Years after*, the Infant comes of Age before any Entry is made on him, yet he shall account for the Profits throughout, and not during the Infancy only; Decreed. Abr. Equ. Cases 280. Pasch. 1699. Yallop v. Holworthy.

21. Infant *Devisee of Lands in Mortgage, whereby an after Part of the Will all Testator's Debts* in general *were made payable out of other Lands* had *by her own Bill submitted to pay off this Mortgage*; But the Master of the Rolls said, that he must take Care of the Infant, and not suffer her to be caught by any *Mistake of her Agent*, and ordered that paying the Costs of the Day she might amend her Bill. 2 Wms's Rep. 387. Mich. 1726. Serle v. St. Eloy.

22. Where an Infant conceives himself *aggrieved by a Decree*, he *may apply for Redress as soon as he thinks fit*, without staying till he comes of Age. Neither is he bound to proceed by way of Re-hearing, or Bill of Review, but may impeach the former Decree *by way of original Bill*, in which it will be enough for him *to say the Decree was obtained by Fraud and Collusion, or that no Day was given him to shew Cause* against it. Wms's Rep. 737. says it was so held Mich. 1721. in the Case of **Richmond v. Tayleur.**

And his Lordship's Secretary acquainted the Court that Mr Vernon in Case of an Erroneous Decree against an Infant used always to advise the bringing of an *original Bill to set it aside, but* in such a Bill *to allege specially the Errors in the former Decree*. Ibid

23. An Infant, when *Plaintiff*, is as much bound, and as little privileged, as one of full Age. Per Ld. C. King. 2 Wms's Rep. 519. Hill. 1728. Ld. Brook v. Ld. and Lady Hertford.

24. Bill

24. Bill to have a Discovery of the Defendant's Title to Lands in B mortgaged to the Plaintiff, and likewise to have an Account of the Rents and Profits thereof &c. The Case was, the Defendant's Father having Occasion to borrow the Sum of 300 l. the *Defendant was employed by his Father to solicit the Plaintiff to lend that Sum upon a Mortgage* of the Lands in B. which the Father made Affidavit of that he was seised in Fee, and that the Lands were free from Incumbrances; The *Defendant being then about the Age of 20 Years, did carry a Feoffment in Fee and Fine of the Lands of the Defendant's Father to the Counsel of the Plaintiff*, and the *Title was approved of, and the Money lent, and a Mortgage made* to the Plaintiff, and the *Defendant was a Witness to the Execution of the Mortgage-Deed, and likewise to the Payment of the Money.* The *Defendant's Father, after the Defendant came of full Age, took* 100 *l. more* upon the same Mortgage, and the *Defendant was privy to that Transaction, but not a Witness to the Deed or Payment of the Money.* The *Defendant by his Answer says, that at the Time of making the original Mortgage, he had heard the Lands were settled upon him after the Death of his Father, but had never seen the Settlement.* The Defendant after the Death of his Father refuses to pay the Mortgage, and claims the Lands as Remainder-man in Tail by Virtue of a Settlement by his Grandfather upon the Marriage of his Father &c. Counsel for the Plaintiff insisted that the Defendant, though an Infant at the Time of making the Mortgage, was liable to make a Satisfaction because he was Party to the Fraud, and was privy to the whole Transaction, and aiding and assisting to the Cheat, and that though an Infant cannot bind himself by Contract at Common Law, yet he is liable to Actions of Tort, as Trespass, Case for Words &c. So is he liable to a Forfeiture upon a Condition in Fact, or implied &c. So in Equity he is liable to make Satisfaction for a Fraud &c. Per Cowper C. If an Infant having a Remainder upon an Estate for Life be a Witness to a Mortgage made by Tenant for Life, I do not think this would bind the Infant, because if he was made a Party to the Deed, and sealed it, yet that would not bind him, and that is a much stronger Case, yet I am of Opinion in this Case the Defendant is liable, and ought to make Satisfaction to the Mortgagee, because at the Time of this Transaction he was very near being of full Age, and solicited the Plaintiff to lend the Money, and produced this Feoffment in Fee to his Father, (which appears now to be forged) and was principally concerned all along in the Fraud, when he knew at the same Time, as he admits by his Answer, that his Father was but Tenant for Life, with Remainder to himself. *If an Infant is old and cunning enough to contrive and carry on a Fraud*, I think in a Court of Equity *he ought to make Satisfaction for it.* Decreed accordingly. MS. Rep. Mich. 1 Geo. in Canc. Watts v. Creswell.

25. In all Decrees against Infants even in the plainest Cases a *Day must be given them to shew Cause when they come of Age.* Per Lords Commissioners. 2 Wms's Rep. 120. Hill. 1722.

Where there is a Decree Nisi Causa against an Infant he may, on his coming of Age and before the Decree made absolute, put in a new Answer. Wms's Rep. 504. pl. 145. Mich. 1718. Fountain v. Caine.

26. If a *Decree* be made *against an Infant* and a *Bill is brought to set it aside for Fraud*, yet if it be not fraudulent, though it may not be in every Respect so equitable as it ought to be, but the Court was fairly and fully apprised of every Thing at the making the Decree Ld. C. Macclefield said the Decree might be just, and therefore he would not set it aside, but that had any Fraud or Surprize upon the Court been

been proved, he would have done it. Wms's Rep. 734. Mich. 1721. Richmond v Tayleur.

Ibid. in a Note of the Reporter, says that an Infant's Answer by his Guardian is not Evidence against him, because the Infant is not sworn, and *it is only for making proper Parties*, and cites Carth 79. Eccleston v. Petty. And where an Infant is Defendant the Service of the Subpæna to hear Judgment must be on the Guardian and not on the Infant. See Wms's Rep. 643. Taylor v. Atwood. But where a Defendant puts in an Answer to a Bill brought by an Infant, who does not reply to it, in such Case it seems, the Answer must be taken to be true, in Regard the Defendant, for want of a Replication, is deprived of an Opportunity of examining Witnesses to prove his Answer; And he ought not to suffer for such Omission in the Plaintiff. So ruled at the Rolls, with some Warmth, by Sir Joseph Jekyll, in the Case of Thurston *and* Dechair, an Infant v. Hutton & Ux'. Trin. 1733. In which the Reporter was of Counsel with the Plaintiff, and much opposed the reading of the Answer; for that the Plaintiff being an Infant could admit nothing, and it might be very Mischievous, if by Reason of the Neglect of the Plaintiff the Infant's Guardian, or Prochein Amy, in not putting in a Replication to the Answer, such Answer should be read, and admitted to be true, though never so detrimental to the Infant's Inheritance. Ideo quære.

27. An *Infant's Answer cannot be given in Evidence against him* because *it is not the Infant's Answer, but the Guardian's*, and the Guardian is sworn, and not the Infant. 3 Wms's Rep. 237. Hill. 1733. in Case of Wrottesly v. Bendish.

28. An Executor, Administrator or Trustee for an Infant neglects to sue within six Years; the *Statute of Limitations shall bind the Infant.* 3 Wms's Rep. 309. Trin. 1734. Wych v. East India Company.

(O) Equity; where an Infant is Trustee.

1. 7 *Ann. cap.* 19. *S.* 1. I*T shall be lawful for any Person under the Age of 21 Years by the Direction of the Court of Chancery or Exchequer, by an Order made upon hearing all Parties on the Petition of such Person for whom such Infant shall be seised or possess'd in Trust, or of the Mortgagor or Guardian of such Infant, or Person intitled to the Monies secured upon any Lands whereof any Infant shall be seised or possessed by way of Mortgage, or of the Person intitled to the Redemption to convey any such Lands as the Court shall by Order direct, and such Conveyance shall be good in Law.*

It must be a Trust *expressly limited*, and not by Implication only. Quære M. 4. Nov. 1738. Warner v. Moore. —— A *Feme Covert Infant Trustee* is not within the said Statute, for she is not capable to do it, and the Husband is not capable. At the Rolls, Eodem Die in another Case

2. A Petition being exhibited upon this Act in Chancery set out the Conveyances in Trust to such and such, and that such a one being *Survivor was dead, and the Estate in Law devolved upon an Infant*, who was in Court; the Declaration of Trust was also read, and the Consent of the next Heir at Law to the Infant required, and then an Order was made for the Infant, by her Guardian, to convey over the Trust-Estate to Cesty que Trust, and the Conveyance to be settled by the Master. Ch. Prec 284. pl. 226. Pasch. 1709. Anon.

4. On the Marriage of A. with M. a Settlement was made, in which *A. was Tenant for 99 Years, if* he so long live, *Remainder to Trustees during the Life of A.* Remainder *to the first &c. Son of that Marriage in Tail*, Remainder *to the first &c. Son of any other Marriage*, Remainder over. They have a Son, and afterwards the Wife and both Trustees died. The Son being upon a Treaty of Marriage with J. S. which was like to be advantageous to the Family, a Bill was exhibited by the Father and Son against the *Heir of the surviving Trustee, an Infant, to join in making a Tenant to the Præcipe* in order to suffer a Common Recovery

covery for making a Settlement on the Son's Marriage. Ld. C Parker decreed accordingly, and that the Master direct a proper Conveyance, in which the Trustee should join. It was then insisted that the Heir of the Trustee (tho' an Infant) was a Trustee within the Stat. 7 Anne 19. and therefore it was *pray'd that the Infant Trustee might levy a Fine*, which must be good unless reversed during his Infancy. But his Lordship said, he did not know how he could direct the Judges or Commissioners to take a Fine from an Infant, but let the *Master direct a proper Conveyance.* Wms.'s Rep. 536. 538. Trin. 1719. Winnington v. Foley.

5. Infant to whom a Trust-Estate descends &c. is obliged to assign &c. by the late Act, and in a Case where a Freehold and *Inheritance came to an Infant who was a Feme Covert* Motion was made in C. B. for Leave to examine her, and the Court made a Rule to do it, non obstante Minoritate sua. Hill. 6 Geo. C. B. Ld. Fitzwilliams and Ux.

6. Where A. had purchased a Burgage-Tenure in Trust, and the Trustee died, and his Heir, an Infant, *acknowled'd that he was only a bare Trustee, and Proof being read that the Money was paid by A. though the Receipt in Writing was given to the Infant's Father*, but A. had been always in Possession of the Writings and Estate, being 40 s. a Year, Ld. C. King said he was satisfied that this was but a Trust resulting by reason of A.'s Payment of the Money, and it being of so small Value, and it being said his Lordship had made a like Order before, he ordered (though only upon a Motion or Petition and Reference to a Master) that the Infant convey, since a Decree would cost the Value of the Fee Simple; But that *for the future, where the Trust is not declared in Writing he would leave the Cesty que Trust to bring his Bill and have a Decree.* 2 Wms.'s Rep. 549. Trin. 1729. Ex Parte Vernon.

7. A. owed several Debts, and by his Will *devised Lands in Fee to an Infant, charged with all his Legacies*; The Infant is not a Trustee within the Stat. 7 Ann. cap. 19 as to so much of the Lands as may suffice for the Payment of the Debts and Legacies. 3 Wms's Rep. 389. in a Note of the Reporter cites Trin. Vac. 1730. at the Rolls. Anon.

8. The *Statute* enabling Infant-Trustees to convey, *extends only to plain and express Trusts*, not to such as are implied or constructive only. 3 Wms's Rep. 387. Mich. 1735. Goodwyn v. Lister.

(P) Allowances in respect of Infants.

1. A. the Father devised Lands and 40 l. in Money to his Son and Daughter; the Mother and her second Husband entered on the real Estate, and possessed himself of the personal Estate of Testator, and paid his Debts and Legacies, and *bred up and educated* the Infants, which amounted to more than the Income of the real Estate and the Interest of the 40 l. The Mother died, the *Father-in-law* offered a fair Account by his Bill, so that he might be allowed *for Necessaries*, and to pay the Defendant, now Guardian to the Infants, the Surplus, he being indemnified by this Court; which was decreed, and that the now Guardian give Security to pay the said 40 l. with Interest to the Infant according to the Will. Fin. Rep. 2. Mich. 25 Car. 2. Hall v. Yates.

Vern. 443. 446. S. C. but not S. P.

2. Where an *Infant recovers by a Decree of the Court*, the Court may, with the Approbation of the Infant's Relations, *allot the Infant a Maintenance, though no Provision is in the Trust* for that Purpose, and this is founded on natural Equity; Per Cur. 2 Vern. 236. pl. 219. Trin. 1691 Englefield v. Englefield.

3. 600 l. per Ann. was allowed by Chancery for the Maintenance of an Infant out of his Estate. *A Fit of Sickness* cost 143 l. extraordinary, which was allowed over and above his quarterly Maintenance; Per Ld. Macclesfield. Chan. Prec. 559. pl. 343. Hill. 1720. Lady Shaftsbury's Case.

4. In a *Foreclosure against an Infant*, though the Infant *has six Months after he comes of Age to shew Cause* &c. yet he cannot ravel into the Account, nor even redeem, but only shew an Error in the Decree. 3 Wms's Rep. 352. Hill. 1734. Mallack v. Galton.

5. An Allowance of Maintenance to a Guardian *must be in regard to what the Infant then had*, and not to what falls in afterwards. 3 Wms.'s Rep. 368. Trin. 1735. in Case of Chaplin v. Chaplin.

See Tit. Age (A) &c.

(Q) Equity. In what Cases the Parol shall demur in Equity.

1. WHETHER the Parol shall demur in *Equity* in Case of a *Descent of a Trust* to an Infant? See Vern. 173. in pl. 167. Trin. 1683. Creed v. Covile.

2. The Parol shall not demur in *Prior Incumbrances*, nor in *Trusts for Sales*, but in *Equities of Redemption* only. G. Equ. Rep. 66. Pasch. 7 Ann. in Canc.

3. Bill by a Bond Creditor *against the Heir and the Executor of the Obligor to have a Satisfaction of a Debt due upon the Bond out of personal and real Assets*; the *Heir insists that as to him the Parol ought to demur*, for that he is an Infant, and the Bill seeks to charge his Inheritance, which came to him by Descent from the Obligor; the Parol shall demur until the Defendant comes to his full Age, as well in this Court as at Law, which was not denied by Attorney-General Counsel pro Quer'. Ordered that the Cause should stand in Statu Quo until the Infant Heir come to full Age; but as to the other Defendant the Executor decree to account and make a Satisfaction out of personal Assets as far as they would go; Per King C. MS. Rep. Trin 12 Geo. Hazard v. Dixon.

1. *Lands are given to A and his Heirs for three Lives. A. dies*; his *Heir* does not take by Descent, so as to have his Age, or to make the Parol demur, but *takes as Special Occupant*; though had it been *in the Case of Lands in Fee descending* on an Infant, the *Parol should have demurred* in Equity as well as at Law. 3 Wms.'s Rep. 368. Trin. 1735. in Case of Chaplin v. Chaplin.

For more of Enfants in General, See Age, Fines, Guardian, Recoveries and other Proper Titles.

Enterpleader.

Enterpleader.

(A) Garnishment.

Of the *Plaintiff* and *Garnishee.*

[Or of whom it shall be.]

Fol. 732.

1. IF a Statute be acknowledged to a Dean and Chapter, and delivered to B till certain Conditions performed, though this B. is one of the Chapter, yet if the Conusor brings Detinue against him, he may say that it was delivered upon Condition, and Garnishment shall be granted against the Dean and Chapter. 13 H. 4. 8.

2 In Detinue of a Writing, the *Defendant said that it was delivered to him by the Plaintiff and one B who is dead, upon certain Condition to be performed to deliver* &c. and if the Condition be performed or not he does not know, and *prayed Garnishment P. Son and Heir of B. because the Charter concerned Inheritance,* and had it without averring the Death returned by the Sheriff, viz. upon Surmise; Quod Nota. Br. Garnishee, pl. 26. cites 21 E. 3. 41.

3. If the *Defendant confesses that the Garnishee has broke the Condition,* this shall not prejudice the Garnishee. Br. Garnishe, pl. 33. cites 39 E. 3 22.

4. In Detinue of Goods, the *Defendant said that they were delivered to him upon Condition, that if A. performed certain Conditions to the Plaintiff,* that they should be delivered to A. and otherwise to the Plaintiff, and *prayed Garnishment to A.* and had it, notwithstanding that A. be *a Stranger, and had no Writ pending thereof.* Br. Garnishe, pl. 38. cites 14 E. 4. 2.

(B) *How* it is to be * *prayed.*

* This by the Plea in Roll seems to be misprinted for [Pleaded]

1. IN Detinue, if the Defendant says it was delivered by the Plaintiff and another upon certain Conditions &c. this is good, without shewing what the Conditions were. 3 H. 4. 18. b. adjudged.

Br. Garnishe &c. pl. 17. cites S. C. and says the Reason seems to be, because the Defendant and one of the Parties shall not try the Conditions in the Absence of the other. —— Fitzh. Garnishe, pl. 19 cites S. C.

2. Action of Detinue *of a Bag of Evidences, and of a Charter special,* and the *Defendant said, that they came to his Hands as Executor, and that F. had entered into Part of the Land, and prayed Garnishment by Scire Facias against F.* and per Marten he shall not have Scire Facias but *where he confesses the Possession of the Thing demanded, and makes Privity of the Bailment;* Quære inde, For Cockyn and Marten held that Scire Facias lay well. Br. Garnishe, pl. 1. cites 3 H. 6. 35.

(C)

(C) What shall be a good *Counterplea* of Garnishment.

Br Garnishe &c pl. 6. cites S C. & S. P. per Marten. ——But Garnishee cannot plead such Plea, because by such Plea he varies in the Bailment from what was pleaded by the Defendant. Br. Garnishe &c. pl. 39 cites 20 E. 4. 13.

1. IN Detinue upon a Delivery to re-deliver, if the Defendant says it was delivered by the Plaintiff and another &c. it is a good Counterplea to the Garnishment that the Delivery was by himself alone, absque hoc that it was delivered by him and the other &c. 3 H. 6. 29. b.

2. In Detinue of a Writing, the *Defendant said that it was bailed to him upon Condition by the Plaintiff and he who is named in the Writing, and prayed Garnishment against him, and he had another Writ against the Defendant of the same Writing returnable now, and was demanded, and was nonsuited*, and yet notwithstanding the Nonsuit Garnishment was granted against him; Quod Nota. Br. Garnishe, pl. 14 cites 41 E. 3. 24

3. In Detinue, the *Plaintiff counted of a Bailment by J. G. to the Defendant to bail to the Plaintiff*, and the *Defendant said, that the same J. G. had brought another Writ of Detinue against him returnable at the same Court, and counted upon a Bailment made by himself to the Defendant to rebail to him*; The *Plaintiff said, that it was bailed to the Defendant to bail to him, absque hoc that it was bailed to the Defendant upon certain Conditions performed to rebail to the said J. G. Modo & Forma*, & alii e contra. Br. Enterpleader, pl. 4. cites 3 H. 6. 43.

4 Detinue *of two Obligations, one in which he was bound to T. H.* and *and another by which T. H. was bound to him*, the *Defendant said, that they were deliver'd upon certain Condition* &c. and pay'd Garnishment against *T. H.* and had it, who came by Scire Facias, and *said that the Obligations were deliver'd to the Defendant upon Condition that if the Plaintiff stand to the Arbitrement of A. B of all Actions &c. and this Award perform'd of his Part that then every one shall have Livery of his own Obligation, and if the one fulfils the Award and the other breaks it, that he who fulfills it shall have Livery of both Obligations, provided always that the said Award be made before Easter next, and said that the Arbitrator did not make any Award before Easter, and pray'd Livery of his own Obligation.* Port. upon his Conusance pray'd Livery of the Obligation of the Plaintiff and had it, and further pray'd Livery of the other Obligation; for he said that the Obligation was deliver'd upon Condition to stand to the Arbitrement &c. as above, and this fulfill'd as above that then the Obligation should be deliver'd as above generally, and *said that after Easter they awarded that the said T. H. should do such Things and shew'd what, which are not done, and that the Plaintiff should do such Things, and shewed what, absque hoc that the Obligation was deliver'd to the Defendant upon Condition to stand to the Award of the said Arbitrator with such Proviso as above, and pray'd Livery* Markham said, You ought to shew that you have perform'd the Award of your Part; Newton said No; But Paston contra, and that he ought to shew it, for it is shewn that he ought to perform the Arbitrement. Port. said I plead so for my Speed, but not de Rigore Juris only. Brooke says, it seems that he shall shew it de Rigore Juris, and the other shall maintain the same Issue alleging the Condition to be perform'd of his own Part. Br. Garnish, pl. 31. cites 21 H. 6. 52.

5. In

5 In Detinue the Defendant *pray'd Garnishment* and had it *against the Baron and Feme*, which was *challeng'd inasmuch as it shall be intended of the Livery of the Baron only, and he shall have Action*, and therefore he shall be warned only, and yet well here; For *the one is Original* and *the other is Judicial*, and there is a *Diversity where two are warned where only one should be warned*, and *where one is warned alone where two should be warned.* Br. Garnish, pl. 43. cites 8 E. 4. 15.

(D) Garnishment.

[What Pleas the Garnishee may plead.]

1. THE Garnishee shall not plead other Plea but Conditions performed. 20 H. 6. 29. b.

Fitzh. Garnishe, pl 9. cites S. C.

2. The Garnishee shall not say that he hath performed the Condition, contained in the Obligation for which the Writ is brought. 20 H. 6. 29. b.

Fitzh. Garnishe, pl. 9. cites S C & S. P. but he must plead that the Condition upon which the Obligation was delivered is performed.

3. Detinue against an Abbot, the Defendant pray'd Garnishment against R. by reason of Delivery upon Condition &c. and R. came and *said* upon the Scire Facias *that the Abbot is depos'd, Judgment of the Writ of Scire Facias*, and the Opinion of the Court was, that he shall not plead in Abatement of it, quod nota; For per Babb. it is his own Writ, and by him he shall not plead in Abatement of the Writ of Deliverance. Br. Garnishe, pl. 4 cites 3 H. 6. 4.

(E) What Pleas the Garnishee may plead.

1. IN Detinue, the Defendant says it was delivered by the Plaintiff and B. upon Condition, and prays Garnishment. B. comes and says that he solely delivered it, and it is not a Plea, for he is warned to answer whether the Conditions are performed or not, and therefore the Plea varies. 12 E. 4 13. b. Curia. Dubitatur, * 3 H. 6 50. † 14 H. 6. 11.

*Fitzh Garnish, pl. 4. cites S. C.

† Fitzh. Garnishe, pl. 7. cites S. C. —— Br. Enterpleder, pl. 15. cites S. C. that if Garnishee comes and says that it was delivered by him alone, the Plaintiff shall recover the Writing; For by the Garnishment the Defendant is out of Court, and cannot rejoin to the Plea of the Garnishee. Br Enterpleader, pl. 15. cites 14 H 6. 11. —— Br. Charters de terre, pl. 43. cites S. C —— S. P. Br. Garnishe, pl 39. cites 20 E. 4. 13. —— Br. Enterpleder, pl 24 cites S C. —— S. P. for if he should be allowed to plead so, the Plaintiff should have Delivery against the Defendant, and yet the Garnishee should have Action against the Defendant

2. The Garnishee shall not say they were delivered upon other Conditions than the Defendant hath said, for the Garnishment is only to know whether the Conditions are performed, and if the Defendant hath mistaken the Conditions he shall be charged by both, and so the Garnishee at no Mischief. ‡ 40 E. 3. 11. b. 3 H. 6. 50. ‖ 21 H. 6. 35. ¶ 14 H. 6. 11. b. Contra 43 E. 3. 28. b.

Defendant alſo, he having a, here charged himſelf to both; Per Paſton; And by him the Garniſhee cannot vary from the Condition alleged by the Defendant; For ſhould he do ſo, the Plaintiff ſhould have Delivery as above, and the Defendant ſhall be charged by his Folly; quod Cockain did not deny. Br. Garniſhe &c. pl. 6. cites 3 H. 6. 50. —— And Nota, that where the *Defendant* in Writ of Detinue *admits the Writ and the Count*, and prays Garniſhment, the Garniſhee when he comes ſhall not plead in Abatement of the Writ or the Count which the Defendant has admitted; Quod Nota per Curiam. Br Garniſhe &c. pl. 6. cites S. C. — He ſhall not plead to the Writ, nor caſt *Protection* after Appearance. Br. Garniſhe &c. pl. 9 cites 20 H. 6. 28. by Newton and Askew.

‡ Br. Garniſhment, pl. 12. cites S. C. —— Fitzh. Garniſhment, pl. 28 cites S. C.

|| Br. Garniſhe &c pl. 30. cites S. C. —— Fitzh. Garniſhe, pl. 16. cites S. C.

¶ Fitzh. Garniſhment, pl. 7. cites S. C. —— Br. Enterpleder, pl. 15. cites S. C.

Fol. 733.

N.B there is no pl. 4. in Roll.

3. **The Garniſhee cannot Plead that they were** delivered to the Defendant and a Stranger **not named.** 3 **H.** 4. 7. **b.**

Br Garniſhe &c. pl. 27 cites 7 H. 4. 34 — Fitzh. Garniſhe, pl 6. cites S. C. —— In Detinue the *Garniſhee ſhewed two Conditions, and that he had performed them, and demanded Delivery*; The *Plaintiff ſaid, that they were delivered upon thoſe Conditions and others, which the Garniſhee has not performed, abſque hoc that theſe are all* &c. Br. Garniſhe, pl. 41. cites 9 H. 6. 14.

5. But **vide** 7 **H.** 6. 3. 4. **b.** 40. **b. that the Defendant ſays, that it was** delivered upon Condition, without ſhewing any Condition, and **when the** Garniſhee **comes he** ſhall ſhew the Conditions, **and the** Plaintiff may ſay **it was delivered** upon other Conditions in certain, and traverſe **other Conditions alledged.**

Fitzh Garniſhment, pl. 16 cites S. C. — Br. Garniſhe &c pl. 30. cites 21 H. 6. 36. —— And See pl. 1. 2 ſupra in the Notes.

6. **In Detinue upon a Bailment** in one County, **the** Defendant ſays **it was** bailed by him in another **&c. the Garniſhee cannot** traverſe the Bailment in this County, **for it is** admitted by the Defendant 21 **H.** 6 35 **adjudged.**

7. **The Garniſhee ſhall not plead** a Grant of the Plaintiff by Deed after the Delivery, **that he ſhould have the Deed** upon certain Conditions **performed,** which he had performed. **Contra** 20 **H.** 6. 29.

Br Garniſhe, pl. 12. cites 40 E. 3. 11. S. P. —— Fitzh. pl. 28 cites S. C.

8. **The Garniſhee cannot plead an** Accord between himſelf and the Plaintiff after the Delivery to do other Things **&c.** without Writing. 40 **E.** 3. 12.

* Br. Garniſhe, pl. 16. cites S. C. — Fitzh. Garniſhe, pl 32 cites S. C — Br. Garniſhe &c. pl. 33. cites S. C.

9 **The Garniſhee may plead the** Releaſe **of the Plaintiff** after the Delivery of all Debts and Claims, **and bar him.** * 49 **E.** 3. 13. **b. Dubitatur,** 39 **E.** 3 23 **adjudged of all Actions Releaſe, Contra** † 20 **H.** 6. 28. **b.**

† Br. Garniſhe, pl. 9. cites S. C. —— Fitzh Garniſhe, pl 9 cites S. C.

10. **The Garniſhee may plead a** Releaſe **of the Plaintiff made to him.** 3 **H.** 6. 18.

11. So **he may plead his Releaſe** of all Actions Perſonal after the Conditions broke. **Dubitatur** 14 **H.** 6. 11.

12. But not **ſuch Releaſe made of Actions Perſonal** before the Conditions broke. 14 **H.** 6. 11.

In Detinue of a certain Deed obligatory, the Garniſhe pleaded Releaſe of all Actions Perſonal Meſne between the Delivery and the Releaſe Judgment ſi Actio, and was held good by Markham and Paſton in avoiding Circuity of Action; For otherwiſe the Plaintiff ſhould recover in this Action, and ſhould after be barr'd in Debt upon the Obligation. But by Newton and Aſcue contra. For each is Actor againſt the other, and one Actor cannot plead in Bar againſt the other

other, and each of them shall make Title to the Writing, and either of them may recover Damages. Br. Garnishe &c pl 9. cites 27 H. 6. 28. and takes Notice that it is not adjudged, but cites 39 E. 3. 22. that it was adjudged a good Plea.

13. **The Garnishee cannot plead** that the Writing is not his Deed generally or specially, **for though it be an Escrow, yet if the Condition be performed the Plaintiff shall have it.** 9 H. 6. 55. b. 11. H. 6. 6.

14. As **he cannot plead that he was** under Age at the making **the Obligation, for this is in Bar of the Thing.** 11 H. 6. 11.

15. Detinue by A. upon Bailment in indifferent Hands, and the *Defendant had Garnishment against the Executors of the other Party, who appear'd* by the Garnishment, and the *Plaintiff shew'd Indenture of the Bailment, in which it appear'd that the Plaintiff and R. were oblig'd in the Writings demanded*, by which the *Garnishee pleaded it to the Counter-plea because R. is not named, by which his Release may discharge all the Actions*, and by this the Plaintiff took nothing by his Writ, quod nota. But *this is rather by the Confession of the Plaintiff than by the Plea*. Br. Garnishee, pl. 32. cites 24 E. 3. 24.

Br. Brief, pl. 108. cites S. C. and says that the Executors came and said that they had another Co-executor, viz. D. who is alive, not Named; Judgment of the Writ; And it was doubted if any other Garnishment should issue, and the Plaintiff shewed Indenture of the Bailment &c.——Thel Dig. 199. Lib. 13 cap. 12. S. 1. cites Pasch. 24 E. 3. 5. 24. S. C. and Hill. 12 H. 4. 18.

16. Detinue *of a Writing of a Statute Merchant*, the *Defendant pray'd Garnishment* and had it, and at the Day the *Garnishee came, and the Defendant made Default*, and the *Plaintiff pray'd Distress to deliver to him the Writing, and the Garnishee to him likewise*, and yet because the *Plaintiff had counted before of Garnishment to deliver upon Condition*, therefore by Award *they enterpleaded* before any Livery, and thereupon the *Garnishee pleaded Release of the Plaintiff of all Actions made Mesne between the making of the Writing and the Livery*, and yet because the Detinue is determined thereby, therefore the Plaintiff was barr'd by Award, and this is good to avoid circuity of Action. Br. Charters de terre, pl. 39. cites 39 E. 3. 22.

17. In Detinue the *Defendant pray'd Garnishment, because the Writing was deliver'd to him upon certain Condition* &c. *and shew'd what*, and had it, and the *Garnishee shew'd another Condition*; there per Thorp the Plaintiff shall recover and the Garnishee is at no Mischief; For he may have another Writ against the Defendant, and recover against him by his pleading of the false Condition. Br. Garnishe pl. 11. cites 40 E. 3. 11.

18. Detinue *of a Writing, the Defendant alledged delivery to him upon Condition*, and pray'd Garnishment and had it, and the *Garnishee confessed the Condition but said that Accord was made between them that he should make Estate of the Manor of D. for Life the Remainder to the Plaintiff, and that the Plaintiff should be there, and then the Deed should be delivered to him*, and said *that he was always ready and the Plaintiff did not come, and pray'd Livery of the Writing*, and because it was *accorded in another Matter than the Condition pleaded* by the Defendant, and *he did not shew Writing of this Accord*, and also he might have made the Estate the Remainder to the Plaintiff tho' the Plaintiff did not come, therefore the Plaintiff recovered by award; For he *did not say in the Negative that if the Plaintiff did not come that no Estate should be made.* Br. Garnishe. pl. 12. cites 40 E. 3. 11.

19. In Detinue of *an Obligation*, the *Defendant said that it was delivered by the Plaintiff and T. B. upon certain Conditions, and he did not know if the Conditions were perform'd or not, and pray'd Garnishment against*

T.

T. B. who came upon the Scire Facias, and *said that it appeared by the Obligation that he and three others were bound who are not Warned*; Judgment if he shall Answer; et non Allocatur; For *it may be that the Garnishee only sealed and delivered the Deed, and the other three not*, and therefore he was awarded to Answer. Br. Garnishe, pl. 16. cites 49 E. 3. 13.

20. Garnishee *pleaded Release made to him by the Plaintiff after the Obligation of all Debts, Trespasses and Claims*, and the best Opinion was that it is no Plea; For *nothing is demanded against him in this Action, but against the Defendant, and the Obligor cannot be damnified in this Action* as he shall be in Debt, and therefore it is a good Plea in Debt upon an Obligation, but not in this Garnishment, et adjornatur &c. Br. Garnishe, pl. 16. cites 49 E. 3. 13. and by 20 H. 6. 28. every one is Actor against the other, therefore no Plea, and see 39 E. 3. thereof.

21. Garnishee pleaded in Abatement of the Writ *that the Bailment was made to the Defendant, and to another not named* &c. Quære. Thel. Dig. 199. lib. 13. cap. 12. S. 2 cites Mich. 3 H. 4. 5.

22 In Detinue the *Garnishee* came and *pleaded to the Writ because the Bailment was by two, and the one alone brought the Action*, and though Garnishee cannot plead to the Writ which the Defendant has affirmed, and to which he is a Stranger, yet because it is apparent therefore per Cur. *both shall bring the Action in Common* by the Opinion of the Court, and this as Amicus Curiæ. Br. Garnishe, pl. 22. cites 12 H. 4. 18.

Thel Dig. 200. lib. 13. cap. 12 S. 3. cites 3 H. 6. 38. S. C.

23. In Detinue *of an Obligation* the *Defendant said, that it was delivered to him by the Plaintiff and one Hillibrond, upon certain Condition to be performed, to deliver to the Plaintiff, but if not then to the Defendant, and he did not know if the Conditions are performed* &c. and prayed a Scire Facias against Hillibrand to warn him, and had it, and the *Garnishee* came and *said that where the Scire Facias is Hillibrondus his Name is Hillibrondus*, Judgment of the Writ. Strange said *he is obliged* to me in an Obligation *by the Name of Hillibrondus*; judgment &c. and the Opinion of the Court was that the Garnishee shall not have the Plea. Br. Garnishe, pl 2 cites 3 H. 6. 37.

Thel Dig. 199. lib. 13. cap. 12 S. 3. cites S. C.

24. In Detinue the Defendant prayed Garnishment upon Condition to deliver &c. by which upon the Scire Facias returned the *Garnishee* came and *pleaded that the Plaintiff is excommunicated*, Judgment if he shall be answered; and per Cur. he shall have the Plea, and is Party well enough before that he has made Title to the Writing; for Judgment of the Damages shall be given against him, by which the *Plaintiff shewed Letters of Absolution pending the Writ*, Westbury demanded Judgment of the Writ because he was once disabled pending the Writ, et non allocatur Br. Garnishe, pl 5 cites 3 H. 6. 40

Such Plea is not good either in Abatement of the Sci Fa. or of the Original. Thel Dig 186. lib. 12 cap 1-. S. 9. cites S. C.

25 Where *Writ is brought against an Abbot, Garnishee cannot say that the Abbot is deposed* in Abatement of the Scire Facias. Thel. Dig 199. lib. 13 cap. 12 S. 3. cites 3 H. 6 41.

26. *Detinue by a Feme Sole* where the *Count was that the Bailment was made by the Plaintiff*, the Garnishee was *not received to say that the Feme was Covert with such a one at the Time of the Bailment* in Abatement of the Writ or Count. Thel. Dig. 200. lib 13. cap. 12. S. 3. cites 3 H. 6. 51.

Thel Dig. 200 lib 13. cap 12. S. 4. cites Pasch. 7 H. 6. 36. S. C.

27. In Detinue the *Defendant pray'd Garnishment by Delivery of the Writings upon Condition*, and had it; The *Plaintiff counted of Delivery at D. in Middlesex*, and the *Garnishee said that at another Time the Plaintiff brought such a Writ against the Defendant, and supposed the Bailment*

Bailment at C. in London; *Judgment of the Writ* supposing it in Middlesex. Babb. [bid him] answer, For the Defendant has admitted the Writ good, therefore you shall not abate it. Br. Garnishe, pl. 27. cites 7 H. 6. 34.

28. The Garnishee shall not plead *false Latin* to the Writ *as Party*, but as Amicus Curiæ. Br. Garnishe, pl. 42. cites 9 H. 6. 39.

S. P. And so of Matter apparent in the Count, but no foreign Matter. Thel. Dig. 200. lib. 13. cap. 12. S 5. cites S. C.

29. In Attaint it was agreed arguendo that *Garnishee shall not plead to the Writ of Detinue to abate it*, but *in a Thing apparent as Amicus Curiæ*, and *not foreign Matter*, and he *shall have Oyer of the Declaration*, but the *Plaintiff shall not declare de novo against him*; but per Babb. if he *comes at the first Day he* shall have Oyer of the Declaration, but if he comes by the Exigent, not. Br. Garnishe, pl. 8. cites 9 H. 6. 38, & 39.

30. In Detinue if the *Defendant prays Garnishment because the Obligation in Demand was deliver'd to him and one C. upon certain Conditions* &c. and the *Garnishee* comes and *says that he alone delivered the Obligation*, the *Plaintiff shall recover the Writing*; For now they do not agree in the Livery, and the Defendant is out of Court by the Garnishment, and cannot reply or rejoin to the Plea of the Garnishee; quod nota. And if the Defendant says falsely it is his Folly, and if the Garnishee says falsely this is his Folly. Br. Charters de Terre, pl. 43. cites 14 H. 6. 11.

31. *Scire Facias* issued *against the Feme and another as Executors* of such a one; the *Feme said that she was Covert with such a one who is in full Life* &c. Thel. Dig 200. lib. 13. cap. 12 S. 6. cites Hill. 21 H. 6. 29. Quære.

32. Per Newton, *where Defendant alleges the Delivery to be by the Plaintiff and J. N. upon certain Conditions, and does not shew what in certain*, there the *Garnishee may vary* from those Conditions; *But where* the Defendant *says that the Bailment was made by the Plaintiff and J. N. upon Condition by the Plaintiff alleged*, and prays Garnishment, there the *Garnishee cannot vary from the Conditions* alleged by the Plaintiff; and so to the Place, where the Defendant says that the Day, Year and Place in the Declaration, the Plaintiff and J. N. bailed upon certain Condition, and prays Garnishment, there the Garnishee cannot vary from the Place, and this affirmed to be the Entry per Brown Prothonotary; by which it was agreed, that the Plaintiff recover against the Defendant his Chattels, and his Damages against the Garnishee, and 14 H. 6. 11. agrees with Newton. Br. Garnishe, pl. 30. citas 21 H. 6. 35.

33. In Detinue the *Garnishee shall plead Recovery of the Writings in Demand, in Action of Detinue against the Defendant and the Plaintiff before the Bailiffs of D. in D. upon such an Action, where the Bailiffs of D. had Conusance of the Plea*, and a good Plea. *Quære* if the Defendant shall not be charged again, because he has not denied the Detinue now? and if the Recovery be good, by Reason that the Sheriff in Justicies granted this Conusance to the Bailiffs? Br. Garnishe, pl. 46. cites 34 H. 6. 47.

34. In Detinue the *Defendant pray'd Garnishment and had it*, and came the *Garnishee*, and *said that at another Time he brought such an Action by Justicies* before the Sheriff, *where the Defendant had Garnishment of the now Plaintiff who made Default, and* this *Garnishee there recover'd the Thing in Demand against the now Defendant, and pray'd thereof Livery*, and it was in Doubt if the Defendant shall have charg'd himself to the Plaintiff now by his Folly, because he had not pleaded the

the fame Recovery in Bar, Quære; For it feems that as long as *Execution is not made* a Man fhall repair to his *new Original*, and then fhall plead De Novo, Quære, For now the Defendant had Notice that the Judgment was given againft himfelf, Nota. Br Detinue, pl. 11. cites 34 H. 6 47.

35. In Detinue of Charters the *Defendant pray'd Garnifhment againft J. N.* and had it, and the *Garnifhee* came and *faid that J. P. gave the Land to the Feme now Plaintiff and her firft Baron, and to the Heirs of the Baron, and the Baron died without Iffue, and the Garnifhee is Heir to him, and the Donor deliver'd the Evidences to the Baron in Salvation of his Inheritance, after whofe Death his Feme got the Evidences and took another Baron now Plaintiff, who alien'd in Fee and deliver'd the Evidences to the Defendant, and the Garnifhee as Cofin and Heir of the firft Baron*, and fhew'd how Cofin, enter'd for Alienation to his Difinheritance, and fo it belong'd to him to have the Evidences &c. And per Laken, the Feme fhall have the Charters for Term of her Life, but Littleton contra, and that by the Alienation they belong'd to the Heir; Laken faid, No, Sir, For we cannot have Cui in Vita after the Death of the fecond Baron; but Littleton faid, Yet we may have them during the Life of the fecond Baron; *But* by him in this Cafe becaufe the Eftate was made to her and her firft Baron, and to the Heirs of the Baron without Deed, and the ancient Charters deliver'd to the Baron alone in Salvation of his Inheritance, the Feme can have none of them. Contra of the Deed of the fame Eftate, though it had been deliver'd to the Baron alone; For all that touches his Eftate fhe fhall have, and no more. Br. Charters de terre, pl. 11. cites 34 H. 6. 1.

39 The *Garnifhment* iffued *againft Baron and Feme upon Surmife that both were Parties to the Bailment*, and the *Baron* came and *prayed Judgment of the Writ of Scire Facias* brought againft him and his Feme &c. Yet he was put to anfwer, but with a Saving to them. Thel. Dig. 200. Lib. 13. cap. 12. S. 8. cites Mich. 8 E. 4. 16.

40. The Garnifhee fhall plead *Outlawry* in the Plaintiff. Thel. Dig. 200. Lib. 13. cap. 12. S. 7. cites 11 E. 4. 14.

(E. 2) Writ, Procefs &c. in Garnifhment, againft whom.

1. IN Detinue the *Defendant pray'd Garnifhment againft the Baron and Feme*, and had it, and the *Baron return'd Dead*, and a new Garnifhment iffued againft the Feme, quod nota. Br. Garnifhment, pl. 15. cites 44 E. 3. 33. 34.

2. *Obligation was deliver'd upon Condition*, viz, *If the Obligor Plaintiff pay* 20*l. to J. K.* that the *Deed fhall be deliver'd to him*, or *otherwife* to deliver it *to the Obligee*, and the *Obligee brought* Action of *Detinue*, and the *Defendant pray'd Garnifhment againft J. K. to fay why he did not receive the Money, and the Plaintiff to have delivery of the Deed*, and had it, and the *Sheriff return'd Nihil*, and *at the Alias he return'd that J. K. was dead*, by which *Garnifhment iffued againft the Heir and Executors*, and the *Sheriff return'd that he had neither Heir or Executors, and that the Bifhop of D. adminifter'd* becaufe he died Inteftate, by which *Procefs iffued againft the Bifhop who came by Attorney, who receiv'd the* 20*l. upon Condition*, that is to fay, If his Mafter ought to have them to retain them, and otherwife re-deliver them to the Court, and found thereof Surety. Br. Garnifhe, pl. 44. cites 48 E. 3. 30.

3. Condition

3. Condition of the delivery of a Deed is *to deliver it to the Maker if he by reasonable Garnishment levy a Fine to the Obligee* 15 *Pasch.* &c. and *the Obligee sued Writ of Covenant* to levy the Fine, and the *Sheriff return'd the Obligor summon'd*, this is not sufficient Garnishment; For he ought to be warn'd by the Party himself. Br. Conditions, pl. 39. cites 11 H. 4. 18.

4. In Detinue of Charters the Defendant pray'd Garnishment against J. N. and had it, and *four Scire Facias's and all return'd Nihil*, and the Plaintiff pray'd Delivery of the Writing; Hank. said, You cannot; For he ought to be warn'd, and it was said to him by the Court, that *he sue till he be warned*, quod nota. Br. Garnishe, pl. 21. cites 12 H. 4. 9.

5. In Detinue *the Defendant pray'd Garnishment against two*, and the *one was dead*, by which *new Garnishment* issued against him who was alive, *without Process against the Executors* of the other who was dead. Br. Garnishe, pl. 23. cites 12 H. 4. 23.

6. In Detinue of two Writings the Defendant *pray'd Garnishment against two*, and had it, and the Scire Facias *return'd that the one was warned and the other dead*, and the Scire Facias was abated as it seems; For it was awarded that he should sue a *new Scire Facias*, and it does not appear if against the Executors only, or against the one, and the Executors of the other. But by 19 H. 6. 32. *the one had Idem dies, and a new Scire Facias against the other.* Br. Garnishe, pl. 24. cites 14 H. 4. 1.

7. By the *Death of Garnishee*, the Writ shall not abate, but *Re-summons shall Issue against the Defendant*, and *Scire Facias against the Executors of the Garnishee.* Br. Garnishe, pl. 7. cites 9 H. 6. 36.

8 In Detinue of an Obligation the *Defendant said, that it was deliver'd to him by the Plaintiff and one C. upon certain Condition* &c. and because *C. is dead* pray'd Garnishment against his Executors and had it, and it does not appear if they were were named or not; It seems they were not. Br. Garnishe, pl. 34. cites 14 H. 6. 11.

9. In Detinue the Defendant pray'd *Garnishment against two*, and Scire Facias issued, and the Sheriff *return'd the one warned and the other dead*, by which issued *Scire Facias against the Executors* of the Deceased, and *Idem dies to the other* who was return'd warned. Per Markham, by the Death of the one the first Scire Facias was abated, therefore the new Scire Facias ought to have been awarded against the one, and the Executors of the other; But Newton and tot. Cur. was against him, and that it was well as above, quod nota. Br. Garnishe, pl. 29. cites 19 H. 6. 9.

And such a Case the same Year, fol. 55. where he who was warned was compell'd to answer, quod nota, and Quære; For it was said there, that the Contrary thereof was adjudg'd Anno 24. Ibid.

10. If the *Sheriff returns the Garnishee warned*, and *does not say by Tales* &c. *Probos et Legales homines*, yet this is good if the Garnishee appears; Contra if the Garnishee makes Default. Br. Garnishe, pl. 45. cites 33 H. 6. 31.

11. In Detinue the *Defendant shew'd that the Writing was deliver'd by the Plaintiff and J. N.* and *pray'd Garnishment* against him *in the County of E.* which was *return'd Nihil*, and *Alias issued*, and *return'd as above*, by which he *pray'd Garnishment in the County of N. upon surmise of Assets there*, and had it. Br. Garnishe, pl. 36. cites 6 E. 4. 11.

(F) [Garnifhment.] Judgment.

S P. and the Plaintiff and Defendant were in Mifericordia. Br Garnifhee &c. pl 13 cites 40 E 3. 29 and fo are all the Editions, but it feems it fhould be as here in Roll, 40 E 3. 39. and there the Year Book fays, Et fi, vide & nota &c. Mich. 39 E. 3 fol 29 the Garnifhee cannot have Judgment to recover by the Default of the Defendant. —— Fitzh. Garnifhe, pl. 29. cites S C.

1. If the Garnifhee comes at the Day, and the Plaintiff and Defendant make Default, the Garnifhee fhall recover. 40 E. 3. 39.

Fitzh. Garnifhe, pl. 29 cites S. C.

2. If there be an Enterpleader in Ravifhment of Ward, he that is not Party to the Writ may plead the Releafe of the Plaintiff. 20 H. 6. 29.

3. If the Garnifhee be returned warned, and does not appear, no Damages fhall be recovered. 20 E. 4. 13. b.

(G) In what *Actions.*

Br. Enterpleader, pl. 17. cites S C. —— Fitzh. Enterpleder, pl. 9. cites S. C. —— In this Cafe, and fo if the Defendant is charged with a feveral Bailment by each of the Plaintiffs, there they ought to have feveral Actions; Roll Rep. 130. and fays, that according to this are 19 H. 6. 3. 9 H 6. 17. 17 H. 6. 22. and 39 H. 6 36. but the Reporter adds a Remark, that 39 H. 6. is adjudged contra as to the Trover.

1. If one brings Detinue upon a Bailment, and the other upon a Trover, there fhall be an Enterpleader. 39 H. 6. 36. b.

2. If A. brings *Quare Impedit againft B. of the Advowfon of C.* and *B. brings fuch a Writ againft A.* there *if A. will aver that the fecond Quare Impedit is brought of the fame Avoidance as the firft is brought*, then they fhall enterplead upon the Writ of elder Date, and otherwife not. Br. Enterpleader, pl. 26. cites 19 H. 6. 68.

3 *In Writ of Ward and Account* Garnifhment does not lie, *but* if *two feveral Writs of Ward* are brought there lies Enterpleader, and in *Debt* Garnifhment does not lie. Br. Garnifhe, pl. 38. cites 14 E. 4. 2.

Br. Garnifh, pl. 39. cites S. C.

4 If *Garnifhee* will *bring Detinue againft the Defendant*, then the Plaintiff in the firft Action and he fhall interplead; Quod Nota. Br. Enterpleder, pl 24. cites 20 E. 4. 13.

(H) For what *Caufes.* [Or the Reafon of Enterpleader.]

Fitzh. Enterpleder, pl. 9. cites S. C.

1. THE Caufe of Enterpleader is, for that the Defendant fhall not be charged to two feverally where no Default is in him. 39 H. 6. 36. b.

2. In

2. In Detinue of Charters againſt one, the *Defendant cannot have Scire Facias to warn a Stranger to ſee if he can make Title, if he does not confeſs the Poſſeſſion of the Charters demanded and make Privity of Bailment*, Contra Babb. and Cokayne, therefore Quære; and per Marten they may *open the Bag*, Contra Babb. and Cokayne. Br. Enterpleder, pl. 3. cites 3 H. 6. 35.

3. *But* it ſeems there, that *no Enterpleader can be unleſs both the Parties have ſeveral Actions pending*. Ibid.

(I) Upon *what Delivery*.

1. ENterpleader ſhall be upon a joint Delivery or ſeveral. 39 H. 6. 30. b.

S.C. & S. P. cited Roll Rep. 130.

(K) At what *Time* it ſhall be made.

1. IF the Goods [the Writs] are not returned at one Time, but one declared the laſt Term, and the Defendant imparled, and now the other brings an Action, yet they ſhall enterplead. 39 H. 6. 36. b.

Fitzh. Enterpleder, pl. 9. cites S. C.

(L) *In what Caſes* there ſhall be an Enterpleader.

1. IF two brings ſeveral Detinues againſt J. S. for the ſame Thing, if the Defendant will acknowledge the Action of one without a Prayer of Enterpleader, they ſhall not interplead upon the Requeſt of the other, for the Enterpleader is given for the Security of the Defendant, that he be not twice charged, and he hath waived that Benefit. 18 E. 3. 22. b.

Fitzh. Enterpleder, pl. 14. cites S. C.

2. Though the Garniſhee cannot vary in the Bailment from the Plea of the Defendant, as to ſay that the Delivery was by him alone, where Defendant had pleaded that it was by the Garniſhee and the Plaintiff, yet he may have Writ of *Detinue againſt the Defendant* alſo, and there the Plaintiff and he ſhall interplead. Br. Garniſhee &c. pl. 39. cites 20 E 4. 13.

3. Where the *Garniſhee comes*, and the *Defendant makes Default*, yet none of them ſhall have Delivery of the Writing, but ſhall enterplead. Br. Garniſhe, pl. 33. cites 39 E. 3. 22.

4. Detinue *of two Obligations*, the *Defendant ſaid*, *that M. had another Writ againſt him of the ſame Obligations returnable the ſame Day, which two Plaintiffs delivered to him the Writings upon Condition* &c. and he his ready to render to whom the Court ſhall award, and the Plaintiffs appear'd, and were awarded to enterplead. Br. Enterpleader, pl. 8 cites 12 H. 4. 18.

5. *But* if the Writs had been *returned at diverſe Days* another Proceſs ſhould have been awarded. Ibid.

6. If *feveral Præcipe* quod reddats *are brought againft one Tenant*, they fhall not enterplead tho' Damages are to be recovered, but *when one has recovered, the Tenant is difcharged againft the others.* Br. Enterpleader, pl. 4. cites 3 H. 6. 43.

7. If *one* be *found Heir to the Tenant of the King in one County*, and *another found Heir in another County*, there they fhall enterplead before any of them fhall have Livery. Br. Enterpleader, pl. 5. cites 9 H. 6. 17.

8. Where they *do not agree in Bailment*, they fhall not enterplead; For here *is no Privity*, and if the Defendant fays falfely it is his Folly, and if the Garnifhee fays falfely it is his Folly. Br. Enterpleader, pl. 15. cites 14 H. 6. 11.

9. If *I bail Deeds which concern the Land of my fecond Feme, to rebail to me or my Heirs and die*, and my *Heir by my firft Feme brings Detinue*, and the *Heir by the fecond Feme likewife*, they fhall interplead; Per Fortefcue, quod Curia conceffit. Br. Enterpleader, pl. 11. cites 19 H. 6. 3. 4 19.

10. It was agreed Arguendo, that if *Diem claufit extremum iffues*, and *one is found Heir*, and *a Melius Inquirendo iffues*, and *another is found Heir*, and *both come into the Chancery and pray Livery*, they there fhall enterplead before either of them fhall have Livery. Br. Enterpleader, pl. 6. cites 35 H. 6. 19.

11. Detinue *of a Cheft with Charters*, the *Defendant faid* at the Diftrefs *that it came to him as Executor, and that J. N. had brought fuch a Writ againft him of the fame Cheft and Charters in the fame County, returnable at the fame Day* that the Diftrefs in the other was return'd, *and brought the Cheft into Court, and prayed that the might enterplead*, and they were *awarded to enterplead upon the eldeft Writ, and not upon the Original return'd now.* Br. Enterpleader, pl. 7. cites 37 H. 6. 23 & 33 H. 6. 25.

12. *And* Per Cur. if the Writs had been *in diverfe Counties, or returnable at diverfe Days*, they cannot enterplead, but the Writs fhall be awarded returnable at one and the fame Day, and then they fhall enterplead. Ibid.

13. *But* if they *vary in Declaration, as* the *one declares of a Cheft feal'd, and the other of a Cheft, and fhews what is in the Cheft*, they fhall not enterplead. Ibid.

14. *But* it was faid, that 38 H. 6. *two Writs* were brought *in two Counties*, and *each declared by Invention*, and they were awarded to enterplead. Ibid.

15. Enterpleader fhall *not* be granted *unlefs Defendant alleges that both Parties demand one and the fame Thing.* Br. Enterpleader, pl. 22. cites 8 E. 4. 6. by all the Juftices.

16. Traverfe, *two Offices were*, by the *one* it was *found General Tail and a Daughter Heir*, and by the *other fpecial Tail* and the *Daughter traverfed*; For *the other claimed as Cofin and Heir Male*; Per Conisbie *where two claim by one and the fame Anceftor* they ought to enterplead. Br. Enterpleader, pl. 16. cites 21 H. 7. 35.

17. *And* Per Palmes, where *one is found Heir and within Age*, and *another is found Heir to this fame and of full Age*, they fhall enterplead; For it is to one Anceftor, and by one Title. Ibid.

18. *Contra* where they claim *by feveral Titles* as here, to which Grevel and Conisby agreed. Ibid.

(M) In

(M) In what Cafes for *a Collateral Refpect.*

1. IF Two bring * feveral Detinues, they fhall not enterpleaded, if their Writs be not returnable at one and the fame Day. 9 H. 6. 18. Curia.

* Againft one and the fame Perfon. Br. Enterpleader, pl. 5. cites 9 H. 6. 17.

2. If two bring feveral Detinues, and the Defendant prays that they may enterplead, they may interplead if they are prefent in proper Perfon. 17 E. 3. 70. b.

3. But not if they or any of them are not prefent in proper Perfon. 17 E. 3. 70. b.

4. But a Writ fhall iffue to warn them to come in proper Perfon at a Day. 17 E. 3. 70. b.

5. If feveral Perfons bring feveral Writs of Right of Ward, returnable at the fame Day, and the Defendant pleads &c. and prays that they may interplead, yet they fhall not interplead without fuing a Scire Facias againft them, to whom the Plea is not pleaded, to be in Court at a certain Day. 30 E. 3. 4. b. adjudged.

Fitzh. Enterpleder, pl 16. cites Hill. 30 E. 3. 5.—If *two bring feveral Writs of Ward againft one and the fame Defendant,* there *upon the Matter fhewn in Form* by the Defendant, there the Plaintiffs fhall enterplead the one with the other. Br. Enterpleader, pl. 27 cites 24 E. 3.

6. If *feveral Writs* of Detinue [are brought], and the *one declares of Bailment in the County of M.* and the *other in the County of D.* there they fhall not be compelled to enterplead, but the *Defendant fhall anfwer to both*; For it is in feveral Counties, and was of a Box of Charters. Br. Enterpleader, pl. 14. cites 14 H. 6. 2.

7. If *two bring feveral Actions of Detinue of a Box fealed with certain Charters, the one of Bailment in one County,* and the *other of Bailment in another County,* yet if the Defendant prays it they fhall enterplead as well as if both Actions were in one and the fame County; For the *Bailment is not material, but the Detinue.* Br. Enterpleader, pl. 19. cites 5 E. 4. 25.

(N) In what Cafes.

Privity upon Actions.

1. If two bring feveral Detinues of Charters, and the one counts of a Bailment to re deliver, and the other demands them by Title to the Land, they fhall not interplead, because there is not any Privity of Bailment between them, and the Defendant is not chargeable to him who makes Title to the Land but for the Land, but to the other for the Bailment, and if he re-delivers to his Bailor, he is not chargeable to the other, and fo he is at no Mifchief. * 19 H. 6. 3. Contra. † H. 6. 17.

* Br. Enterpleder, pl. 11. cites S. C.——Fitzh. Enterpleder, pl. 7. cites S. C——Br. Travers per &c. pl. 68 cites 19 H. 6. 3 19.——† Br. Enterpleder, pl. 5. cites S. C.——Fitzh Enterpleder, pl. 5 cites S. C

2. In a Detinue one Plaintiff demands a Bag of Charters, and another Plaintiff demands certain Charters in the Bag, as belonging to him, against an Executor, because the were in his Hands, but not upon any Bailment, quære whether they shall interplead, 3 H. 6. 36.

3. If one brings Detinue against B. and counts upon a Delivery to re-deliver to him, and another brings Detinue against him also, and counts so also, and if there be not any Privity of Bailment between them yet they shall enterplead to avoid the double Charge of the Defendant, and also because the Court cannot know to whom to deliver the Deed if both recover. * 3 H. 6. 44. Curia, for perhaps the Defendant found it. Dubitatur, 11 H. 6. 19 b.

* Fitzh. Enterpleder, pl. 2 cites S. C. —— Br. Enterpleder, pl 4. cites S. C. —— Ibid. pl. 11. cites 19 H. 6 3 4 19. —— Br. Traverse per &c. pl. 68. cites 19 H. 6 3 29.

4. [And] upon such several Detinues, if the Defendant says that he found it, and traverses the Bailment, they shall enterplead, for then he is chargeable as well to the one as to the other. * 7 H. 6. 22. † 19. H. 6. 3. Curia.

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* Br Enterpleder, pl. 9. S. P [without any mention of the Traverse] where the two Writs were returnable the same Day cites S. C. —— Fitzh Enterpleder, pl 3. cites S. C.

† Br. Enterpleder, pl. 11. cites 19 H 6. 3. 4. 19. —— Fitzh. Enterpleder, pl 7. cites S. C —— Br. Traverse per &c. pl. 68. cites S. C.

5. So if he says that they delivered it jointly, absque hoc that they delivered it as they have counted. 19 H. 6. 3. b.

Br. Enterpleder, pl. 11. cites 19 H. 6. 3 4. 19. —— Fitzh. Enterpleder, pl. 7. cites S. C. —— Br. Traverse per &c. pl. 68. cites S. C.

6. But it is otherwise if he does not traverse the Bailment, for if there was a Bailment he is chargable only to the Bailor, and may plead in Bar against the others. * 7 H. 6. 22. † 19 H. 6.

* Fitzh. Enterpleder, pl 2 cites S. C. —— † Fitzh. Enterpleder, pl. 7. cites S. C. —— Br Enterpleder, pl. 11. cites S. C.

7. If two Detinues are severally brought against an Executor because of his Possession, they shall enterplead, because he is not more chargeable to one than the other. 9 H. 6. 18.

Br Enterpleder, pl. 5 cites 9 H. 6. 17 S. P.

8. So for the same Reason, if they are brought against a Man who found the Thing demanded, they shall enterplead. 9 H. 6. 18.

Br. Enterpleder, pl. 5. cites 9 H. 6. 17. S. P.

9. In Detinue, if they count of several Bailments, the Defendant may say it came to his Hands as Executor, absque hoc that he had it of their Delivery, and then the Plaintiffs shall interplead. 19 H. 6. 3.

Fitzh. Enterpleder, pl. 7 cites S. C.

10. If two bring several Writs of Ward against me at the same Day, they shall enterplead * 3 H. 6. 44. † 9 H. 6. 17. b. Curia. ‡ 19 H. 6. 3. b.

* S. P agreed per Cur and yet there is no Privity by which they should interplead. Br Enterpleder, pl. 4. cites 3 H 6 43. —— S. P. [without any Mention of the several Writs being brought at the same Day] Br. Enterpleader, pl. 5. cites 3 H. 6. 43, 44

† Br. Enterpleder, pl 5. cites S. C

‡ Fitzh Enterpleder, pl 7. cites S. C.

11. But otherwise if they bring Ravishment of Ward. 9 H. 6. 18. b.

12. In

12. In Detinue, if the Plaintiff counts of a Delivery to re-deliver, the Defendant shall not have a Scire Facias against any other but him that was privy to the Delivery. 3 H. 6. 44.

It was agreed, Arg. that the Defendant in Writ of Detinue shall *not* have a Sci. Fa. to warn a Stranger *without alleging Privity of Bailment.* Br. Garnishe &c. pl. 5. cites S. C. ——— Br. Enterpleder, pl. 4 S P. cites 3 H. 6. 43.

13. If two bring several Writs of Detinue, and each counts upon a Delivery at several Places in the same County to re-deliver, if the Defendant says the Delivery was by the Plaintiffs upon Condition, and does not acknowledge whether the Condition is performed, they shall interplead, because the Defendant cannot traverse the Place of the Delivery, this being in the same County. 8 H. 6. 30. b. adjudged.

Br. Enterpleder, pl. 10. cites S. C. and that the Scire Facias issued well; For non constat judicialiter whether the two Actions are of one and the same Writing till both have counted. ——— Fitzh. Enterpleder, pl. 4. cites S. C.

14. But it had been otherwise if Deliveries had been in several Counties, for there the Defendant might have traversed the Place. * 8 H. 6. 31. † 14 H. 6. 2.

* Br. Enterpleder, pl. 10. cites S C. ——— Fitzh. Enterpleder, pl. 4 cites S. C.

† Br. Enterpleder, pl. 14. cites S. C.

15. If one brings Detinue, and counts of a Delivery by himself and one J. S. in equal Hands, upon Condition &c. if J. S. brings Detinue also against the same Defendant, and counts of a Delivery by himself alone, they shall not enterplead upon this Matter. 14 H. 6. 11. b. Quære.

16. Detinue of Charters *by one who counted by Title to the Land as Heir*, and *J. N. brought such a Writ against the Defendant returnable the same Day*, *and counted upon Bailment made to the Defendant*, and the *Defendant brought the Charters into Court*, and said that he was ready to deliver them to whom the Court should award, and prayed that the Parties interplead, and the Opinion of Babb. Fulthorp, and Martyn was, that they should interplead, but Paston contra, because the one counted upon Bailment, and this is the Folly of the Defendant; and Brown Clerk said, that 3 H. 6. they interpleaded, where the one counted as Heir, and the other upon Bailment; For it *may be*, *that at the Time of the Bailment the Defendant did not know of the Title.* Br. Enterpleader, pl. 5. cites 9 H. 6. 17.

17. And there it was agreed, that *he who finds a Deed*, *and an Executor shall not be charged but only to him who Right has*; *Contra upon several Bailments*; For there is Folly in the Defendant. Ibid.

18. Where a Man is to bring a Party into Court by Garnishment, he ought to make Privity of the Bailment, viz. *that it was bailed by both upon Condition* &c. and pray Scire Facias against the other. Br. Enterpleader, pl. 5. cites 9 H. 6. 17.

(O) At what *Time* it ſhall be.

1. IN ſeveral Writs of Ward by divers againſt one Man, **if they pray that they may interplead, though** all the Writs **of the Plaintiffs** are returnable at one Day, **and ſo** they have Day all to this Day, **yet** Proceſs ſhall iſſue to warn them, and they ſhall not enterplead before Garniſhment. 30 **E. 3. 5. b.**

2. In Detinue, the *Defendant prayed Garniſhment*, and had it, and Scire Facias &c. and *at the Day another Man brought another Writ* of Detinue *returnable the ſame Day*, and *all appeared*, and the *Defendant prayed that they might interplead*, and per Littleton and Choke they cannot; For the *Defendant is out of Court* to pray it by reaſon of the Prayer of the firſt Garniſhment; *Quære.* Br. Enterpleader, pl. 23. cites 11 E. 4. 11.

3. If A be *found Heir to B. by one Office of Land held of the King in Capite, and C. is found Heir to him likewiſe to the ſame Land by another Office*, and *both are within Age*, there they have no Remedy but to ſtay till full Age, and then they ſhall interplead. Br. Enterpleader, pl. 28. cites 1 H. 7. 14.

(P) Upon *what Writ* it ſhall be.

1. **THE Enterpleder ſhall be** upon the Original. 22 **E. 4. 49.**

2. **If two bring ſeveral Detinues, the Enterpleader ſhall be upon the Original** of the eldeſt Date, if the other hath not counted **upon his Original.**

3. So **it ſhall be** though **he that is** Plaintiff in the Original of lateſt Date had firſt counted. * 3 **H. 6.** 20. † 19 **H. 6. 4. b. Curia.** ‡ 39 **H. 6. 37. b.** || 12 **H. 4.** 18.

* Br. Enterpleder, pl. 2. cites S. C. —— Fitzh. Enterpleder, pl. 1. cites S. C. —— And in ſuch Caſe there is no Miſchief; For he who brings the ſecond Writ ſhall have every Advantage which he might have had in his own proper Writ in which he was Plaintiff. Br. Enterpleder, pl. 26 cites 19 H. 6 68.
† Br. Enterpleder, pl. 11 cites 19 H 6. 3 4. 19.
‡ Br. Enterpleder, pl. 17. cites 39 H. 6. 36. S. P.
|| Br. Enterpleder, pl. 8. cites S. C.

4. [But] if **the Writs are** of one and the ſame Date, he that firſt **comes and demands an Anſwer, or** counts, ſhall be Plaintiff, **and the Enterpleader ſhall be upon his Original.** 19 **H. 6. 4. b.**

Fitzh. Detinue, pl. 14. cites S. C.

5. Or **otherwiſe** he **ſhall be Plaintiff** whom the Court ſhall aſſign, **in ſuch Caſe where the Writs are of one and the ſame Date.** 19 **H. 6. 4. b.**

Fitzh. Detinue, pl. 14. cites S. C.

6. Upon Enterpleader he, who has the *Writ of elder Date, firſt* counts againſt the other, and the other ſhall defend, and ſo they did. Br. Enterpleader, pl. 11. cites 19 H. 6. 3. 4. 19.

7. He who has *Writ of younger Date* ſhall anſwer to the other who has Writ of Elder Date. Br. Enterpleader, pl. 17. cites 39 H. 6. 36.

8. *Three*

8. *Three several Writs* of Detinue *of Charters* were *brought against one and the same Man*, and were awarded to enterplead at the Prayer of the * Defendant upon the Matter shewn, and the Evidence tender'd, and they enterpleaded *to the Writ of elder Date*, and so they interpleaded every one against the other severally, and the Bar of the one is his Title against the Plaintiff, and the other, and so *three Issues*. Br. Enterpleader, pl. 20. cites 4 E. 4. 9.

* All the Editions of Br. are (Plaintiff) but it should be (Defendant) and so is the Year-Book.

(Q) Upon an Enterpleader, *who shall keep* the Thing demanded.

1. IN ancient Time **the Thing demanded ought to** remain in Court. 12 H. 4. 6.

2. But now **the Use is, that the** Defendant shall keep it **till it be tried, and not the Court.** * 12 H. 4. 39 H. 6. 38.

* Br. Garnishe, pl. 22. cites 12 H. 4. 6. S. C.

3. In several Rights of Ward, **if the** Parties **are awarded to enterplead, they** may pray that the Defendant find Sureties to keep **the Infant**, and to have him in Court at a Day, **and it shall be granted.** 30 E. 3. 5. b.

4. But **the** Plaintiffs shall not find Sureties not to take **the Ward** in the mean Time. 30 E. 3. 5. b.

5. Pending the Writ **for the Thing, the** Defendant cannot deliver **it** to any Party without award **of the Court.** 12 H. 4. 6. b. **Curia.**

Fitzh. Garnishe, pl 27. cites S. C.

6. **If the** Defendant prays Garnishment, **and the** Garnishee **comes and** pleads against the Plaintiff, **the Defendant cannot after deliver the Writing to the Plaintiff.** 39 E. 3. 23.

7. *Ward by the King against E.* who *said that she did not claim any Thing but by Cause of Nurture, and that H. S. had brought such a Writ against her, and that the Infant is here ready at the Bar*, as he ought upon this Plea, *ready to deliver to whom* &c. and therefore Day was given to a certain Day to enterplead &c. and at the Day they *both appear'd and pray'd that the Infant might be deliver'd to them in common quousque* &c. et non allocatur; For it is not forma Juris. Br. Enterpleader, pl. 12. cites 24 E. 3. 38. 65.

8. In Detinue the Defendant pray'd Garnishment against D. and had it, and at the Day the *Garnishee came*, and the *Defendant made Default*, and *neither the Plaintiff or the Garnishee could have Livery before they had enterpleaded*, quod nota, by which the *Garnishee barr'd the Plaintiff by his Release of Actions.* Br. Enterpleader, pl. 13. cites 39 E. 3. 22.

(R) *Pleader*

(R) *Pleader by* the *Defendant after* an *Enterpleader.*

[And to what Purposes the Defendant shall be said to be in Court or not.]

When he hath pray'd Garnishment *and has Process against the Garnishee.* Br. Garnishe, &c. pl. 20. cites S. C.

1. WHEN the Defendant hath prayed Garnishment he is out of Court to plead any Plea. 12 H. 4. 6. b.

Br. Garnishe &c. pl. 20. cites S. C.

2. But he hath a Day in Court to deliver the Writing to whom the Court shall award it. 12 H. 4. 6. b.

3. The Defendant is not demandable before Judgment given, but then he is, because he is to deliver the Thing demanded. 12 H. 4. 7. b.

4. After the Garnishee comes in, and pleads against the Plaintiff, the Defendant cannot say the Condititions are broke on the Part of the Garnishee, and so the Plaintiff ought to have Judgment. 39 E. 3. 23. Curia.

5. In Detinue of an Obligation *Defendant said that it was delivered to him by the Plaintiff and one M. to hold till certain Conditions were performed, and then to deliver to the Plaintiff*, and prayed Scire Facias against M. to enterplead, and *brought the Writing into Court which was not sealed, and said that he is ready to deliver it to whom the Court should award* &c. and by the Opinion of the Court, because it is not sealed, the Parties cannot enterplead upon it; for it is not such a Deed as the Plaintiff demands, and if the Plaintiff shall grant it he shall not recover other Deed; Quære inde; and so see that upon such Demand of Enterpleader, the Deed *ought to be brought into Court*; Nota. Br. Enterpleader, pl. 1. cites 2 H. 6. 16.

6. *Two Persons brought several Writs* of Detinue against the Defendant *of a Charter*, the *one* conveyed *as Heir to the Brother, and the other as Heir to the Sister*; the Defendant *said, That no such Brother*, and so to Issue. Br. Enterpleader, pl. 2. cites 3 H. 6. 20.

7. In Detinue of an Obligation the *Defendant prayed Garnishment and shewed the Writing*; The *Plaintiff said that the Writing which the Defendant shew'd is only an Escrowe without Seal, and not the Obligation which he demanded*, and the *Defendant said that it is the same Obligation which was bail'd to him.* And per Marten, if the Garnishment shall be granted upon Escrowe the Plaintiff by this accepts it to be the Deed which he demands, Quære; for the *Defendant here confess'd the Detinue of the Obligation implicative.* Br. Garnishe, pl. 40. cites 2 H. 6. 16.

(S) Judgment

(S) Judgment.

1. If an Enterpleader be prayed by the Defendant between the Plaintiff and T. S. upon the Count of the Plaintiff, which supposes it to be delivered to him or T. S. upon Condition, and the Plaintiff and T. S. appear at the Return, and the Defendant makes Default, yet they shall enterplead, and the Plaintiff shall not have Judgment. 39 E. 3. 22. b. because the Plaintiff himself hath supposed it to be upon Condition.

2. If two bring several Detinues for one Thing, and the Defendant prays that they enterplead, and delivers the Thing to the Court, and before the Award of the Enterpleader one discontinues his Suit, the other shall not have Judgment to recover, because they were not awarded to enterplead. 11 H. 6. 19. b.

3. But otherways it had been if he had discontinued his Suit after the Enterpleader awarded. 11 H. 6. 19 b.

4. If a Recovery be had upon an Enterpleader, Judgment shall be given to recover the Thing demanded against the Defendant, and not against the Garnishee, * 3 H. 6. 18. † 7 H. 6. 45. 30 E. 3. 6. b. adjudged.

* Fitzh. Judgment, pl. 1. cites S. C. —— † Br. Garnishee &c. pl. 28. cites S. C. —— S. P. Br. Detinue, pl. 47. cites 1. E. 5. 3. —— Br. Charters de Terre, pl. 5. cites 9 H. 6. 36. —— Br. Garnishe &c. pl. 7. cites S. C. —— So upon Judgment given for the Plaintiff upon a *Demurrer* in Law. Br. Garnishe &c. pl. 10. cites 27 H. 6. 2.

5. So the Garnishee shall recover it against the Defendant. 3 H. 6. 40. b.

[S. 2] [Damages.]

6. If the Defendant prays Garnishment to know whether the Conditions are performed, and the Garnishee comes and says nothing, yet the Plaintiff shall not recover any Damages against the Defendant, because he was not bound to deliver it till very Notice of the Performance of the Condition. 9 H. 6. 39. b.

In Detinue of Writings after that the Garnishee has pleaded, if the Plaintiff recovers the Judgment of the Writings it shall be against the Defendant and of the Damages against the Garnishee. Br. Detinue, pl. 9. cites 33 H. 6. 27.

7. If the Garnishee comes the first Day, and cannot deny the Conditions to be broke, or makes Default, the Plaintiff shall not recover any Damage against him, because he hath not delayed him, which is the Cause that Damages are given against a Garnishee. 8 H. 6. 11.

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In Detinue *of two Writings*, where the *Defendant prayed Garnishment*, and the Scire Facias served against the *Garnishee*, and he *made Default*, there the *Plaintiff recovered against the Defendant*, but no Damages. Br. Detinue de biens, pl. 25. cites 21 H. 6. 35. —— S. P. And per Ascue, where the *Garnishee appears* and the *Plaintiff makes Default*, the Garnishee shall recover against the Plaintiff his Damages, ad quod non fuit responsum. Br. Damages, pl. 73. cites 21 H. 6. 35. 36. —— If he comes and says nothing the Plaintiff shall recover the Writing detained, but without Damages. Br. Damages, pl. 97. cites 36 H. 6. 26.

‡ By several Writs Br. Damages, pl 10 cites 9 H 6. 18.

8. If two bring Detinue ‡ against another, and they interplead, he that recovers shall recover Damages against the other. 8 H. 6. 5. 9 H. 6. 18.

—— Br Damages, pl. 68. cites 8 H. 6. 4. 5. S. P. accordingly, because each is Actor against the other; Per Strange.

|| Fitzh. Garnishe, pl 9 cites S C —— S P Br. Garnishe, pl 47. cites 1 E 5. 3.

9. If the Garnishee pleads with the Plaintiff, and it is found against him by Verdict, the Plaintiff shall recover Damages against him. 49 E. 3 13. b. 7 H. 6. 45. b. 8 H. 6. 5. 10 H. 6. 8. b. || 20 H. 6. 29. b.

—— Judgment shall be of the Thing detained against the Defendant, and of the Damages against the Garnishe. Br. Detinue de Biens, pl. 47. cites 1 E. 5. 3. —— Br. Charters de Terre, pl. 5. cites 9 H 6. 36. —— Br Garnishe &c. pl 7. cites S. C. —— S, P. but the Body of the Garnishe shall not be put in Execution because he was not Party to the first Writ, quod Nota, but it shall be of Goods or Chattels or Land. Ibid. pl 28. cites 7 H. 6. 45. —— Br. Executions, pl. 49. cites S. C.

* Fitzh. Judgment, pl 1. cites S C. ——

10. The same Law if he plead with the Plaintiff, and it be adjudged against him by the Court. 49 E. 3. [13.] 3. b. * 3 H. 6. 18.

Plaintiff *demurred* in Law *to the Plea of the Garnishee and adjudged for him*, and Judgment was given of Damages against the Garnishee. Br. Garnishe &c. pl 10 cites 27 H. 6. 2. and cites 49 E. 3. to the contrary, because it is upon Demurrer which is the Default of the Court; For there is no other Delay in the Garnishee, but in Default of the Court by their not giving Judgment immediately.

Br. Garnishe &c pl. 10. cites 49 E. 3. 4, that the

11. So if it be adjudged against him upon Default. † 8 H. 6 5. But the Garnishee, if it pass with him, shall not recover Damages against the Defendant. Contra, 3 H. 6. 40. b.

Garnishee was warned and made Default, and the Plaintiff recovered the Writings, but no Damages against the Garnishee, nor against the Defendant.

† Br. Damages pl 68. cites S. C for by the Interpleader of the Garnishee the Defendant is wholly excused of Damages, and the Garnishee has taken Matter on himself.

‡ Br. Damages, pl. 68. cites S C. — Fitzh Damages, pl. 21. cites S. C.

12. [But] If the Inquest pass for the Garnishee he shall recover Damages against the Plaintiff ‡ 8 H. 6. 5. 13 H. 4. Damage F. 131. 9 H. 6. 39. || 20 H. 6. 29. b.

|| Fitzh Garnishe, pl. 9 cites S C. —— S. P. Br. Detinue de Biens, pl. 47. cites 1 E. 5. 3. —— Br. Garnishe, pl. 7. cites S. C.

* Br. Damages pl. 68. cites S. C. — Fitzh. Damage, pl 21. cites S. C.

13. So if two bring Detinue against another, and upon his Prayer, they enterplead, if the Inquest pass for him who enterpleads upon the Original of the other, he shall recover Damages against the other. * 8 H. 6. 5.

S. P. and not against the Defendant —Br. Enterpleder, pl. 5. says Quod Nota, and cites 9 H. 6. 17. ——See pl. 8 S. C & S. P.

Br Damages, pl. 68. cites 8 H. 6. 5 of which 8 H. 6 11. is a Continuation —— Fitzh. Damage, pl. 21. cites 8 H. 6. 4. which is the Comencement of this Case cited here.

14. The Recovery against the Garnishee is for the Delay after the Writ purchased. 8 H. 6. 11.

S. P. *And where the Garnishees had Assise against the*

15. Detinue *of a Box of Charters against P.* who came and *said that the Box was delivered to him by the Plaintiff and two others*, and pray'd Scire Facias against them, and had it, who *came and made Title to the Land and pray'd Livery*, and the *Plaintiff shewed Feoffment made to one*

Que

Que Estate he has, and pray'd Livery, and it was long in Doubt whose Deeds were in the Box, and to whom they belonged, and at last Thirn *opened the Box and delivered to every one the Evidences which to him belonged*; quod nota; and the Plaintiff recover'd Damages against him who came by Scire Facias &c. Br. Garnishe, pl. 18. cites 7 H. 4. 7.

Plaintiff of those Charters now in Demand and recover'd by Default, yet the Plaintiff shall not recover his *Damages* in this Action of Detinue to the value of the Land, per tot. Cur. Br. Charters de terre, pl. 18. cites S. C.

16. In Detinue the *Defendant said the Writing was delivered to him by the Plaintiff and one R. upon certain Conditions to be performed to deliver to the Plaintiff, and if not to deliver it to the said R.* and pray'd Garnishment against R. to know if the Conditions were performed &c. and there it was agreed that the * *Judgment of the Writing* upon the Enterpleader between the Plaintiff and the Garnishee *shall be against the Defendant*, for he has the Possession thereof, *and of the Damages it shall be against the Garnishee*, quod nota. Br. Detinue de biens, pl. 3. cites 3 H. 6. 18.

* S. P. Br. Detinue de biens, pl. 9. cites 27 H. 6. 2.——Br. Garnishe, pl. 10. cites S. C.

17. *And* it is said elsewhere, that the Process of the Execution thereof is *Distringas against the Defendant* to deliver the Writing, and *Fieri Facias against the Garnishee* of the Damages. Ibid.

18. If a Man brings several Writs of Detinue against three, and they enterplead, he for whom the Jury passes shall have Damages against the other; For *every one is Actor against the other*. Br. Damages, pl. 68. cites 8 H. 6. 4. 5.

19. Where the *Plaintiff recovers* the *Judgment shall be of the Charters demanded, and if they are burnt, there he shall recover all in Damages*. Br. Detinue de biens, pl. 27. cites 21 H. 6. 35.

20. Note, that the *Entry is that he recover the Writings against the Defendant*, and that he have Delivery against the Garnishee. Br. Detinue de biens, pl. 25. cites 21 H. 6. 35.

21. The *Judgment of the Writings shall be against the Defendant*, and *of the Damages against the Garnishee if he pleads*; quod nota. And there it was *upon Demurrer*, and the Plaintiff recovered Damages against the Garnishee. Br. Damages, pl. 11. cites 27 H. 6. 2.

S. P. Br. Damages, pl. 67. cites 7 H. 6. 4.——S. P. And if it be found for the Garnishee, he shall recover Damages against the Plaintiff, quod nota. Br. Damages, pl. 142. cites 1 E. 5. 3. 4.——S. P. Br. Damages, pl. 68 cites 8 H. 6. 4. 5.

22. *And* the same Year, fol. 4. the *Garnishee was returned Warned*, and *made Default*, and therefore the Plaintiff recovered, and no damages against the Garnishee, nor against the Defendant; For there he is not delay'd by the Garnishee. Br. Damages, pl. 11. cites 27 H. 6. 2.

23. *And* in the same Case above it was said, that where the *Judgment* is upon Demurrer *upon the Plea of the Garnishee* the Plaintiff shall recover no Damages; For there the Delay is in Defectu Curiæ. Br. Damages, pl. 11. cites 27 H. 6. 2.

24. In Detinue, the Defendant prayed Garnishment, and had it, and the *Scire Facias returned* the *Garnishee did not come*, by which the Plaintiff *recovered the Thing demanded, and no Damages* against the Defendant, nor against the Garnishee. Brooke says it seems that the Defendant appeared at the first Day. Br. Damages, pl. 191. cites 27 H. 6. 4.

(T) How

(T) [How pl. 2. And] *How much* Damage. [pl. 1.]

Br. Damages, pl 68. cites S. C. accordingly by Martin and Strange, and says that at Dayenother Paston and Strange held that he shall recover according to the Discretion of the Justices. Quære.——Fitzh. Damage, pl 21. cites 8 H. 6. 4. S. C.

1. If the Plaintiff counts but to the Damage of 20 l. yet more Damage may be given to him against the Garnishee, for he does not declare this against the Garnishee, 8 H. 6. 5.

Fitzh Enterpleder, pl. 17. cites S. C.

2. In several Writs of Ward brought by Two, if the Defendant prays that they enterplead, and after the Plaintiffs agree, and pray that it be delivered to them in common, yet the Court shall not suffer it. 24 E. 3. 24. b.

(U) When the Recovery is had, what *Remedy* there shall be *against him that has the Thing.*

1. A Scire Facias shall be awarded against the Defendant who has the Custody of the Thing demand. 39 H. 6. 38.

Fitzh. Garnishe, pl. 29. cites S. C.——Br. Charters de terre, pl. 5. S. P. cites 9 H. 6. 36.——Br Garnishe &c. pl. 7. cites S C.——Ibid. pl. 13. S. P. cites 40 E. 3. 29. but it should be 40 E. 3. 39. as in Roll.

2. A Distress shall issue against him to deliver the Thing. 40 E. 3. 39.

3. In Detinue of Charters the *Defendant alleged Livery by the Plaintiff and two others, and prayed Garnishment against them*, and had it, and at the Day *they made Title to the Charters, and the Plaintiff made other Title*, by which the Court had the Box, and delivered to every Man those which to him belonged Br. Enterpleader, pl 25. cites 7 H. 4. 3.

4. Where the *Plaintiff recovers*, the *Judgment shall be of the Chattels demanded*, and *Distress shall issue against the Defendant to deliver the Chattels.* Br. Detinue de biens, pl. 25. cites 21 H. 6. 35.

Br. Scire Facias, pl. 4. cites S. C.

5. A Man shall not have *Scire Facias* in Detinue of Charters *to warn a Stranger*, unless he acknowledges the Possession of the Charters, and makes Privity of Bailment; per Marten; And by him the Court may *open the Bag to see what belongs to him, and what to the other, in the Absence of the one Party*, which Cokain and Babb. expresly denied, and said that they cannot judge to whom they belong by seeing them, and that Scire Facias lies against a Stranger; Quære inde. Br. Charters, pl. 2. cites 3 H. 6. 35.

6. The granting of *Scire Facias upon Garnishment in Detinue against the Heir of J. N. and against the Ordinary, upon a Surmise that he is dead without Executors*, is not Error; Per Brian. Br. Error, pl. 195. cites 14 E. 4. 1.

For more of Enterpleader in General, See other Proper Titles.

Entry.

(A) *Congeable.*

In what Cases. [And How.]

1. IF the Conusee of a Statute sues an Extent, by which the Lands of the Conusor are seised into the Hands of the King, and after a Liberate is sued, the Conusee may after enter into the Land before the Liberate executed, for this Liberate is a sufficient Warrant for his Entry. Dubitatur, P. 38 Eliz. B. R. between † *Butler and Wallis.* Intratur, 37 El. Rot. 206. M. 40, 41 Eliz. B. R. (*) between *Sir Thomas Gerrard and Candish*, per Curiam, where the Entry was not good, because the Liberate was void, being made to the Sheriff to deliver the Land to himself.

† Cro. E. 463 (bis) pl. 15. S. C. per 3 Justices, but Gawdy e contra.

* Fol. 738.

2. If the King seizes certain Lands, upon which an Ouster le Mayn is sued to the Escheator to deliver this Land to the Party again, he may after enter into the Land before any Execution of the Writ. P. 38 El. B. R. agreed, because there is a Judgment given before that the Hands of the King shall be removed.

3. Upon an Elegit, if the Sheriff takes an Inquisition, though the Sheriff does not deliver the Land to the Party Plaintiff, yet the Plaintiff may enter presently after the Inquisition taken, before the Return thereof to the Court, without any Liberate to him directed. Hill. 8 Car. B. R. between *Lister and Bromly*, per Curiam. Intratur, M. 8 Car. Rot. 68. where an Action on the Case was brought against the Sheriff, for returning that he had delivered the Land to the Plaintiff upon the Inquisition taken, where he refused to deliver it, and so the Return false, though it was objected he might have entered; But the Court said, this was only in Mitigation of Damages, and his Return false, and therefore an Action upon the Case lay against him.

Cro. E. 463. (bis) pl. 15. S.P. per Curiam, in the Case of Butler v. Wallis.

4. In Assise, the *Lord distrained* for Rent *pending Assise of the same Rent*; The Assise shall abate; Quod Nota; For *Distress* is in Law an Entry into the Rent, as it seems. Br. Assise, pl. 302. cites 29 Ass. 52.

5. In Assise, *Tenant in Tail is bound in a Recognizance*, and the *Land is delivered in Execution by Elegit*, as the Moiety of the Land which the Recognisor had, and the Tenant in Tail died; The Issue in Tail may well enter; Quod Nota, by Judgment. Br. Entre Cong. pl. 77. cites 38 Ass. 5.

6. In Assise, *Tenant in Tail after Possibility* of Issue extinct *aliens with Warranty*, he in Remainder, or in Reversion, may enter notwithstanding the Favour of the Warranty; Quod Nota. Br. Entre Cong. pl. 84. cites 43 Ass. 24.

7. If the *Tenant in special Tail has Issue and aliens*, the Issue cannot enter; For he cannot be Heir in the Life of his Father. Br. Taile & Dones, pl. 31. cites 45 E. 3. 25.

8. Where

8. Where a *Feoffment* is made *upon Condition*, which *Feoffee dies seised*, so that there are *divers Descents*, there if the *Condition be broken before the Descents*, or after, the Feoffor or his Heir may enter notwithstanding the Descents, for the Land is bound by the Conditions, as it is where a Man recovers Land, and does not enter till after Descent. Br. Ent. Cong pl 130. cites Littleton, fol. 94.

9. Where a *Man willed that his Executors should sell*, and died, and the *Heir entered and was disseised*, the Executors may sell, and therefore the *Vendee may enter*, for he has Title of Entry only. Br. Entre Cong. pl. 138.

10. If a Man *enters with Force upon his Disseisor*, by which he is restored, yet the Disseisee [who was the first Disseisor] may enter, or have Assise. Br. Entre Cong pl. 110. cites 22 H. 6. 18.

11. *Tenant dies without Heir* by which *the Lord entred by Escheat*, there he who by *Right has Paramount* may enter; for a Discent takes away an Entry, but Escheat does not take away an Entry. Br. Entre Cong. pl. 112. cites 37 H. 6. 1.

12. If *Disseisor*, *Intruder* or *Abator enfeoffs his Father and dies seised*, and the Land descends to the Offender, the Party may enter. Br. Entre Cong. pl. 119. cites 5 H. 7. 6.

13. *So* if such Offender *enfeoffs a Stranger who dies seised*, and *his Heir enters and enfeoffs the Offender*; the first Disseisee may enter; but against *Strangers* the Descent shall hold Place; per Keble, which was not denied. Br. Entre Cong. pl. 119 cites 5 H. 7. 6.

14. If *J. infeoffs N.* and after it is *enacted that all Estates made by J. to N. shall be void*; there J. may enter upon N. Br. Entre Cong. pl. 89. cites 5 H. 7. 31.

15. A Man may enter after the Year or within the Year by *Fine Executory*. But see Fitzh. Entre Congeable in Fitzh. 51. that after Descent after such Fine he cannot enter, but shall have *Scire Facias against the Tertenant*. Br. Entre Congeable, pl. 108. cites 15 H. 7. 5. and says, this appears by the Argument there.

16. Lessee for Years Remainder for Life, *Remainder in Tail to Lessee for Years. Lessee for Years made a Feoffment in Fee with Warranty* and died. Remainder-man for Life died. Resolved that the Entry of the Issue in Tail is lawful, notwithstanding that the *Disseisin was done to another Estate* than that which was to be bound by the Warranty. Le. 39. pl. 105. Pasch. 26 Eliz. C. B. King v. Cotton.

17. *What may be reduced by a Real Action may be reduced by an Entry*, as in one Acre in the Name of more, and this was observed by the Court for an infallible Rule. Noy. 108. Trin. 2 Jac. C. B. Nichol's Case.

18. Where one has *Judgment* to recover, (if his Entry be lawful) he may enter without *Scire Facias*, and without suing Execution; Per Cur. D. 379 b. pl 26. Marg cites Mich. 3 Jac. B. R.

29. If *Tenant for Life levy a Fine*, Remainder in Tail may enter now or have five Years after the Death of Tenant for Life, for they are two several Titles, one by Forfeiture, and the other by Determination of the Estate, and for this to have two several five Years, for if he compels the Remainder-man to enter presently, he shall be *bound by all the Charges of Tenant for Life*. Arg. Litt. Rep. 217. Mich. 4 Car. C. B. Thomas v. Kenns

30. After *Recovery in Ejectment* one may enter *without the Sheriff*, for the Assistance is only to preserve the Peace. Per Cur. 2 Sid. 156. Pasch 1659. in a Nota.

(A. 2) By whom it may be.

1. IF the *Tenant in Præcipe quod reddat aliens pending the Writ*, and the *Demandant recovers* by Judgment, and the *Tenant brings a Writ of Error* as he may well and *recovers*, the *Alienee may enter*. Br. Entre, Cong. pl. 51. cites 12 Aff. 41.

2. If my *Tenant for Life* be *diffeifed* and *will not enter*, yet I cannot enter. Per Finch, for clear Law. Br. Entry Cong. pl. 120. cites 40 E. 3. 5.

3. A Man of *non fane Memoriæ made* a Deed of *Feoffment and Letter of Attorney* to deliver Seifin of the Land in Chivalry and died, the Friend of the Heir within Age entred, there the Lord may enter for the Ward, for the *Feoffment is void*; *Contrary if he himfelf had made the Livery*, as it feems, and it feems here that none can enter but the *Privies*, for the Lord pleaded entry of the Friend of the Heir, and not by himfelf immediately. Br. Entry Cong. pl. 106. cites 7 H. 4. 12.

4. If *Leffee for Life of a Diffeifor makes Feoffment*, and the *Diffeifee releafes to the Feoffee, the Entry* of the Diffeifor for the Forfeiture is not congeable; Per Littleton. Cited D. 339. a. pl. 44. in Cafe of Blackaller v. Martine.

5. *Tenant for Life*, the *Remainder for Life, the Remainder in Tail*, the *Remainder to the Remainder for Life, Tenant for Life, and he in Remainder for Life joined in a Feoffment by Deed*; Per Curiam he in Remainder in Tail may enter for Forfeiture of both their Eftates; for he in Remainder joining, is particeps criminis. If the Tenant for Life himfelf had made a Feoffment, he in Remainder for Life might not enter, becaufe he had not Eftate of Inheritance. D. 239. a. pl. 44. Mich. 16 & 17 Eliz. Blackaller v. Martine.

6. Leafe to three for 80 Years, and in the End of the faid Leafe was a Claufe, that *if they died within the faid Term, that then the Leffor might enter*. A. Grantee of the Reverfion makes a *new Leafe* thereof to B. for 21 Years to *begin after the Expiration*, Determination, or Surrender of the former Leafe. The three Leffees died within the Term. B. cannot enter before A. has entered, for it is in the Election of A. if he will take Advantage of the Condition and defeat the Leafe, but that ought to be by Entry, and none can make fuch Entry but Leffor himfelf, or by his exprefs Directions. 3 Le. 269. pl 363. Pafch. 33 Eliz. C. B. Anon.

(A. 3) Barr'd. By what Act.

1. IN Affife, it was held and adjudged, that where one abated upon another and the *Abator or Diffeifor made a Feoffment* or Leafe for Life, and fo over, fo that one is in by defegfible Title and hath Caufe of Warranty by Reverfion or fuch like, that in this Cafe *he upon whom* the Abatement or Diffeifin was made *cannot enter upon him, who has Warranty againft other Perfons*, notwithftanding that there be not any Defcent to take away the Entry, but only the Lofs of the Warranty.

Warranty. Br. Entre Cong. pl. 48. cites 1 Aff. 13. and 11 E. 2. accordingly. Contrary at this Day.

2. He who *distrains* for Rent, and has Claufe of Re-entry in his Leafe for Non-Payment cannot re-enter; quod nota, by reafon that he has diftrained. Br. Entre Cong. pl. 53. cites 14 Aff. 11.

3. In Affife, the Tenant *pleaded in Bar that he was bound in a Statute Merchant in 20 l. to the Plaintiff who fued Execution*, and had this Land in Execution, and after granted to the Defendant by Indenture, that if he paid the 20 l at a certain Day he may enter, and that he paid and entred, and a good Bar. Br. Affife, pl. 227. cites 20 Aff. 7.

So of Releafe of all Actions. Br. Entre Cong. pl. 109. cites 19 H. 6. 4. *For* the Right, nor the Entry, is not releafed by thefe Words, All Actions.

4. If the *Diffeifee releafe all Actions Perfonal*, yet he may enter; Quod nota. Br. Entre Cong. pl. 54. cites 17 Aff. 25.

S. P. Br. Entre Cong. pl 102 cites 18 E. 4. 13. *And* he may enter within Age, or at full Age, at his Pleafure, to defeat the Warranty.——*But* it feems that *if a Defcent be* had *mefne between the full Age and the Entry* he cannot enter Br Entre Cong pl. 102. cites 18 E. 4. 13.——*Contrary upon a Recovery or* an *Eftate Conditional*. Br. Ibid.

5. In Affife an *Infant* may enter notwithftanding *Collateral Warranty* be defcended upon him, *where his Entry was lawful before*; Per Shard, Stanton and Birton; and hence it feems, that the contrary is Law, if his Entry was not lawful before. Br. Entre Cong. pl. 65. cites 28 Aff. 28.

6. In Affife, *Tenant for Life is diffeifed*, he in *Reverfion may enter*; Per Perfey, which was denied by Fincheden; Quod nota bene inde. Br. Entre Cong. pl. 11. cites 45 E. 3. 21.

7. In Writ of Entry in the Per & Cui, if the *Tenant vouches him in the Per*, he *may enter into the Warranty and plead to the Writ by Falfifying the Entry*, quod tota Curia conceffit. Br. Enter en le Per, pl. 21. cites 22 H. 6. 13.

(A. 4) Revived.

1. D*iffeifor is diffeifed*, and *fecond Diffeifor levies a Fine*, and the Year and Day pafs *without Claim of firft Diffeifee*, but *fecond Diffeifee makes Claim* within the Time, now the firft Diffeifee is bound as to the Entry upon the laft Tenant in Poffeffion; but if *fecond Diffeifee enters*, as he may by reafon of his Claim, now the firft Diffeifee fhall enter upon him; Arg. Mo. 346. cites 0 E. 2. Fitzh. tit. Continual Claim.

Admitted. Arg. Mo 349.

2. *Tenant makes Feoffment pending the Writ*, and the *Demandant recovers*, the Feoffee is bound as to the Demand; but if the firft Tenant reduce the Poffeffion by *reverfing the Recovery for Error*, the Feoffee upon the fame Tenant fhall re-enter; Arg. Mo. 347. cites 21 E. 3. and 12. Aff. pla. Ultimo.

3. In Affife it was found by Verdict, that *Tenant in Tail aliened in Fee*; The *Alienee died feifed, and three Heirs after him*, and the *Iffue of the third Heir had the Deed of Tail in his Hand*, and being in his Bed dying fent for the Iffue in Tail, and faid to him, that he had Right to have the Tenements comprifed in the Deed by Force of the Tail, and delivered him the Deed, and *furrendered the Land* to him by

by Par l, and after died in the House of the same Tenements, and the Issue in Tail entred by this Render by the Tail, and the Heir of him who surrendered ousted him, and he him re-ousted, and the Heir of him who surrendered brought Assise, *and the Surrender was awarded good*, and the Entry of the Issue in Tail good, and the Plaintiff barred of the Assise. Br. Entre Cong. pl. 70. cites 34 Aff. 2.

4. If Land be *given to A. and to B. and C. his Feme, and to the Heirs of the Body of the Baron and Feme*, and after the *Donor releases to A. and to B. and C. and their Heirs*, and the *Baron and Feme have Issue*, and the *Baron dies*, and *A. aliens the Moiety in Fee*, * C. may enter by reason of the Tail for the Alienation to her Disinheritance; But if the Issue dies after without Issue, then the Alienee of A. may re-enter, for the *Alienation of A. was good before to sever the Jointure for Term of Life, and to give his Part of the Fee-simple*, and therefore when the Tail is extinct the Fee-simple shall take Place. Br. Entre Cong. pl. 136. cites 45 Aff. 7.

* Ibid. pl. 87 cites S. C.

5. If an Infant *be a Disseisor, and another* Man *disseise him and dies seised*, and *his Heir* is *in by Descent*, the Entry of the first Desseisee is taken away; *But if the Infant enters* or recovers, the first Disseisee may enter; and so see that the Entry of one shall give Advantage to a Stranger. Br. Entre Cong. pl. 38. cites 4 H. 6. 7. 3.

6. A *Disseisor made a Gift in Tail, Remainder over in Fee*, if the *Donee dies* and *his Heir is in by Descent*, the Entry of the Disseisee is taken away; *But if* the *Issue dies without Issue*, and he in *Remainder enters*, the Entry of the Disseisee is revived, for *he is in as Purchasor.* Br. Entre Cong. pl. 92. cites 9 H. 7. 24.

7. *But if a Descent be had from the Disseisor to his Heir*, by which the Entry of the Disseisee is taken away, and after the *Issue dies without Heir*, so that the *Lord enters by Escheat*, yet the Entry of the Disseisee is not revived, for he affirmed the first Estate. Br. Entre Cong. pl. 92. cites 9 H. 7. 24.

8. *But if the Disseisor himself dies without Heir, and the Lord enters by Escheat*, the Disseisee may enter, for *there was no Descent.* Br. Entre Cong. pl. 92. cites 9 H. 7. 24

9. *And* if a *Feme* be a *Disseisoress*, and *dies seised*, and *her Baron is Tenant by Curtesy*, the Disseisee may enter upon him. Br. Entre Cong. pl. 92. cites 9 H. 7. 24.

10. *But if* the *Tenant by the Curtesy dies, and the Heir of the Feme enters*, the Entry of the Disseisee is not lawful upon him; which was agreed by all the Court, quod mirum! For per Littleton, in this last Case, the *Descent* is *only of a Reversion*, which *does not take away an Entry.* Br. Entre Cong. pl. 92. cites 9 H. 7. 24.

11. If a *Disseisor* be, and he *aliens*, and *Alienee dies seised*, and *his Heir enters*, the Entry of the Disseisee is tolled; But if the *Disseisor be Heir to the Alienee*, then he may enter because he was Party to the Wrong; Per Moyle for Law, which was not denied. Br. Entre Cong. pl. 3. cites 33 H. 6. 5.

12. *Tenant in Tail makes Feoffment with Warranty*, and dies; the Issue recovers by *Formedon* because *no Assets* descended; yet *if Assets descend afterwards* the Tenant shall have Sci. Fa. to re-have the Land. Arg. Mo. 347. cites Pl. C. 110. [a. Mich. 2 M. 1.] Fulmerston v. Steward.

(A. 5) Scire Facias. In what Cases Entry is not lawful without a Scire Facias.

1. IT is agreed in Trespass that where a Man *recovers Land and makes a Feoffment*, and after the *Judgment is revers'd by Error*, the Party cannot enter before he has had a *Scire Facias against the Feoffee*, for he was not a Party to the Reversal. Br. Entre Cong. pl. 132. cites 4 H. 7. 10. 11.

2. *But* where *Attainder* of Treason or such like is *revers'd by Parliament*, the Party *may enter* without a Scire Facias *against the Patentee*, and *otherwise upon the King*. Br. Entre Cong. pl. 132. cites 4 H. 7. 10. 11.

(B) Where an Entry *into Part* shall be an Entry *for the Whole*.

1. IF a Disseisor leases several Parcels of Land to several Men for Years, and after the Disseisee enters upon one in the Name of all, this is a good Entry for the Whole, because there is but one Tenant to the Præcipe, who is the Disseisor, who is only Tenant of the Freehold. P 6. Ja. B. between *Damport and Honour*.

4 Le. 14. pl. 50. Hill. 31 & 32 Eliz. C. B. Anon. S. P. —— 4 Le. 8. pl. 35. Hill. 27 Eliz. Holland v. Hopkins, S. P but says Quære if the Lessees of Disseisor had been Tenants for Life; because he might have his Action against them. —— Co. Litt. 252. b. S P and same Diversity, and in the Case of Leases for Years the Disseisee might have one Assise against the Disseisor, because he remained Tenant of the Freehold for all the Acres, and therefore one Entry shall serve for the Whole. —— But Entry into the Franktenement of one Person is not an Entry into the Franktenement of another Person And 28. in pl. 64 Mich. 14 & 15 Eliz. —— Same Diversity as above as to Lessees for Years and Lessees for Life. D 337 b. Marg. pl. 37. cites Mich. 42 & 43 Eliz B. R Goodman v Gerners, and Dalton v. Brown. —— As to Lessees for Years, the Entry upon one in the Name of all Lands in the same County was held good by Jones, Doderidge and Crew, because the Freehold is in one only and within the same County D. 337 Marg. pl. 37. cites Hill. 22 Jac. and Pasch 1 Car. B. R. Argoll v Cheyney. —— Palm. 402. S. C. held accordingly. —— Lat. 71. S. C

2. [But] If a Man be disseised of two several Acres by two several Persons, and after enters into one Acre in the Name of both, this is not any Entry into the other Acre. M. 8 Ja. between *Champernoon and Hall*, per Curiam.

The Entry in this Case is good for no more than the Acre enter'd into, and so it is though the several Acres lay all in one County; For each Disseisor is a several Tenant of the Freehold, and the Entry of a Man to re-continue his Inheritance must ensue his Action for Recovery of the same, and as he must have several Actions against them for Recovery of the Land so his Entry must be several. Co. Litt 252. b —— Dal. 88. pl 2 Anno 15 Eliz. Anon. S. P.

3. *Two purchased to them and to the Heirs of one*, and *Cesty que Vie aliened the Whole*; the other may *enter into* the Whole, the *one Moiety for Disseisin* to him, *and the other for Alienation* to his Disinheritance. Br. Entre Cong pl. 52. cites 13 Ass. 7.

4. In Assise, if my *Father dies seised of one Acre* of Land *in D. in his own Right, and of another Acre* of Land *there jointly seised with his Wife,* who

who survives him, and I *enter into the Acre of which my Father was sole seised in the Name of all* the Lands and Tenements whereof my Father died seised in D. this does not give any Entry but in this Acre, and not in the other, because I have no Right to enter into the other living my Mother; quod nota. Br. Entre Cong. pl. 80 cites 39 Aff. 16.

5. If I have *Title to two Acres* of Land *in one Vill*, and my Title *is taken away in the one Acre*, but not in the other; if I *enter into that where my Entry is toll'd, claiming the other Acre also*, and in the Name of both Acres, *this is not any Possession* in me but only of that Acre where I have enter'd, *but if my Entry had been congeable in the same Acre* into which I enter'd *claiming the other* Acre at the Time of my Entry, *this had been a good Entry* and a good Possession of both Acres to have an Assize. Keilw. 20. b. pl 5. Hill 12 H. 7. Anon.

6. If a Man be *disseised of two Acres in several Counties*, and the Disseisee enters *into one* Acre *in the Name of both* Acres, yet this Entry shall not extend to the Acre lying in another County, in which Acre Entry was not made. Perk. S. 229.

Br Entre Cong. pl 35. cites 22 H. 6. 10 Per Paston and Portington, S P.

7. It is said that if a Man be *disseised of two Acres* in one County, and he *entered into one* of the Acres, *claiming the said Acre only*, and *maketh a Deed of Feoffment of both Acres unto a Stranger, and makes the Livery* of Seisin according to the Deed *in the Acre in which he enter'd*, that both Acres should pass unto the Feoffee, because that this Claim is nothing to the Purpose, because he had Right of Entry before &c. and both Acres are in one County, so as his Entry into one Acre shall be Entry into both Acres, notwithstanding the Claim &c. against which it may be said that the Acre into which the Feoffor did not enter shall not pass by the Feoffment; for when a Man is out of Possession of a thing severable he is at Liberty to continue his Possession in it, in which Part he will, and shall not be compelled for to re-continue his Possession unto all in Despight of him. Perk S. 232. cites 9 H. 7. 25.

If one *disseises me of two several Acres in one County*, and I *enter into one of them generally, without saying in the Name of both*, this shall revest only that Acre wherein Entry is made Co. Litt. 252. b.

8. If *Lord and Villein* be, and the *Villein purchase two Acres of Lands in Fee lying in one County*, and Possession of them is executed to him accordingly, and the *Lord* of the Villein *enter into one Acre, not claiming the other Acre*, and afterwards makes a Deed of Feoffment of both Acres unto a Stranger, and makes Livery of Seisin in the Acre in which he hath entered according to the Deed, yet the Acre into which he did not enter shall not pass by the Feoffment &c. Perk. S. 234.

9. An Entry of a Man to re-continue his Inheritance or Freehold *must ensue his Action* for the Recovery of the same; As if three Men disseise me severally of three several Acres of Land, being all in one County, if I enter into one Acre in the Name of all the Rest, this is only good for that Acre which I entred into; for every Disseisor hath a several Freehold, and therefore I must bring several Actions. &c. Co. Litt. 252. b. cites Mich. 14 & 15 Eliz. Ld. Arundel's Case.

10. So if one disseise me of three Acres of Lands, and after leases these three several Acres to three several Men for their Lives, there the Entry of the Disseisee upon one of the Lessees is not good for the Rest; but if the Disseisor had letten these three Acres to three several Men for Years, an Entry into one in the Name of all the three Acres would revest the Whole. Co. Litt. 252. b.

11. If *A. disseises B. of Lands in three Towns*, and *levies a Fine with Proclamations of the Lands in one Town to C. in Fee*, and the *Disseisee* within five Years *enters into the Lands in the other two Towns only, (being in the Possession of the Disseisor) in the Name of all the Lands in the three Towns*,

And 28. pl. 64. Croke v. Mason. S. C. this

was no Entry into the Lands of which the Fine was levied; For the Conusee was in by Title. Bendl. 207. pl. 243. S. C adjudged, and for the same Reason.

Towns, by this the Estate of the Conusee in the third Town was not devested, because he was in by Title. Kelw. 213. a. pl. 22. Mich. 14 & 15 Eliz. Brook v. Meason.

12. A *Copyholder surrendered to the Use of his Will, and* thereby *devised the Land to his Wife for Life*, the *Remainder over to his Son in Tail, and died*, the *Wife entred and died*, a *Stranger did intrude upon the Lands, and* thereof *made three several Feoffments to three several Persons*, he in the *Remainder entered upon one of the said three Feoffees in the Name of all the Lands so devised, and made a Lease of the whole Land*; And by Clench and Wray it was a good Entry for the Whole, and by consequence a good Lease of the Whole; Gawdy contrary; Note, *all the Lands were in one County*. Le. 36. pl. 46 Trin. 28 Eliz. B. R. Troublefield v. Troublefield.

13. The Case was this, *Three several Persons did occupy three several Houses in B. to which J. S. had Right*, and *J. S. went to one of the Houses and entred, and afterwards went away, leaving him who occupied the said House upon the Land*; and *then he enter'd into another of the Houses, and* then *went from that, leaving him who occupied the same before upon the Land*; and *then he enter'd into the third House, and there sealed a Lease for Years unto another Man of that House, and naming the two other Houses*; and the *Lessee brought an Ejectione Firmæ for the two Houses in which the Lease was not delivered*, and the Opinion of the Court was against him, that he was barred in the Action; for the Entry or Continuance of him, who occupied the same before, did defeat the Entry of the Plaintiff or Lessor; and the Plaintiff was forced to be Nonsuited. Godb. 72. pl. 87. Mich. 28 & 29 Eliz. B. R. The Earl of Kent's Case.

14. When a Freehold is out of a Person, if the *Disseisee enters generally into one Parcel*, this shall not re-continue both, for it *may be that the Disseisor or the Feoffee had a Warranty*, and therefore the general Entry into one Parcel shall not re-continue both. Co. de Fin. Lect. 15.

15. If *one disseises me of one Acre at one Time, and* after disseises me *of another Acre in the same County at another Time*, in this Case my Entry into one of them in the Name of both is good, for that one Assise might be brought against him for both Disseisins. Co. Litt. 252. b.

But if the Lands lie in several Counties there must be several Actions and consequently several Entries Co Litt. 252. b.

16 But if I *enfeoff one of one Acre of Ground upon Condition, and at another Time I enfeoff the same Man of another Acre in the said County upon Condition also*, and *both the Conditions are broken*, an Entry into one Acre in the Name of both are not sufficient, for that I have no Right to the Land, nor Action to recover the same, but a bare Title, and therefore several Entries must be made into the same, in respect of the several Conditions. *But an Entry into one part of the Land in the Name of all the Land* subject to one Condition is good, although the Parcels be several and in several Towns. Co. Litt. 252. b.

17. *Where the Possession is in no Man, but the Freehold in Law is in the Heir that enters*, there the general Entry into one Part reduces all into his actual Possession. And therefore if the *Lord enters into a Parcel generally for a Mortmain, or* the *Feoffor for a Condition broken*, or the Disseisee into Parcel generally, the Entry shall not vest nor devest in these or like Cases but for the Parcel. Co. Litt. 15. b.

18. But *when a Man dies seised of several Parcels in Possession, and the Freehold in Law is by Law cast upon the Heir; and the Possession in no Man*, there

there the *Entry into Parcel generally* seems to vest the actual Possession in him in the Whole. *But* if this *Entry* in that Case be *special*, viz. that he enters only into that Parcel and no more, there it reduces that Parcel only into actual Possession. Co. Litt. 15. b.

19. If a Man hath *Cause to enter into any Lands or Tenements in divers Towns in one and the same County*, if he *enters into one Parcel of the Lands* or Tenements which are *in one Town, in the Name of all* the Lands or Tenement into the which he hath Right to enter, within all the Towns of the same County, by such Entry he shall have as good a Possession and Seisin of all the Lands and Tenements whereof he hath Title of Entry, as if he had entred indeed into every Parcel. Litt. S. 417.

20. If *three Men disseise me severally of three several Acres* of Land, being *all in one County*, and *I enter in one Acre in the Name of all* the three Acres, this is good for no more but for that Acre which I entred into, because every Disseisor is a several Tenant of the Freehold, and as I must have several Actions against them for the Recovery of the Land, so my Entry must be several. Co Litt. 252. b.

21. So it is if *one Man disseises me of three Acres* of Ground *and lets the same severally to three Persons for their Lives* &c. There the Entry upon one Lessee in the Name of the Whole, is good for no more than that Acre that he has in his Possession. Co. Litt. 252. b.

If a Man be *disseised of three Acres by one Man*, and the *Disseissor lets severally the said three Acres to three Persons for Years*, there the Entry upon one of the Lessees in the Name of all the three Acres shall re-continue, and revest all the three Acres in the Disseisee; For that the Disseisee might have had one Assise against the Disseisor, because he remained Tenant of the Freehold for all the three Acres, and therefore one Entry shall serve for the Whole. Co. Litt. 252. b.

22. If *one disseises me of one Acre at one Time, and* after disseises me *of another Acre in the same County at another Time*, in this Case my Entry into one of them in the Name of both is good; for that one Assise might be brought against him for both Disseisins. Co. Litt. 252. b.

23. If *I enfeoff one of one Acre* of Ground *upon Condition, and at another Time I enfeoff the same Man of another Acre in the same County upon Condition also*, and *both the Conditions are broken*, an Entry into one Acre in the Name of both is not sufficient; For that I have no Right to the Land, nor Action to recover the same, but a bare Title, and therefore several Entries must be made into the same in respect of the several Conditions. Co. Litt. 252. b.

But an Entry into one Part of the Land in the Name of all the Land subject to one Condition is good, althouth the Parcels are several, and in several Towns, and so Note a Diversity between several Rights of Entry, and several Titles of Entry by Force of a Condition. Co. Litt. 252. b.

24. If Lands lie in several Counties there must be *several Actions*, and Consequently several Entries. Co. Litt. 252. b.

25. The Entry of an Attorney or Lessee *into one Acre in Possession of A. in the Name of other Lands*, shall vest all in the same County which are *in Possession of other Lessees for Years*, if the *Freehold be in one Person*. Palm. 402. Pasch. 1 Car. B. R. Argol v. Cheyney.

25. It was held, that where a Man would recover the mesne Profits *in an Action of Trespass*, he must prove Entry into every Parcel, and not into one Part in the Name of all. Clayt. 35. pl. 61. Aug. 11 Car. Gledel's Case.

26. If there is a Manor-House, and Demesne Land belongs to it, and one Lord enters into the Land, and the other Lord into the House, the *Possession* of the *House* shall not be the Possession of the *Demesnes*, nec e converso. 2 Sid. 75. Pasch. 1658. Crouch v. Wills.

(C) Entry to the Use of another.

In what Cases the Entry *of one to the Use of another* shall *settle the Possession* in him *without Agreement*, and in what not.

1. IF the Baron enters to the Use of his Feme, where the Entry of the Feme is lawful, this settles the Possession in the Feme presently, without any Agreement. 14 H. 6. 25. b.

Br. Continual Claim, pl. 6. cites S. C. but S. P. does not appear there. —— Br. Entre Cong. pl 41. cites S. C. but S. P. does not appear there.

2. So if a Man enters to the Use of an Infant into Lands where his Entry is lawful, this settles the Possession in him before Agreement by the Infant. 14 H. 6. 25. b.

Br Continual Claim, pl. 6. cites S. C. but not S. P. —— Br Entre Cong. S. C. but S. P. does not appear. —— Co. Litt. 245. a ad finem, S. P. —— Ibid. 258. a. S. P.

3. So if the Entry be to the Use of one of full Age, where the Entry is lawful, this vests the Possession in him before Agreement. 34 E. 3. Entry Congeable 50.

Co. Litt. 245. b. ad finem. —— Ibid. 258. a. —— Mo. 450. pl. 613. S. P. admitted per Cur. —— If one disseises me, and a Stranger enters upon the Disseisor for me, this Entry takes away the Disseisin; Per Roll Ch. J. Sty. 370. Pasch 1653.

4. If a Man enters to the Use of one of the Plaintiffs, where the Entry is not lawful, this vests nothing in him before Agreement, because he shall be a Disseisor by the Agreement. 34 E. 3. Entry Congeable 50.

For the Entry of one for two shall not be the Entry of the other, where the Entry is not lawful. Br. Entre Cong. pl. 69. cites 31 Ass 33. and 1 H. 6. and 8 H. 6. 16. accordingly.

5. So if a Man enters to the Use of an Infant, where his Entry is not lawful, this vests no Possession in the Infant. 14 H. 6. 25. b.

Br Continual Claim, pl. 6. cites S. C. & S. P. —— Br. Entry, pl. 41. cites S. C.

6 If a Man disseises me, and I make continual Claim, and after he dies, and this descends to two Coparceners, upon whom I enter, by which the Coparcenary is defeated, if after one enters, claiming to the Use of herself and her Coparcener, yet nothing vests in the other before Agreement, for their Entry is not lawful. 14 H. 6. 26.

So where one Coparcener enters, claiming for her and her Sister who is an Infant, she of full Age is a Disseisoress only, and the other who is an Infant not. Br. Entre Cong. pl. 60. cites 26 Ass. 39.

7. So

7. So if a Man enters upon two Jointenants, where his Entry is lawful, by which the Jointenancy is defeated, if after one enters to the Use of both, yet nothing vests in the other before Agreement. 14 H. 6. 25. b.

Fol. 739.

As where Disseisor infeoffs Baron and Feme, and the Disseisee re-entered, and the Baron re-entered claiming to him and his Feme, this vests nothing in the Feme, because the Jointenancy was defeated by the Regress of the Disseisee, and so he that enters by Tort, as the Baron here does, cannot by his Claim vest any thing in the Feme Covert, in Infant, nor in a Stranger to the Entry. Br. Entre Cong. pl. 6 cites S C — And cites 1 H. 6. 5. to the same Purpose. ——— S. P unless they enter actually. Br. Continual Claim, pl. 6. cites S C. But Brooke says, it seems if the Stranger agrees after, this will make him a Disseisor. ——— Br. Entre Cong pl. 41. cites S C which was in Case of a Feoffment made by a Disseisor to a Baron and Feme, and the Disseisee re-entered, a Claim afterwards by the Baron vested nothing in the Feme.

8. If two Coparceners have a Right of Action to certain Land, but their Entry is not lawful, and the one enters to the Use of both, yet nothing vests in the other till Agreement. 27 Ass. 68. adjudged.

Br. Entre Cong pl. 64. cites S. C. & S P. —— Fitzh. Ass. pl. 261. cites S. C.

9. If two Jointenants are disseised, and the Disseisor aliens, and one Jointenant enters upon the Alienee to the Use of both, this settles the Freehold in both. 27 Ass. 68.

10. If a Man commands J. S. to enter into certain Lands in his Name, if he has Right, otherwise not, if he enters accordingly, yet if the Commander had no Right, no Estate vests in him by this Entry, because his Command was conditional. 34 E. 3. 12. adjudged.

This is at 34 Ass. pl. 12.

11. In Assise, it was found that the *Son infeoffed his Father of two Parts of the House, and* 20 *Acres of Land for Term of Life, and* that he infeoffed *his Father and his Mother for Term of their Lives*, and after the *Son went beyond Sea* the *Father aliened the whole*, and his *Sister entered in Name of her Brother if he be alive, and if he be dead in her own Name as Heir to him*, and she was ousted, and the Son came back and brought Assise of this Ouster, and recovered the whole by Award notwithstanding she was not deputed by the Son to enter. Br. Seisin, pl. 21. cites 11 Ass. 2.

12. In Assise, it was found that *Tenant in Tail had Issue two Daughters and aliened in Fee*, and *died*, and *one Daughter entered*, and ousted the Feoffee, *claiming to the Use of her and her Sister*; The Feoffee re-entered, and she who re-entered brought Assise and recovered, and after *the other Sister entered upon her claiming as Heir*, and the other ousted her, *and she brought Assise and recovered*, by reason that her Sister entered first to the Use of both, and recovered upon the same Title, and therefore her Sister may enter with her; Brooke says, *Quod mirum!* Br. Entre Cong. pl. 55. cites 21 Ass 19.

13. *Guardian entered* claiming the Franktenement to the Heir within Age, *where the Entry was not congeable*, and yet because the Infant was not named in the Assise the Writ was abated, and therefore it seems that the Franktenement is in him till he refuses; Quære; For where one Coparcener entered claiming for him and his Coparcener, he alone brought the Assise of an Ouster after and recovered, notwithstanding that it was pleaded to the Writ that the Plaintiff entered claiming to him and his Companion. But Fish said, that he would have a Writ of Error, and, as it seems, it is clearly Error where such Entry and Claim is made, and the Entry lawful. Contrary it seems if the Entry be not lawful. Nevertheless, it seems that this Case is not Error, for the Case was, that *Baron and Feme seised in Tail*, the *Baron made a Feoffment*, and had *Issue two Daughters*, *who had Issue two Sons*, the

Baron died, the *Feme entred upon the Feoffee of his Assent, claiming at his Will*, and *died*, and *the two Daughters died*, and *one of the Sons entered* upon the Feoffee, *claiming to* the Use of *him and his Companion*, the *Feoffee brought Assise against him who entered only*, and recovered by Award, for the *Feme by her Entry was no Disseisoress*, and then she did not die seised of an Estate of Inheritance, so that the Heir may be remitted; Quod Nota. Br. Entre Cong. pl. 37. cites 24 E. 3. 42.

14. *And where the Entry is not lawful*, there *the Claim to him and his Companion does not vest Seisin in his Companion*, and *e contra where* the Entry is *lawful*. Br. Entre Cong. pl. 37. cites 24 E. 3. 42.

Br. Condition, pl 77. cites S. C.

15. In Quare Impedit, the Defendant made Title, because A B was *seised of the Land* in Fee *with the Advowson appendant* and *infeoffed* upon Condition one *R. to re-infeoff* A. B. and *his Feme and G. his Son*, and after *A. B. died*, and *G. the Son died within Age after Request made to re-infeoff him*, and after *J. his Son died also within Age*, and *W. his Son being within Age*, one *H. as his Prochein Amy enter'd*, by which the Defendant as Lord seised the Ward, and the Church voided, and he presented; And admitted for good Title to have the Ward where the Heir enters into the Land within Age by Condition descended; quod nota. Br. Gard, pl. 58. cites E. 3. 37.

16 If *a Feme Covert* has Title of Entry into Land, *or* if *Infant has* such *Title of Entry*, and the *Baron or another enters to the Use of the Feme or Infant*, this vests Possession in the Feme or Infant; Contra if the Entry be not lawful, and if Disseisor infeoffs two, and the Disseisee re-enters, and after one of the Feoffees re-enters, this is no Remitter to his Companion; Contra if his Entry had been lawful. Br. Remitter, pl. 42. cites 14 H. 6. 25.

17. *By Re-entry of the Tenant at Will after a Disseisin* the *Franktenement is not recontinued to the Lessor*, as it is by Entry *of a Termor*. Br. Trespass, pl 227. cites 38 H. 6. 27.

A Feoffment by Tenant for Years is a Disseisin, and in such Case every one may enter on Behalf of Disseisee where he has a Right of Entry. Cro. C. 170. pl. 16. Mich. 5 Car. B. R. in Case of Edgar v. Sorrell.

18. If a Man enters to the Use *of him who has lawful Entry*, this vests the Seisin and Possession in him who has Title of Entry without other Agreement. Br. Seisin, pl. 50. cites 10 H. 7. 12.

19. *Contra if he has not Title of Entry*, by Justices of B. R. For there the Possession vests in those who enter. Br. Seisin, pl. 50. cites 10 H. 7. 12.

20. If an *Infant makes a Feoffment in Fee*, an *Estranger of his own Head cannot enter* to the Use of the Infant, for the Estate is voidable. Co. Litt. 245. a.

21. If an Infant, or a Man of full Age is *disseised*, an Entry by a Stranger, of his own Head, is good, and so vests presently the Estate in the Infant or other Disseisee Co Litt. 245. a.

22. If *Tenant for Life makes a Feoffment in Fee*, an *Estranger may enter for a Forfeiture in the Name of him in the Reversion*, and thereby the Estate shall be vested in him, Et sic de similibus. Co. Litt. 245. a.

23. If an Infant or any Man of full Age, have any *Right of Entry* into any Lands, any *Stranger* in the Name, and to the Use of the Infant, or Man of full Age, may enter into the Lands, and this regularly shall vest the Lands in them *without any Commandment precedent*, or *Agreement Subsequent*. Co. Litt. 258. a.

24. If a *Disseisor levy a Fine with Proclamations* according to the Statute, a Stranger without a Commandment precedent, or an Agreement subsequent within the five Years cannot enter in the Name of the Disseisee

feffee to avoid the Fine, and the Refolution was grounded upon the Conftruction of Stat. 4 H 7. cap. 24. Co. Litt 258. a.

25 *Guardian for Nurture, or in Socage*, may enter in the Name of the Infant, having a Right of Entry, and this fhall veft the Eftate in the Infant *without any Commandment or Affent*. 9 Rep. 106. a. Pafch. 10 Jac. 1. in Margaret Podger's Cafe.

(D) Entry to the Ufe another.

What fhall be a *good Agreement* to fettle the Eftate.

If a Man diffeifes another to the Ufe of Baron and Feme, and they agree to it, the Eftate is in both. 15 E. 4. 15. b. admitted.

2. [But] If a Man diffeifes another to the Ufe of a Feme Covert, the Agreement of the Feme without the Husband will not fettle the Eftate in the Feme, becaufe her Agreement is void, for her Will is transferred to the Baron.

3. But in this Cafe, the Agreement of the Baron will fettle the Eftate in the Feme, though fhe is no Diffeiforefs thereby, for the whole * will of the Feme is put in the Baron during the Coverture, and he may agree to the Feoffment made to the Wife; Ergo. 12 E. 4. 9. b. Curia.

Br. Diffeifin, pl 97. cites S. C. —— Fitzh. Diffeifin, pl. 3. cites S. C. —— Br. Agreement, pl. 4. S. C.——* The Original in Roll is (agree).

4. If the Baron diffeifes another to the Ufe of the Feme, this fhall fettle the Eftate in the Feme, for the Baron upon a Diffeifin by Another by his Agreement might have fettled the Eftate in the Feme, and this Diffeifin to the Ufe of the Feme is an Agreement in Law; Ergo. * 44 E. 3. 9. admitted. 44 Aff. 26. admitted. Contra † 14 H. 6. 25. b. 7 E. 4. 7. b.

* Fitzh Entre congeable, pl. 33. cites S. C. —— † Br. Continual Claim, pl. 6. cites S. C — Br. Entre congeable pl. 41. cites S. C. but S. P. does not clearly appear.

5. If Baron and Feme enter into Land in the Right of the Feme, where the Feme hath not any Right, the Feme is Tenant of the Land thereby. 35 Aff. 5. adjudged.

Fitzh. Affize pl. 321. cites S. C. —— Br. Coverture, pl. 41. cites S. C. and Brooke fays, Et fic Vide that the Feme has no Power to waive the Tenancy during the Life of the Baron.

6. If the Baron feifed in the Right of the Feme aliens in Fee, and after diffeifes the Difcontinuee, claiming his firft Eftate, without faying any Thing of the Feme, this fhall veft nothing of the Tenancy in the Feme, becaufe he does not claim by exprefs Words in the Name of the Feme. 44 E. 3. 9. adjudged per Curiam. 44 Aff. 26. the fame Cafe.

Fitzh. Entry Congeable, pl. 33. cites 44 E. 3 8. S C.

7. If a Man enfeoffs Baron and Feme of a Manor, and after the Baron and Feme, by Colour of this Feoffment, enter into certain Land which are not Parcel of the Manor, but they thought they were Parcel, yet the Feme fhall gain nothing in the Land by this, but the whole Eftate is in the Baron. Quære, 21 Aff. 1.

8. If the Guardian enters and disseises a Man, claiming the Freehold to the Use of the Heir, this shall settle the Freehold in the Heir. 27 Aff. 68. said to be so adjudged.

9. If a Man leases Lands for Years to J. S. and delivers the Deed to J. D to the Use of J. S. and after J. D. enters into the Land to the Use of J. S without Commandant of J S. and is ejected, and after J. S. assents thereto, he shall have an Ejectione Firmæ upon the said Ejectment. P. 44 El. B. R. *Bishop's* Case, per Curiam.

(E) *What* shall be said an Entry into Lands *to reduce his Estate.*

1. If the Disseisee enters into the Land, and continues in the Land with the Disseisor, and manures the same Land with the Disseisor, claiming nothing of his first Estate, yet this is an Entry that will reduce his first Estate 40 Aff. 38. Curia.

2. [But] If the Disseisee enters, and takes the Profits as Lessee at Will of the Disseisor, or in any Manner, this will be an Entry, and reduce his Estate. 28 Aff. 42 adjudged, but Quære.

28 Aff. pl. 42. is a D. P. and so is 26 Aff. pl. 42. nor does the S. P. appear in Br. Entre Congeable, pl 61. nor in Br. Damages, pl 159. nor in Br. Seisin, pl. 23. cited by Mr. Danv. for that Purpose and to correct the misprinting of Roll.

3. If the Disseisee commands a Stranger to put in the Cattle of the Stranger in the Land to feed there, this is an Entry in Law into the Land. 1 E. 4. 3.

Co Litt. 245 b. S. P.

4. If A. leases to B. for Years, the Remainder to C. in Fee, and A. and B. come upon the Land of Purpose, scilicet, A. to make Livery and B. to take it, this shall not be said any Entry of B. to vest the actual Possession in him till Livery made; for then the Remainder would be void, which would be against the Intention of the Parties. Co. Lit. 49. b.

5. If it be agreed between the Disseisor and Disseisee, That the Disseisee shall release all his Right to the Disseisor upon the Land, and accordingly the Disseisee enters upon the Land, and delivers the Release to the Disseisor upon the Land, this is a good Release, for the Entry of the Disseisee being for this Purpose, shall not avoid the Disseisin, for his Intent in this Case guides his Entry to a special Purpose. Co. Lit. 49. cites P. 19 El. B. per Curiam, resolved.

6. But if the Disseisor makes a Feoffment to the Disseisee and others, there though the Disseisee comes to take the Livery, yet when the Livery is made, the Disseisee is remitted. Co. Lit. 49. b.

7. [But] If the Disseisee comes upon the Land, and puts his Foot in, but takes no Profits, but the Disseisor ousts him, this Entry shall not settle any Estate in him, (at the Election of the Disseisee as it seems) for the Disseisee may have an Assise of the first Disseisin. 26 Aff. 42. adjudged.

Br Damages pl 159 cites S C that this is no Remitter. — Br. Entre Congeable, pl. 61. cites S. C. Brooke says this seems not to be an Entry; For if it was an Entry he should have Trespass of the first Disseisin and not an Assise.——— Br Seisin, pl 23 cites S. C. ——— Br Entre Cong. pl 57 cites 22 E 3 14. contra. That the *putting of a Foot into the Land* is a good Entry. But quære, for it seems the Year-Book is misquoted

8. If

8. If I have an House and Land adjoining to the Plot of Land in Question between me and another, and I stand upon one Piece of Stone-Wall, which is mine own Soil, and put my Hand through a Wall made of Lime and Lathes which stands upon the Land in Question, and there delivers a Lease sealed to try the Title, this is a good Entry, though I do not come within the Plot in Question. M. 11 Ja. B. between *Ballard and Richardson*, per Curiam.

9. If *Lessee for Life* be, the *Remainder or Reversion in Fee*, and *Lessee is disseised with Warranty*, *and dies*, and after *Lessee enters or recovers by Assise*, because the Warranty does not descend upon him, yet this shall not reduce the Remainder or Reversion, but it shall be bound by the Warranty, because it was bound before the Re-entry. 44 Ass. 35. 2 Roll 740. Voucher (F) pl. 1.

Cited 1 Rep 67. in Archer's Case

10. *But* otherwise it is if the *Lessee re-enters before the Death of the Ancestor*, then the Reversion or Remainder is not bound by the Warranty, because it does not descend upon him, and therefore the Re-entry of Lessee reduces the Estate of him in Reversion or Remainder, and then the Estate upon which the Warranty was annexed is destroyed. 44 Ass. 35. 2 Roll. 740. Voucher (F) pl. 2.

11. Where *Disseisor infeoffs his Father* or Cosin, *who dies seised*, and the *Disseisor is Heir*, the Disseisee may re-enter upon him; Per Moile and Chocke, quod fuit concessum. Br. Property, pl. 7. cites 34 H. 6. 10.

12. If the *Disseisor dies seised*, and his *Feme is endowed* by his Heir, the Entry of the Disseisee is *revived for the third Part put in Dower*. Br. Seisin, pl. 18. cites Littleton, tit Descents.

13. It was agreed, that if a Man has *Title to a Moiety*, or to a *third Part*, or *fourth Part* &c. by this he may enter *into the whole* Land, and this (as it seems) is understood *before Partition* of the Land clearly. Br. Entre Cong. pl. 103. cites 21 E. 4. 10, 11.

14. If the *Disseisee*, *at the Request of the Disseisor*, *comes into the Cellar to see it*, or to come to his House to his Daughter's Wedding, *or to dine with him* &c. this is no Entry. Pl. C. 92. b. 93. a. Trin. 3 M. 1.

15. The Disseisee *comes upon the Land to deliver a Release to the Disseisor*; This is no Entry to revest the Land in the Disseisee; Arg. Le. 127. pl. 172. Trin. 30 Eliz. cites it as adjudged in C. B. in Waynman's Case.

16. If the *Cattle of a Lessee that is ousted estray into the Land* whereof he is ousted, this is not any Re-entry to revive the Rent, because they were not put into the Land by the Disseisee himself, but went there of their own Accord; Per Anderson, to which Periam agreed. Le. 110. pl. 169. Pasch. 30 Eliz. C. B. Cibel v. Hills.

Gouldsb. 80. pl. 18. Sibil v. Hill, S. C. but S. P. does not appear.

17. *Lessee* being in Possession makes Feoffment and *Livery in the Presence of Lessor*, which he may do, and the Lessor's Presence cannot disturb it, but immediately by *Lessor's being there*, this is an Entry by him, and a *revesting* the Freehold in him. Cro. E. 322. pl. 10. Pasch. 36 Eliz. B. R. Read and Morpeh v. Erington.

18. A Diversity is to be observed between an *Entry in Law* and an Entry *in Deed*, for that a *continual Claim* of the Disseisee being an Entry in Law, shall *vest* the Possession and Seisin in him *for his Advantage*, but not for his Disadvantage; and therefore if the Disseisee brings an *Assise*, and hanging the Assise he makes continual Claim, this shall not *abate* the Assise, but he shall recover *Damage* from the Beginning; but it is otherwise of an Entry in Deed. Co. Litt 253. b.

19. If the *Bastard invites the Mulier to see his House, and to see Pictures &c. or to dine with him, or to Hawk, Hunt*, or sport with him, or such like, upon the Land descended, and the Mulier comes upon the Land

Land accordingly, this is no Interruption, becaufe he *came in by the Confent* of the Baftard, and therefore the coming upon the Land can be no Trefpafs. Co. Litt. 245 b.

20. *But if* the *Mulier comes* upon the Ground *of his own Head, and cuts down a Tree, or digs the Soil, or takes any Profit,* thefe fhall be Interruptions, for rather than the Baftard fhall punifh him in an Action of Trefpafs, the Act fhall amount in Law to an Entry, becaufe he has a Right of Entry. Co. Litt. 245 b.

21 *So* it is if the Mulier *puts any of his Beafts into the Ground, or commands a Stranger to put in his Beafts*; Thefe do amount to an Entry, for although in thefe Cafes the Mulier does not ufe any exprefs Words of Entry, yet thefe and fuch like Acts do, without any Word, amount in Law to an Entry, for Acts without Words may make an Entry, but Words without an Act, cannot make an Entry, (viz Entry into the Lands &c.) Co. Litt. 245 b.

22. If a Man has *Common in the Land of J S. between Lady-Day and Michaelmas*, and the *Commoner brings an Affife* of his Common, *and at Chriftmas puts in his Beafts*, this fhall not be any Entry to abate his Writ; for it cannot be intended for the fame Common; Cited per Fleming Ch. J. as cited by Yelverton J. and which Cafe is agreed to be good Law. 2 Brownl. 238. Pafch. 10 Jac. B. R. in Cafe of Rutland (Earl) v. Shrewsbury (Earl).

23. Though a Fine be a Feoffment of Record, yet it is but fo *Fictione Juris*. If another were in by Tort it will not amount to an Entry as a Feoffment fhall; Per Bridgman Ch J. Cart 176. Hill. 18 & 19 Car. 2. C. B.

24. Entry on the Land *by a Ceftuy que Truft* is no fufficient Claim; It muft be by *Subpœna*; Per Ld. Keeper. Chan. Cafes 268. Mich. 27 Car 2. Clifford v. Asbly.

25. Though a Declaration in Ejectment be delivered within 20 Years, and a Trial, whereby there is a *Leafe Entry and Oufter confeffed*, yet that will not amount to an Entry to bring it out of the Statute of Limitations, though an Entry be actually confeffed, for it muft be an actual Entry though an Ejectment be a cuftomary way of Proceeding, and this has been fo adjudged; Per Holt Ch. J. 12 Mod. 573. Mich. 13 W. 3. in Cafe of Hayward v. Kinley.

26. In proving an Entry and Claim it is neceffary to prove that it be *Animo clamandi*. 6 Mod. 44. Mich. 2 Ann. B. R. Ford v. Ld. Grey.

A Cafual Entry by Hunting is not good. Lat. 25, 26 cites Pl. C. 93.

27. A *bare Entry* on another without an Expulfion makes fuch a *Seifin* only that the Law will adjudge him in Poffeffion that has the Right, and fo are the Words *Intravit & fuit inde Seifitus prout Lex poftulat* to be underftood in Special Verdict, but it will not work Diffeifin or Abatement without *actual Expulfion*. Per Holt Ch. J. 1 Salk. 246. pl. 2. Trin. 3 Ann. B. R. Anon.

(F) In

(F) In what Cases the Entry *of one* shall be *for another.*

1. If a Rent descends to an Aunt and Niece as Coparceners, and the Aunt hath the Niece in Ward, (scilicet, as Guardian in Socage as it seems) and takes the Rent to her own Use, and never claims to the Use of the Niece, yet this Seisin of the Aunt shall be an actual Seisin for the Niece, for in Law the general Seisin of one is of both, and here is not any express Act that her Entry was to her own Use. 30 Ass. 1.

Br. Brief, pl. 307. cites S. C.

2. If Lands descend to two Coparceners, and a Stranger abates, and after one enters generally into the Land, this shall be an Entry for both, and settle the Possession in both. 26 Ass. 1. admitted.

Br. Assise, pl. 258. cites 26 Ass. 2 and Roll is misprinted.

——— Br Entre congeable, pl. 59. cites S. C. and in Assise brought by her alone against the Abator she recover'd by Award; For she had Right against all that had no Right. ——— See Tit. Parceners (B) and (B. 2)

3. If Lands come to two in Common, and one enters into it generally, this shall be an Entry for both. M. 40, 41 El. B. R. between * *Hempsley and Brice*, per Curiam. Hobert's Reports 166. between † *Smales and Dales*, adjudged.

* Cro. E. 639. pl. 41. S. C. resolved. ——— Mo. 546. pl. 729. Hemley v. Brise. S C. and S. P ruled accordingly.

† Hob. 120. pl 152. S. C adjudged accordingly; For Entry Generally shall always be taken according to Right, as being under the Construction of Law, and therefore ever construed lawful. ——— Mo. 868. pl. 1201. Small v. Dale S. C adjudg'd

4. If a Man devises of Lands held in Capite by Knight's Service to (*) his younger Son, by which the Devise is void for a third Part, and the Devisee enters generally into the Whole, this shall be an Entry in Law for the eldest Son also. M. 40, 41 El. B. R. between † *Hempsley and Brice*, per Curiam. Hobert's Reports 166. between || *Smales and Dales*, adjudged.

* Fol. 740.

† Cro. E. 639. pl. 41. S. C & S. P. resolv'd ——— Mo. 546. pl. 729. S C & S P rul'd accordingly.

|| Hob. 120. pl. 152. S. C. adjudg'd ——— Mo 868. pl. 1201. S. C. adjudg'd.

[4.] So if the Devisee after his Entry makes a Lease for Years of the Whole, yet this shall not be any Explanation of his Entry, but that his Entry shall be said an Entry for both. M. 40, 41 Eliz. B. R. between *Hempsley and Brice*.

Cro. E. 639. 640. resolv'd by all the Court; Præter Fenner. ——— Mo. 546. pl. 729. S. C. & S. P. ruled accordingly.

5. So if the Devisee levies a Fine of the Whole. M. 40, 41 El. B. R. between *Hempsley and Brice*.

6. If a Man seised of Lands held by Knight's Service in Fee, devises the whole to B. in Fee, and B after his Death enters into the Whole, claiming the Whole to himself, yet this is an Entry for the Heir, who is Tenant in Common with him for a third Part, the Devise being void for a third Part, for one Tenant in Common cannot disseise his Companion without an actual Ouster. Hobert's Reports 167.

Mr. Danvers in his Remarks on this Plea says, Vide Hob. fol. 120. and Quære, Whether it must not be intended the Heir was in Possession before, or that B made his Entry first, and afterwards being in

in Possession claimed the Whole: For by Co Litt. 243. b. 373. b where one Parcener enters specially, claiming the Whole, and takes the whole Profits, she gains the Moiety of her Sister by Abatement. But See Cart. 176. where Hob. is taken [by Bridgman Ch. J. Hill. 18 & 19 Car 2. C. B. in delivering the Opinion of the Court in the Case of Rundale v. Ely.] as here abridged.

Noy. 51. Intr. H. 41 Eliz. B. R. Rot. 1061. Aynsworth v. Batty. S. P. exactly, only in that Case the Legacies were paid to two, but not to the other two, and seems to be S. C. resolv'd that by the Entry of one of the two who was not paid, the Estate was vested in all four; For they take Jointly, and the Estate of the Heir devests from him in toto. —— Cro. E. 919 pl. 14. Hainsworth v. Prety. S. C. & S. P. adjudg'd. —— Mo 644 pl. 891. Hamsworth v. Pretty. S. C. all the Sons were paid but one, and adjudg'd accordingly.

7. If a Man devises certain Annuities to his four Sons out of certain Lands, and devises further, That if his Heir does not pay the said Annuites, then his said Sons shall have the Lands to them, and the Survivor of them, and after the said Annuities are not paid, upon which one of the Sons enters generally, this shall be an Entry for all the four Sons, inasmuch as they are Jointenants. P. 42 El. B. R. between *Purslowe and Parker*, adjudged.

8. If a Man devises to J S. Lands held by Knight's Service, and dies, his Heir within Age, and a Stranger enters upon the Devisee, and disseises him, and after the Lord in Chivalry enters upon the Disseisor, and upon the Re-entry by the Disseisor, brings Trespass against him, this is maintainable, for the Entry of the Lord into his third Part (the Devise being void for that) is an Entry for the Devisee for the other two Parts, and so the Lord and Disseisor are no Tenants in Common. P. 3 Car. between *Rogers and Blynman*, per Curiam, resolved upon Evidence at the Bar.

Br. Assise, pl. 167. cites S. C. and adds, that the Feme upon this Alienation may recover by Cui in Vita; For this shall not stay the Assise.

9. In Assise the *Son leased to his Father for Life, and went beyond Sea*, and the *Father aliened in Fee*, and the *Sister of the Son entred in the Name of her Brother if he be alive, and if he be dead in her own Name*, and was ousted, the *Son returned* and brought Assise, and recovered by Award upon this Entry and Seisin, and yet the Son did not depute the Daughter to enter; quod nota, by Award. Br. Entre Cong. pl. 50. cites 11 Ass. 11.

10. In Assise the *Baron and Feme* were *Tenants in Tail*, and *had Issue two Daughters*, the *Baron discontinued and died*, and *Feme by Assent of the Feoffee entred and claim'd nothing but at his Will*, and after *died*, *one Daughter entred claiming to both*, and the Feoffee brought *Assise against her who entred only*, and all this Matter found by Verdict, and the Writ *shall not abate by the not naming of the other Coparcener*, but the Plaintiff shall recover; for the Entry of one for two shall not be the Entry of the other, where the Entry is not lawful. Br. Entre Cong. pl. 69. cites 31 Ass. 33. and 1 H. 6. 5. and 8 H. 6. 16. accordingly.

11. If a *Fine* is levied *to two*, and *one does not enter, nor say any Thing*, and *the other enters and is impleaded*, there per Hank. he may plead Jointenancy with the other, notwithstanding that *he alone counts of the Possession*, and that the other never entred. For the Possession by the Fine and the Entry of the one, shall be adjudg'd in Law to be in both, *till the other disagrees by Matter of Record*, and so see that Disagreement to relinquish a Thing shall not be but by Matter of Record, but Agreement to take a Thing may be by Parol or Matter in Deed. Br. Jointenancie, pl. 57. cites 8 H. 4. 13.

12. If *Disseisor*, *Intruder* or *Abator enfeoffs a Stranger and dies seised*, and *his Heir enters and enfeoffs the Offender*, the first Disseisee may enter, but

but againſt *Strangers* the Deſcent ſhall hold Place. Per Keble, which was not denied. Br. Entre Cong. pl. 119. cites 5 H. 7. 6.

13. If a *Man diſcontinues the Land of his Wife upon Condition*, and *dies without Iſſue*, the *Entry is given to the Heir of the Baron*, and *if he enters* for the Condition broken *then may the Heir of the Feme enter*, for the Entry of the one revives the Entry of the other. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

14. *And if a Recovery by erroneous Judgment* be had *againſt the Father, of Land of the Right to his Wife*, and *he dies*, if the *Heir of the Part of the Father reverſes the Judgment* by Error, there the *Heir of the Part of the Mother may enter*. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

15. *And* where a Man *ſeiſed of Land has Iſſue two Sons*, and the *Eldeſt enters into Religion*, and the *Father dies*, and an *erroneous Recovery is had againſt the Youngeſt*, and the *Eldeſt is deraigned*, he hath no Remedy; Per all the Juſtices of C. B. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

16. *But* if the *Youngeſt reverſes this by Error*, the Eldeſt may enter, for in theſe Caſes the Land is put in ſuch plight as if no Recovery or Diſcontinuance had been, and ſo the Entry of one ſhall give Advantage to the other. Br. Entre Cong. pl. 91. cites 9 H. 7. 24

17. Two *Tenants for Life are diſſeiſed by A. and B.* if one of the Tenants for Life releaſes to A. and the other Tenant for Life re-enters, he has the Moiety in Common with A and he has reveſted the *entire Reverſion* in him in whom the Reverſion was before; Per Manwood J. Le. 264. pl. 354. 19. Eliz. C. . Anon.

18. When an Entry *is given by a ſpecial Statute*, there the Entry ſhall not enure further than the Words of the Statute, as Land is given to the Husband and Wife, and to the Heirs of the Body of the Huſband; The Husband levies a Fine and dies; The Wife enters; This Entry ſhall not avail the Iſſue in Tail; For the Entry is given to the Wife by a ſpecial Law, and ſo where the Husband aliened the Lands of the Wife and after they were divorced the Husband dies, the Wife ſhall not enter by 32 H. 8. but is put to her Writ of *Cui in Vita ante Divortium*; Arg; Le. 7. pl. 10. Mich. 25 and 26 Eliz. B. R. cited in the Caſe of Stonely v. Bracebridge as Sir Richard Haddons Caſe.

19. Tenant in Poſſeſſion of Lands to which another has Right of Entry *levies a Fine with Proclamation*; he who has Right ought to enter in *Perſon*, or make *Warrant ſpecial*, or Commandment to one to enter for him, otherwiſe he does not preſerve his Right, and other Entry by a Stranger will not *avoid the Fine*. Mo. 150. pl. 613. Paſch. 38 Eliz. B. R. Lutterel's Caſe.

Mo. 457. Awdley's Caſe, S. P. — Gawdy J. ſaid, that the Agreement peradventure of him that had the Right, if made *within the five Years* after ſuch Entry made in his Name, would ſerve; but an Agreement afterward would not ſerve; Quære. Cro. E. 561. pl. 10. Paſch. 39 Eliz. B. R. in Caſe of Pollard v. Audley.——Poph. 108. Pollard v. Lutterell. S. C. agreed by the Chief Juſtices.

20. Two *Copartners of a Houſe. One entred Generally and made a Leaſe by the Name of "All that his Houſe &c."* Popham and Fenner held, that the intire Houſe paſſed; For when he ſays All that my Houſe &c. that intended the whole Houſe, and by his Livery made he gained the Intire, and gave the Intire, altho' by his general Entry it is not intended that he enter'd into more than to what he had Right; but Gawdy e Contra; For as this Entry prima Facie does not gain more, than he had Right to demand, no more ſhall this Leaſe. And Foſter at the Bar cited, that it was adjudged in this Court in Reignold's Caſe according to the Opinion of Popham. Cro. E. 615. pl. 4. Trin. 40 Eliz. B. R. Gerry v. Holford.

21. The

21. The Rule of the Law is, that in all Cafes when *Coparteners or Jointenants* may join in Action, and have one and the fame Remedy, there if one be fummoned and fevered, and the other fues forth and recovers the Moiety, the other may enter with her; but when they are driven to feveral Actions, or where their Remedies are not equal, there if one recovers or continues the one Moiety, the other cannot enter with her, and yet when both have recovered, they fhall be Coparceners again. 2 Inft. 308.

(G) *Special* Entry.

* This is mifprinted, and fhould be (2)

1. IF Lands defcend to two Coparceners, and a Stranger abates, and after one Coparcener enters into the whole to her own Ufe, this fhall not fettle any Poffeffion in the other, but all the Eftate fhall be in herfelf by the fpecial Entry. 26 Aff. * 1. adjudged.

If one enters claiming the whole and takes the Profits of the whole, this will devest the Freehold in Law of the other Parcener Co. Litt. 373. b —— Ibid. 243. b. S. P. —— Cro. E. 642, 641. S. P. and fo if a Title devolves or comes to two as Tenants in Common, if the one enters firft and claims all before the other has entered, that will gain the Poffeffion of the intire Eftate; But if they were once in Poffeffion, then the Claim of the one only, or the Occupation of the one only, fhall not oust his Companion. And Ibid cites the principal Cafe of 26 Aff. 2.

F. N. B. 167. (C)

2. If there are *two Coparceners*, and *one and a Stranger oufts the other*, a Nuper Obiit lies againft the Coparcener fole, and Brooke fays hence it Follows, that the Stranger gains no Franktenement by his Entry. Br. Entre Cong. pl. 122. cites F. N. B. 197.

(G. 2) Entry. Not Neceffary in what Cafes.

1. DIffeifee may *enter into every Parcel*, but *not into the Appendancies without the Manor or Land to which* &c. As Common &c. and tho' an Advowfon may be fever'd and made in grofs, it ought to be *when the Owner is feifed of the Land to which* &c. and *not by Prefentment when he is out of Poffeffion*; Per Danby Ch. J. quod nota, good Reafon, and Needham J. cum illo. Br. Prefentation, pl. 30. cites 9. E. 4. 38.

If a Man is *diffeifed of Lands whereunto a Common is Appendant*, the *Diffeifee cannot ufe the Common till he enters into the Land to which it is Appendant*, becaufe it might be a Prejudice to the Tenant of the Soil, for if the Diffeifee might do it, fo might the Diffeifor, which would be a double Charge to the Tenant. Co. Litt. 122. b.

2. *And* where *Tenant for Life aliens the Manor in Fee* he in Reverfion cannot prefent to the Advowfon before that he has enter'd into the Manor; Per Needham J. Ibid.

But if a Man is diffeifed *of a Manor to which there is an Advowfon appendant*, he may prefent to the Advowfon before he enters into the Manor. Co. Litt. 122. b.

3. In Trefpafs it was agreed, that where a Man *recovers by erroneous Procefs or Judgment* certain Land *and makes Feoffment*, and the other brings *Writ of Error and reverses it*, yet he cannot enter, but fhall have Scire

Scire Facias against the Feoffee; For he *is in by Title, and is a Stranger to the Reversal.* Br. Scire Facias, pl. 163. cites 4 H. 7. 10.

4. *But by reversal by Act of Parliament* he may enter without Scire Facias; For every one is Party to an Act of Parliament; Per Townsend J. quod non negatur Br. Scire Facias, pl. 163 cites 4 H. 7. 10.

5. Of a thing transitory a Man may be in Possession *without Entry or Seisin*; Per Brudnell. Br. Trespass, pl. 169. cites 14 H. 8. 23.

6. *As where Tenant in Chivalry dies, his Heir within Age,* the Lord shall have *Ravishment of Ward without Seisin,* but *not Ejectment* of Ward of the Land. Ibid.

7. If Tenant in Fee of *a Common Lord* is attainted of Felony, his Lands remain in him during his Life *until the Entry of the Lord,* and where *the King is Lord* until Office found; But in the Case of a Common Lord, after the *Death of the Person attainted,* they are in the Lord before Entry, and in the Case of the King before Office for the Mischief of Abeyances; Arg. 2 Le. 126. in pl. 169. Mich. 28 & 29 Eliz. B. R. in Case of Venables v. Harris.

8. A Feoffment is made to the *Use of B.* Per Anderson and Walmsley J. contra Granvil J. B has such a Seisin before his Entry of which he may be *disseised,* and this by Force of the Statute. Ow. 87. Mich. 41 & 42 Eliz. C. B. Green v. Wiseman.

Noy 73. S. C. the Court seemed that Plaintiff could not bring Ejectment; for actual Possession is not in Cestuy que Use by the Stat. 27 H. 8. for he may disagree to it. But by Walmsley and Glanvil, He may have an Assise, but not Trespass without actual Possession.

9. A Man after an Ejectment and *Liberate* returned cannot *assign Lands* before Entry. Show. 290. Mich. 3 W. & M. Hannam v. Stephens.

(G. 3) Necessary in what Cases.

To vest or devest an Estate.

1. IF a *Feme inheritable takes Baron,* and has Issue, and the Feme dies, the *Law adjudges the Franktenement in the Baron as Tenant by the Curtesy immediately without Entry,* and Præcipe quod reddat lies *against him.* Br. Præcipe, pl. 38. cites 21 E. 3. 49. and Doct. and Stud. lib. 2.

2. *Lease for Life on Condition,* that if Lessor pay to Lessee such a Day 20 l. that his Estate shall cease; now by the Performance of the Condition the Estate is determined without any Entry. 4 Le. 119. cites 21 H. 7. 12.

3. Where Estate *ends by Limitation* there needs no Entry, because not waivable as a Condition is. Mo. 612. in pl. 842. 19 Eliz. cites Bracebridge's Case.

4. Though a *Lease* become *void on Nonpayment* according to Covenant, yet it seems there must be a Re-entry to re-settle the Possession of the Land. 2 Le. 143. pl 178. 33 Eliz. in the Exchequer.

5. Inheritance or *Freehold* in Use shall not *cease* without Claim or Entry since the 27 H. 8. unless he that has Power to cease it be *Tenant of the Franktenement*; Arg. Mo. 663. in pl. 906. Mich. 44 & 45 Eliz. in Canc. cites 1 Rep. Diggs's Case.

1 Rep. 173. S. C. — Mo. 663. S. C.

6. A Man *cannot be said seised* upon a *Fine sur Render* without an Entry alleged; But upon a Fine * *Sur Conusance &c. come ceo &c.* it is otherwise for that is executed. Cro. E. 903. pl. 6. Mich. 44 & 45 Eliz. B. R. in Case of Bullard v. Coulter.

* So upon a Fine sur Conusance de droit tantum, for these are Feoffments upon Record, and the Conusee has a Freehold in him before Entry. Co. Litt. 266. b.

7. Upon a *Surrender of a Lease for Years*, the Lease is determined, and the Possession and Interest is in the Lessor without Entry. Cro. C. 102. pl. 1. Hill. 3 Car. C. B. Peto v. Pemberton.

Hetl. 50. 71. S C. but no Judgment. —— Hutt. 94. S. C. and agreed, that where the Lessee for Years surrenders, to which the Lessor agrees and accepts it, the Possession and the Interest is in him without Entry.

8. *Tenant for Life levies a Fine*, he having a Freehold his Fine displaces the Remainder, therefore an Entry is requisite within five Years after the Death of Tenant for Life; Per Hale. Hardr. 402. Pasch. 17 Car. 2. in Scacc.

So if Tenant for Life at the Common Law make a Feoffment or a Lease for Life, in such Case the first Lessor ought to avoid this Forfeiture by Entry, and it is not void by the Death of the second Lessor, viz. the Tenant for Life; Arg. Godb 318. cites 4 H. 7 18. —— But if such Lease be made by Cestuy que Use it determines by his Death, and the Lessee becomes Tenant at Sufferance; Arg. Godb. 319. cites D 57.

9. Upon executing the Deed of Mortgage the Mortgagor, by the *Covenant to enjoy* till Default of Payment, is *Tenant at Will*, and the Assignment of the Mortgagee to the Assignee, and the Assignee's assigning it over again *without the Mortgagor's joining*, can only make the Mortgagor *Tenant at Sufferance*, but his continuing in Possession can never make a *Disseisin*, nor devesting of the Term mortgaged; Otherwise if the *Mortgagor* had *died and his Heir had entered*, for the Heir was never Tenant at Will, but his first Entry was tortious; Or if the *Mortgagee* had *entered on the Mortgagor, and the Mortgagor* had *re-entered*; For the Mortgagee's Entry had been a Determination of the Will, and the Re-entry of the Mortgagor had been merely tortious; Per Holt Ch. J. 1 Salk. 246 pl. 1. Pasch. 6 W. & M. in B. R. Smartle v. Williams.

(G. 4) Necessary.

To bring Trespass.

1. IF Land descend to the Heir he may *make Leases* before Entry, but he cannot have an Action of Trespass before Entry; Arg. Pl. C. 142. b. cites Pasch. 37 H. 6. 18. B. Surrender 21.

2. It was agreed, that *Disseisee* may have Trespass *of the first Entry* without Regress, but not of the Continuance of the Trespass after the Entry; for he shall not punish Disseisor in charging him with Damages which are the Accessory, before he has re-entered into the Franktenement which is the Principal. Br. Trespass, pl. 227. cites 38 H. 6. 27.

3. *Tenant at Will* may have Trespass without Re-entry *after Disseisin till the Will of the Lessor be determined by Release &c.* and because he by his Entry cannot re-continue the Franktenement to the Lessor, therefore

fore he shall have Trespass without Regress, but he who may by his Entry re-continue the Franktenement and will not enter, shall not have Trespass without a Regress; Note a Diversity, per Fortescue and Yelverton. Br. Trespass, pl. 227. cites 38 H. 6. 27.

4. In Trespass the *Defendant said that the Plaintiff himself was seised in Fee, and leased to the Defendant for six Years, and* after *the Term ended*, the *Defendant held himself in and did the Trespass, of which he has brought this Action before any Entry*; Judgment &c. and by all the Justices Trespass Vi & Armis does not lie before the Plaintiff has made Regress, as here; quod nota. Br. Trespass, pl. 365. cites 22 E. 4. 13.

5. *And* per Fairfax, *the Ouster of the Lessee* for Years shall give *Assise to the Heir, where* his Father made the Lease, and *the Son never entered.* Br. ibid.

6. *But where the Father dies seised, and did not make the Lease, and a Stranger enters*, there Trespass does not lie without Entry first by the Heir, nor Assise, but Mortdancestor. Br. ibid.

7. If A. makes a *Lease to commence at Michaelmas*, the Lessee may *grant* the Lease before Michaelmas, but he cannot have *Trespass* before Entry; Arg. Pl. C. 142. b. cites 22 E. 4. 37. Br. Grants 100.

The Interest vests before Entry. Arg. Show. 299.

8. A. *devised Land to B. and his Heirs*, and dies, it is in B. immediately, but till Entry he cannot bring a possessory Action, as *Trespass* &c. 2 Mod. 7. cites Pl. C. 412. 413. [Mich. 13 & 14 Eliz.

It passes to B. before Notice or Consent; Per Ventris J. Arg. 2 Vent 202.

9. A. made a *Lease to B. to hold to B. and his Heirs at the Will of A.* afterwards *B. dies.* If the Heir of B. enters, Trespass Vi & Armis lies for A. before any Entry. Litt. S. 82. and Co. Litt. 62. b.

Cited per Bridgman Ch. J. who said that in this Case the Heir was a Stranger. Carth. 66, 67. Pasch. 18 Car. 2.

10. When the *Lease at Will ceases*, he in Reversion may bring an Action of Trespass; Per Tirrel J. Carth. 62. cites Co. Litt. 62. b.

11. By the *Death of Tenant at Will* the Tenancy is determined, and the Estate revested in his Lessor to maintain Trespass before Re-entry by Reason of the Possession which the Law casts upon him; Agreed. Lev. 202. Hill. 18 & 19 Car. 2. B. R. in the Case of Geary v. Bearcroft.

12. If *Lessee holds over his Term* there must be actual Entry to bring Action of Trespass. 5 Mod, 384. Hill. 9 W. 3. B. R. Trevillian v. Andrews.

(G. 4) At what Time it may be made.

1. IF *Disseisor infeoffs four*, upon whom the *Disseisee re-enters*, and *one of the Feoffees enters again*, and the *Disseisee brings Assise*, he cannot plead Jointenancy with the other three, for by the Entry of the Disseisee their Interest is defeated, and therefore *Regress of the one does not remit the others*, for the *Right is determined.* Br. Remitter, pl. 16. cites 1 H. 6. 5. per Hals. J.

2. *But where four Coparceners*, or others, *are lawfully seised, and are disseised*, the *Entry of the one remits all the others*, for the Entry is lawful and the Right remains; and in the other Cases e contra; for the Right, Interest and Possession is defeated by the lawful Entry. Ibid.

3. If

3. If a *Feme Sole of full Age be diffeifed* and *takes Baron*, and the *Diffeifor dies feifed*, and the *Baron dies*, the Feme cannot enter, for she might have re-entered before that she took Baron, and did not, therefore it was her Folly; Per all the Justices. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

4. *Contrary* if the Diffeifin had been *during the Coverture*, *or* if she had been *within Age* at the Time of the Diffeifin, and when she took Baron, there she might have entered after the Death of her Baron. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

5. *And e contra* if she be *diffeifed within Age, and takes Baron at full Age, and* the *Diffeifor dies feifed*, and the *Baron dies*, the Feme cannot enter; which all agreed. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

Br. Seifin, pl. 37. cites S. C.

6. In Præcipe quod reddat the *Tenant faid, that before the Writ purchafed H. was feifed till by him diffeifed, which H. entered pending the Writ*; Judgment of the Writ; and adjudged a good Plea, as it feems, but the Reporter did not hear it. Br. Brief, pl. 356. cites 5 E 4. 5.

Ow. 81 S.C. & S. P. held accordingly. — 3 Le. 169. pl. 220. S. C. but S. P. does not appear — Mo. 311. S. C. but S. P. does not appear. — Godb. 15. pl. 124. S. C. but S. P. does not appear.

7. Leffor may enter inter into the Land for a Forfeiture *pending the Suit before Judgment*, as well as after, if the Plea be entered of Record. Goldsb. 41. pl. 18. Mich. 29 Eliz. Dixey v. Spencer.

8. A. infeoffs B. on Condition to go to Rome within two Years; B. ftays in England till within two Days of the End of the two Years, fo that now it is *impoffible to perform the Condition within the Time*, yet the Feoffor fhall not enter till the two Years ended; Arg. Mo. 328. Trin. 32 Eliz.

9. If there be Tenant for Life, and *Tenant for Life commits a Forfeiture*, he in Remainder for Life may enter, and the Cafe 29 Aff. 64. is not Law; For the particular Eftate in Poffeffion is determined by the Forfeiture; and if he in Remainder could not enter, then it fhould be at the Will of the Leffor, whether he fhould ever enter; The fame Law is if the Remainder be for Years. Godb. 175. pl. 241. Pafch. 8 Jac. C. B. in Cafe of Meers v. Ridout.

(G. 6) Excufed by Act or Fear of the Party.

1. IF a Man hath Title to enter into any Lands or Tenements, if he *dare not enter* into the fame Lands and Tenements, nor *into any Parcel* thereof *for doubt of Beating*, *or for doubt of Maiming*, *or* for doubt of *Death*, if he *goeth* and approach *as near to the Tenements as he dare* for fuch doubt, *and by Word claim* the Land to his, prefently by fuch Claim he hath a Poffeffion and Seifin in the Lands, as well as if he had entred indeed, although he never had Poffeffion or Seifin of the fame Lands or Tenements before the faid Claim. Litt. S 419.

2. If a Man *fear the burning of his Houfes, or the taking away or fpoiling of his Goods*, this is not fufficient, becaufe he may recover the fame, or Damages to the Value, without any corporal Hurt. Co. Litt. 253 b.

3. Such doubt of *fear muft concern the fafety of the Perfon* of a Man, and not his Houfes or Goods, becaufe he may recover the fame or Damages to the Value without any Corporal Hurt. Co. Litt. 253. b.

4. If

4. If the Fear concerns the Person, yet it must not be a vain Fear, but *the Fear must be such as may befall a constant Man*, as if the adverse *Party lies in wait in the Way with Weapons*, or by Words *Menace to beat, mayhem or kill him, that would enter*, and so in Pleading must he shew some just Cause of Fear; For Fear of itself is internal and secret; But in a special Verdict, if the Jurors find, that the Disseisee did not enter for Fear of corporal Hurt this is sufficient, and shall be intended that they had Evidence to prove the same. Co Litt. 253. b.

5. *Fear of Imprisonment* is also sufficient; For the Law has a special Regard to the Safety and Liberty of a Man. Litt. S. 420.

(G. 7) Writ abated by Entry; In what Cases.

1. WRIT of *Entry in* le Quibus, the Tenant had not Entry unless after the Lease which one made who had not any thing therein unless as Guardian &c. was abated because he might have Assise or Writ of Entry sur Disseisin, as his Case required. Thel. Dig. 117. Lib. 10. cap. 27. S. 1. cites Mich. 4 E. 2, Brief 790. But says that in the Time of Bracton the other Writ was in Use as appears fol. 324.

2. *In Admeasurement of Pasture* the *Tenant said, that the Demandant himself had ejected the Tenant out of the Common of Pasture, pending the Writ* &c. And adjudged no Plea; For the Tenant was seised of the Land by the Reason of which he surcharged the Pasture. Thel. Dig. 187. Lib. 12. cap. 21. S. 4. cites 8 E. 2. It. Kanc. Brief 846. Admeasurement 14.

3. If the *Demandment disseises the Tenant, or enters pending the Writ*, it shall Abate notwithstanding that the *Demandant* has *Aliened the Land after to another* Thel. Dig. 187. Lib. 12. cap. 21. cites Trin. 4 E. 3. 148.

4 In *Cessavit after Verdict* found *for the Demandant* against the Tenant en Pais the Tenant was not received at the Day in Bank to *plead that the Demandant had disseised him* &c. in Arrest of Judgment. Thel. Dig 187 Lib. 12. cap. 21. S. 5. cites Trin. 5 E. 3. 201.

5. And where it appears by the Writ that the *Writ was upon the Seisin of another Ancestor* than him upon whose Seisin it is brought, it shall abate. Thel. Dig. 117. Lib. 10. cap. 27. S. 2. cites Hill. 7 E. 3. 301.

6. *At the Grand Cape return'd* the Tenant was received to *say that that the Demandant had disseised him after the Default made, and that the Demandant is Tenant by his Disseisin* &c. without saving the Default. Thel. Dig. 187. Lib. 12. cap. 21. S. 7. cites Pasch. 8 E. 388. And that so agrees Pasch. 9 E. 3. 455. at the Petit Cape return'd but he ought to say that the Demandant is this Day seised, cites 10 E. 3. 541.

7. If the *Demandant enters into Parcel*, pending the Writ, *and thereof infeoffs another*, the Writ shall abate for all. Thel. Dig. 187. lib. 12. cap. 21. S. 8. cites Mich. 10 E. 3. 531.

8 In *Writ of Right of Ward of the Body*, if the *Demandant seises the Body* of the Infant the Writ shall abate. Thel. Dig. 187. lib. 12. cap. 21. S. 9. cites Mich. 13 E. 3. Brief 673. and Mich. 12 H. 4. 7. where there was an Enterpleader.

9. To say that the *Demandant after the last Continuance disseised the Tenant, and so is Tenant* &c. is a good Plea to the Writ. Thel. Dig. 187. lib. 12. cap. 21. S. 11. cites Mich. 18 E. 3. 57.

In *Formedon*, the Tenant *pleaded Non-tenure, and thereupon to Issue* &c. And *after the Tenant pleaded that the Demandant entered after the last Continuance* &c. and held good notwithstanding the Non-tenure pleaded before. Thel. Dig. 187. lib. 12. cap. 21. S. 14. cites Mich. 7 H. 6. 15.

10. Entry *into Parcel shall abate all the Writ*; Per Shard. Thel. Dig. 187. lib. 12. cap. 21. S. 10. cites Mich. 17 E. 3. 57. and 4 E. 4. 34. Contra it is said Trin 27 E. 3. 82.

In *Assise*, it is affirmed by Prisot, that the *Entry of the Plaintiff, pending the Writ, into Parcel pleaded by Disseisor goes in Bar for this Parcel.* Thel. Dig. 187. lib. 12. cap. 21. S. 17 cites Mich. 35. H. 6. 13.

And *so* it is held *in Præcipe quod reddat pleaded* by the Tenant. Thel. Dig. 188. lib. 12. cap. 21. S. 17. cites 39 H. 6. 45 and 21 H. 6. 53. And by Tenant by Receipt 37 H. 6. 2.

11. In Assise, the *Tenant said that* the Assise ought not to be, for *the Plaintiff himself by this Deed indented, which he shews, granted to him after the last Continuance, that he should hold the Land till Michaelmas last past*, and so has abated his Writ; Judgment; Caund. said, the Grant proves that it was granted to the Use of the Plaintiff; and per Cur. the Writ is abated, by which the Plaintiff was nonsuited. Brook says the Reason seems to be, because *this Lease is an Entry in Law*, as *Exchange*, or *Partition*, or *Assignment of Dower* of the Land in Plaint, as it is said elsewhere, that those are Entries in Law which shall abate a Writ. Br. Brief, pl. 308. cites 42 Ass. 21.

12. And if the Demandant *receives Parcel of the Tenements of the Tenant* pending the Writ *by Accord between them, and after leases this Parcel to the Tenant for Years*, the Writ shall abate for all, notwithstanding that this Accord was upon Condition, which did not give Re-entry by the Non-performance thereof. Thel. Dig. 187. lib. 12. cap. 21. S. 8. cites Mich. 10 E. 3. 532 and says see 42 Ass. 21.

13. Writ of Entry sur Disseisin, the *Tenant said that the Demandant with other Strangers, by his Procurement, have ousted the Tenant pending the Writ*; Judgment of the Writ; & non allocatur, but the Writ awarded good; But if the *Demandant himself had entered, or another to his Use, to which he agreed*, this shall abate the Writ; Note the Diversity; Quære of *Commandment*. Br. Brief, pl. 87. cites 50 E. 3. 2.

14. One *leased for Life rendering Rent*, and *reserving a Re-entry for Default* of Payment, and afterwards *brought Writ of Waste, pending which* Writ *he entered, because the Rent was arrear* &c. Quære if the Writ shall abate. Thel. Dig. 187. lib. 12. cap. 21. S. 12. cites Pasch. 45 E. 3. 9. and says see 12 H. 4. 6 and 4 E. 4. 34.

15. The Tenant said, that the *Demandant with others, by his Procurement, had ousted the Tenant of the Land pending the Writ*, and no Plea, without saying *that the Demandant is, or was Tenant of the Land by this Ouster*. Thel. Dig. 187. lib. 12. cap. 21. S. 13. cites Hill. 50 E. 3.

16. If the *Demandant in Formedon enters* into the Land in Demand *to shew it to the Sheriff to make the View*, such Entry shall not abate the Writ clearly; Quod Nota per Cur. Contra elsewhere if he claims to himself. Br. Brief, pl. 408. cites 10 H. 6. 8.

So in Assise it was agreed that if the *Plaintiff comes upon the Land, pending the Writ, and does not claim any Thing by his Entry*, that such Entry shall not abate the Writ, for he comes there to shew the Jury the Land to have the View of it, and to give them Evidence. Br. Brief, pl. 328. cites 5 E. 4. 59.

And therefore *the same* seems to be, that if he *enters to see if Waste be done pending the Writ*, as in Formedon between Morton and .... .. in the County of Stafford. Br. Brief, pl. 328. cites 5 E. 4. 59.

So where *a Common Way is over the Land*, and the Plaintiff uses the Way, without claiming any other Thing. *Br. Brief*, pl. 328. cites 5 E. 4. 59.

17. In Formedon, if a Man *enters upon the Tenant*, and the *Demandant prosecutes his Suit and recovers*, this shall bind the Tenant and him who entered; But if he who entered had *elder Title before the Writ of Formedon*, the Recovery is not good; and see elsewhere, that Writ shall be brought against the Mortgagor and Mortgagee, and the Lord and Villein; For an Entry by the Feoffor, or Lord of the Villein, shall abate the Writ, and so see that *the Entry of a Stranger* shall abate the Writ in several Cases. Br. Brief, pl. 182. cites 21 H. 6. 17.

18. Where a *Manor is demanded* the *Entry of* the Demandant *into an Acre, Parcel* of the Manor, shall abate all the Writ. *But where 20 Acres are in Demand*, and the Demandant *enters into one Acre*, if he does not claim to enter into any more than into this Acre, the Writ shall abate only for this Acre; Per Prisot. Thel. Dig. 187. lib. 12 cap. 21. S. 16. cites 34 H. 6. 2. 2 H. 6. 17. 39 H. 6. 45. and 1 E. 4. 4.

19. In Cui in Vita *of three Acres* it was agreed, that if the *Demandant by another Action recovers one of the three Acres and enters*, it shall abate all the Writ, because it is the Act of the Demandant to recover it, and to enter, and therefore she shall abate her Cui in Vita; Quod Nota, that Recovery in Assise of Parcel of the Land shall abate the Cui in Vita for all the three Acres. Br. Brief, pl. 238. cites 1 E. 4. 3. 4. and 2 E. 4. 10.

In *Cui in Vita*, after Issue and *after the last Continuance, the Tenant pleaded that the Demandant had recovered Parcel* of the Tenements against him by Assise, *and that the Demandant had entered into this Parcel by force of this Recovery* &c. And it was held that this was a good Plea to all the Writ, yet Judgment was given for the Demandant to recover Seisin of all. Thel. Dig. 188. lib. 12. cap. 21. S. 19. cites 1 E. 4. 4. Quære. 2 E. 4. 11.

20. If a Man brings *Præcipe quod reddat of a Manor*, House, or the like, *which is intire*, and *enters into Part*, pending the Writ, all the Writ shall abate. Br. Brief, pl. 480. cites 2 E. 4. 10.

21. In Formedon, the *Tenant vouched A. who entered into the Warranty and vouched B. and* the *Demandant as to the third Part granted the Voucher, and to the rest counterpleaded the Voucher*, by which Process issued against the Inquest *upon the Voucher against B. and at the Day A. the first Vouchee said that the Demandant, after the last Continuance, had entered into* 10 *Acres, and into the Moiety of the Rent Parcel of the Tenements in Demand*, and did not answer to the rest, and well, per Cur. For Entry into Part shall abate the Writ in all, for he has *falsify'd his own Writ by his own Act*, and it lies well in the Mouth of the first Vouchee; for he remains Tenant of this Part which is counterpleaded, and he is also Tenant of the rest till the second Vouchee has entered into the Warranty; Quod Nota. Br. Brief, pl. 332. cites 5 E. 4. 116.

22. The *being of the Demandant upon the Land claiming nothing* is no such Entry or Possession of the Demandant as shall abate the Writ. Thel. Dig. 188. lib. 12. cap. 21. S. 18. cites Mich. 5 E. 4. 60. And that so agrees Plowden in the Assise of Parnel, fol. 92. For *the Intent* of him who entered *shall be consider'd*.

23. In *Scire Facias against a Vicar upon Recovery of an Annuity*, it is no Plea that the *Plaintiff has entered into certain Land of the Vicarage*, nor of the Abbey, Mutatis Mutandis, *nor of the Heir where the Recovery is against the Ancestor*; for the *Person is charged in Writ of Annuity and not the Land.* Br. Brief, pl. 370. cites 10 E. 4. 10.

24. So in *Assise of Fresh-force* the Plaintiff after the last Continuance *entered into the Cellar* of the Disseisor *to view the Antiquity* thereof, *in order to give Evidence* upon a Subpœna delivered to him. It was adjudged that this was not such an Entry as should abate the Writ. Pl. C. 91. b. 93. a. b. Trin. 3 Mar. Panel v. Moore and Corporation of Mercers.

25. As

S. C. cited 2 Brownl. 231 in Case of E of Rutland v. the E. of Shrewsbury's Case.

25. An Entry *to abate a Writ* ought to be an Entry into the Thing demanded, which every Entry will not do, as Entry was *into the Cellar* hanging the Assise, but it was *to view the Antiquity* of the Cellar, and so did not abate the Writ; Per Fleming Ch. J. 1 Bulst. 9. Hill. 7 Jac. cites Pl. C. 92. The Parson of Honey-Lane's Case.

2 Brownl. 238. S. C. & P.

26. Several were upon the Land cutting down Wood, the Demandant came upon the Land and *admonished* them *to do no more* than they could do by Law at their Perils; and this was adjudged no Entry to *abate his Writ*; Per Fleming Ch. J. 1 Bulst. 9. Hill. 7 Jac. cites Pl. C. 93. in the E. of Shrewsbury's Case.

27. Every Entry which may abate a Writ *ought to be in the Thing demanded*, and therefore *if a Man brings an Assise of Rent or Common, and hanging this Assise, he enters into the Land*, this is not any Entry which will abate the Writ; Per Fleming Ch. J. 2 Brownl 237. Pasch. 8 Jac. B. R. in Case of Rutland (Earl) v. Shrewsbury (Earl)

Bulst. 4. &c Shrewsbury (Earl) v Rutland (Earl) S. C the Entry here was not as an Officer but as a Wrong-doer, but *if he had entered ad Custodiendum*, this would have abated his Writ, because this would have been a Claim of Property.

28 An *Assise* was brought *for the Office of Keeper of a Park, and of the Vails and Fees*; and *Entry into the Park* will not abate the Writ brought for the keeping of it, and though it was said that he *took* a Fee, viz. *A Shoulder of a Buck*, that does not make any Matter for two Reasons, 1st, He has not shewed a Warrant he had to kill the Buck. 2dly, The taking of the Fee is no Entry into the Office, but the exercising of that; Per Fleming Ch. J. 2 Brownl. 237, 238. Pasch. 8 Jac. B. R. in Case of Rutland (Earl of) v. Shrewsbury (Earl of)

This was only an Entry to hunt, but an Entry to have abated the Writ ought to have been alleged that he entered to *keep*; for in every Entry the *Intent of the Entry* is to be regarded. 2 Brownl. 231 the E of Rutland v. the E. of Shrewsbury. —— 235. 237. per tot. Cur. in S. C.

29. Error of a Judgment in Assise of the Office of Keeper of a Park granted to the Demandant in Reversion, and afterwards the Park itself was granted to another, who entered and keeps out the Reversioner after the Death of the Tenant for Life, for which he brought an Assise, and after the Verdict and before Judgment entered into the *Park, and hunted and killed a Deer*; this Entry did not *abate the Writ* or make the Judgment erroneous. 1 Bulst. 5. Hill. 7 Jac. in the E. of Shrewsbury's Case.

30. In Ejectione Firmæ the Entry of the Plaintiff *after Verdict* upon the Nisi Prius, and before the *Judgment*, does not abate the Writ, and is not assignable for Error. Jenk 341. pl. 100.

31. The *Lessor pending the Action* brought by himself *for the Rent, entered into the Land*, and the *Lessee re-entered* upon him; the Question was, Whether the Writ once abated by the Plaintiff's Entry was revived by the Re-entry of the Defendant, and held it was not. Sty. 260. Pasch. 1651. Webb v. Wilmer.

32. In Ejectment the Quære was, If Entry *after the Day of Nisi Prius, and before the Day in Bank*, may be pleaded in Abatement; and if such Entry *after the Darrein Contin'* be a Plea in Abatement in Ejectione Firmæ, See 18 E. 4. 19. 34 H. 6 9. cites 2 Cro. 303. Kersey v. Lovet. Note, this was Error out of C. B. and at another Day it was held per Cur. that this is not Error, because it is only in Abatement, and a Diversity is between this and Death, and cites 1 Rep. 5. and it is usual where Entry is before Nisi Prius to plead such Plea at the Assises, and shall be tried at the Assises, and if it be omitted, the Advantage of it is lost, but not in Case of Death. Sid. 231. pl. 8. Hill. 16 & 17 Car. 2. B. R Boys v. Norcliff.

(G. 8) Writ abated by Entry of a Stranger.

1. IN *Writ against Tenant for Life*, if *he aliens in Fee*, and he in *Reversion enters* &c. Quære if the Writ shall abate; for it is said in this Case that he in Reversion after such Entry may be received by Default of the Tenant. Thel. Dig. 190. lib. 12. cap. 29. S. 1. cites Mich. 18 E. 3. 48.

2. If the *Mortgagor pays the Money* to the Mortgagee *at the Day limited* pending the Writ against the Mortgagee, *and enters*, the Writ shall abate. Thel. Dig. 190. lib. 12. cap. 29. S. 2. cites Mich. 39 E. 3. 36. and 18 E. 4. 27.

3. *Writ* brought *against a Villein* shall *abate by the Entry of the Lord*, pending the Writ. Thel. Dig. 190. lib. 12. cap. 29. S. 4. cites 3 H. 6. 34. and 4 H. 6. 14.

4. It is held that where the *Disseisor makes Feoffment over*, and the *Feoffee is impleaded by a Stranger*, if the *Disseisee enters upon the Feoffee, pending the Writ against him*, the Writ shall abate. Thel. Dig. 190. lib. 12. cap. 29. S. 3. cites Mich. 7 H. 6. 17. and says it seems that the Opinion of Hill. 3 H. 6. 34. agrees so *where the Disseisor himself is Tenant, and the Disseisee enters upon him.* Trin. 5 E. 4. 6. and 15 E. 4. 4. and 22 H. 6. 26.

5. But it said that where one is *infeoffed upon Condition to be performed of the part of the Feoffee*, if he be impleaded by Writ, and the *Feoffor enters for the Condition broken pending the Writ* it shall not Abate. Thel. Dig. 190. Lib. 12. cap. 29. S. 5. cites Mich. E. 4. 5. Quære.

(G. 9) Pleadings in Writs of Entry.

1. IN Writ of Entry, the Demandant *pleaded Jointenancy by Fine*, and the Demandant was not received to maintain his Writ, but it was Abated. Thel. Dig. 226. Lib. 16. cap. 7. S. 5. cites Mich. 17 E. 2. Maintenance de Brief, 1. and 55. Pasch. 15 E 3.

2 Feme received pleaded Entry of the Demandant pending the Writ, without saying after the last Continuance, and held good. Thel. Dig. 188. Lib. 12. cap. 21. S. 20. cites Trin. 21 H. 6. 54.

3. *If the Tenant enters pending Præcipe quod reddat before Issue*, the *Pleading shall be that he entered pending the Writ, but if he enters after Issue*, the Entry *shall be that he entered after the last Continuance.* Br. Brief, pl. 2. cites 26 H. 8. 3.

Thel. Dig. 188. Lib 12. Cap 21. S. 23. cites S. C.

4. Upon *pleading a Conveyance by Bargain and Sale* actual Entry ought to be pleaded, and Possession by 27 H. 8. of Uses is not sufficient. Noy 6. Per the Justices. Anon.

5. A. *tortious Entry* is not to be pleaded in Bar of an *Action vested*; Arg. Skin. 210. pl. 4. Mich. 36 Car. 2. in Case of Pool v. Archer.

6. *As* in *Debt for Rent* upon a Lease for Years *due at Lady-Day*, an *Entry after* our Lady-Day shall not be pleaded in Bar; Arg. Skin. 210. in S. C.

(G. 10) Bar of Action; In what Cases.

1. WHERE a Man *recovers an Advowson*, *or brings Præcipe quod reddat of Land*, and *before Judgment or Execution enters and makes a Lease* of it, *or takes a Lease* of it *for Years*, *Execution by Elegit*, or the like, *or accepts Dower in Part*, *pending Cui in Vita*, or *takes Part in Exchange or in Partition*, it is a Bar for the Time. Br. Barre, pl. 33. cites 24 E. 3. 3.

2. If *Disseisee re-enters* he *shall not have Trespass of the first Damage*, for it was folly that he had not taken the Assise; Per Thirn. Br. Trespass, pl. 72. cites 2. H. 4. 11.

3. In Writ of Entry the *Tenant pleaded Entry by the Demandant pending the Writ*, the *Demandant said that the Tenant was Tenant of the Franktenement the Day of the Writ purchased*, *and yet is*, & non allocatur; For if the Demandant entered, and the Tenant re-entered, it shall not make the Writ good which was once abated; Per Fitzherbert and the best Opinion. Br. Brief, pl. 1. cites 26 H. 8. 1.

(G. 11) Entry in Nature of Assise. Writ and Pleadings.

1. IN Writ of Entry in Nature of Assise *against A. and B. by several Præcipes de Quibus A. and B. disseisiverunt the Demandant*, and adjudged good *without supposing the several Disseisins*. Thel. Dig 113. Lib. 10. cap. 23. S. 16. cites Hill 8 R. 2. Br. 929. And says it is so in Formedon, Writs of Entry, and Writs founded upon Disseisin; Per Belknap.

2. It was said, that in Writ of Entry in Nature of Assise *by Tenant in Tail*, *or for Life*, the Writ *ought to comprehend their Title*, and the Estate which they claim. Thel. Dig. 105. Lib. 10. cap. 14. S. 9. Hill 21 H. 6. 28.

(G. 12) Sur Disseisin; Writ and Pleadings.

1. IF a Man *gives in Tail*, *or* aliens *in Fee upon Condition*, if *the Condition be broken* the Donor, Feoffor, or his Heir may have Ad terminum qui præteriit, Per Mombray, quod Chelr. and Finch omnino negaverunt. Per Grene, if J. *leases for Term of Years*, *and the Term expires*, and a Stranger enters, the Lessor shall have Ad terminum qui præteriit; Contra upon Estate upon Condition if the Condition be broken there is no other Remedy but Entry, quod Skipw. & omnes concesserunt by their Judgment. Br. Enter en le Per, pl. 27. cites 33 Ass. 11.

2. If *Disseisee releases to the Disseisor all his Right*, the Disseisor in Writ of Entry after this Release shall be supposed in the Per by the Disseisin; Per Hody. Br. Releases, pl. 22. cites 19 H. 6. 17. 23.

3. The

3. The *reason for which Writ of Entry Ad terminum qui præteriit lies against Termor who holds over* his Term is because *this holding in by Tort is in the Law a Fee-simple.* Br. Enter en le Per, pl. 32. cites 22 E. 4. 14. 38.

Br. Estates, pl. 46. cites 22 E. 4. 38. S. C.

4. *Tenant in Tail brought a Writ of Entry sur Disseisin,* and the *Writ was General,* and the 21 H. 6. 26 was vouched to be held, that the Writ ought to be Special, viz. to make mention of the Tail; but the Court held that the General Writ is good enough. And then the Count ought to be Special. Le. 231. pl. 314. Pasch. 33 Eliz. C. B. Brownsall v. Tyler.

(G. 13) Upon what Plea by Defendant the Demandant may enter without praying Seisin.

1. FOrmedon *against two,* the *one disclaimed,* and the *other pleaded Non-tenure,* and therefore the *Demandant prayed Seisin* of the Land, for nothing can be vested in him who pleaded Non-tenure, because he did not take the Tenancy; but the Opinion of all the Court was that the *Demandant may enter*; quod nota. Br. Disclaimer, pl. 17. cites 36 H. 6. 28

2. Per Danby, *in Action in which a Man may recover Damages,* and the *Tenant disclaimed,* the *Demandant may aver him Tenant.* But *Contra where he cannot recover Damages*; For he is at no Mischief; For he may enter. Br. Disclaimer, pl. 17. cites 36 H. 6. 28.

3. And note, That upon the Disclaimer the Judgment is, *that the Writ shall abate,* and no Judgment is given for the Demandant, and yet he may *enter by Reason of the Estoppel which is between the Demandant and the Tenant,* but it is no Estoppel to another. Br. Disclaimer, pl. 17. cites 36 H. 6. 28.

4. *In Quid juris clamat,* the *Tenant claimed Fee* which is *found against him,* the Plaintiff *shall not have Judgment to recover the Land nor to have Attornment*; For no Land was in Demand, and yet the Demandant may enter. Br. Disclaimer, pl. 17. cites 36 H. 6. 28. per Prisot.

5. In *Formedon* the *Tenant disclaimed,* the *Demandant maintained his Writ, that the Tenant was Pernor of the Profits the Day of the Writ, and Tenant of the Franktenement the Day of the Action accrued*; and per Littleton he shall not so *maintain his Action*; For he *is not to recover Damages* in this Action, and therefore he may enter. But Needham J. contra, and that he may so maintain his Writ; For he cannot enter; For the Judgment upon Declaimer is no more, but that the Demandant shall take nothing by his Writ, which is in Effect that the Writ shall abate, and then cannot the Demandant enter; For if he enters the Tenant may have Assise. Quod quære inde; For it seems the Law is contra, for the Disclaimer estops the Tenant to have Assise. Br. Disclaimer, pl. 24. cites 4 E. 4. 38.

6. In *Formedon* the *Tenant disclaimed,* the Demandant cannot enter into the Land upon the Tenant or any who is in by him pending the Writ or after, as where the Tenant aliens pending the Writ or after. But he cannot enter upon him who is not in by him; As in Præcipe quod reddat against Disseisor who disclaims where the Disseisee has enter'd pending the Writ, he cannot enter upon the Disseisee. But

Danby

Danby contra, if the Title of the Demandant be elder than the Title of the Disseisin. Br. Disclaimer, pl. 25. cites 5 E. 4. 1.

Of the several Writs of Entry of Ad Communem Legem. Ad Terminum qui præteriit. In Consimili Casu. In Casu Proviso. En le Per. En le Per, Cui & Post. En le Quibus. See F. N. B. and see Thel. Dig. 170. &c. Lib. 11. Cap. 54. per totum.

For more of Entry in General, See Conditions. Descent. Ejectment. Estate. Fines. Forfeiture. Remitter. Trespass. And other proper Titles.

Error.

(A) In what Cases an Erroneous Judgment may be *avoided by Plea* without Writ of Error.

Fol. 742.

1. If the Tenant in a Cui in Vita dies seised pending the Writ, and after Judgment is given against him, which is erroneous, and after the Recoveror sues Execution against the Heir, and he brings an Assise; he shall not avoid this Judgment against his Father, by saying, that his Father died pending the Writ; but he is put to his Writ of Error; for the Judgment is not void, but only voidable. * 28 Ass. 17 adjudged. 32 E. 3. Ass. 99. Curia.

* Br. Error, pl. 123. cites S. C. but Brooke says, that it seems if the Father who died had not been Tenant at any Time pending the Writ, but a Stranger had been, there the Judgment is void as to the Stranger, because he may always falsify the Recovery.

2. If a Man recovers in an Ejectione Firmæ, and after his Executor sues in Execution by Scire Facias against the Recoveree, the Recoveree cannot avoid the Judgment, nor stay Execution, by saying the Testator died between Verdict and Judgment, or such like; but he is put to his Writ of Error, for the Judgment is only voidable. Mich. 5 Jac. B. R. between *Hide and Markham*, which concerned the Earl and Countess of Shrewsbury. Adjudged per Curiam; and by the Clerks, such Pleas have been several Times disallowed.

By Stat. 17 Car. 2. cap. 8. S. 1 and made perpetual by 1 Jac. 2. cap. 7. It is enacted that in all Actions Real, Personal or Mixt the Death of either Party between the Verdict and Judgment shall not be alleged for Error, so as such Judgment be enter'd within two Terms after the Verdict.

3. So if a Man recovers Lands in any real Action, and after sues Execution against the Heir of the Recoveree by Scire Facias; it is not any Plea for the Heir to say, that his Father died pending the Writ, but he is put to his Writ of Error. 28 Ass. 17. by Mowbray, admitted.

4. If

4. If a Man recover, againſt the Principal and ſues a Scire Facias againſt the Bail, they cannot ſay the Principal died before the Judgment, and ſo avoid the Judgment by Plea; for it is againſt the Record. Mich. 32, 33 El. B. R. between *Warter* Plaintiff, and *Perry and Spring* Defendants. Per Curiam.

Cro. E. 199. pl. 20 S. C. the Court at firſt held it no Plea, becauſe it goes in Avoidance of the Judgment, and proves it Erroneous which cannot be avoided but by Writ of Error, but they might plead the Death of B before the Scire Facias, and after Judgment, becauſe then they could not bring in the Body. But notwithſtanding the Plea was afterwards receiv'd becauſe they cannot have a Writ of Error to reverſe the Judgment. ——— 2 Le. 101. pl. 125. Walter v. Perry. S. C. and all the Juſtices except Wray held the Plea not good; For it is a Surmiſe againſt the Judgment, which cannot be given againſt a dead Man; but it was agreed that he may plead that Defendant is dead after the Judgment, but it was ruled that Defendants ſhould be ſworn that the Plea was true. ——— S. C. cited 2 Mod. 308. and ſaid that ſuch Plea was good by way of excuſing themſelves to bring in the Body, but not to avoid the Judgment becauſe it is againſt the Record which muſt be avoided by Writ of Error.

5. In an Action upon the Caſe, if the Plaintiff be nonſuit, and after it is entered, that he reliquit Actionem ſuam & fatetur ſe nolle ulterius proſequi, upon which Coſts are aſſeſſed, though it be admitted that this Judgment is Erroneous, becauſe this is not any Nonſuit as is entered; yet in an Action of Debt for the Coſts, the Defendant ſhall not avoid it by Plea without a Writ of Error; for it is a Judgment de facto not void, but only voidable by Writ of Error. Mich. 11 Jac. B. R. between *Coles and Low*, adjudged.

6. If Land in one County be *recover'd by Præcipe in another County*. *Or if* the *Tenant dies pending the Writ*, thoſe ſhall be revers'd by Error as may be avoided by Anſwer; For thoſe *are* Ipſo Jure void. Br. Error, pl. 104. cites 36 H. 6. 33.

8. If a *Judgment* is given *in a Court which has no Juriſdiction* it may be avoided by Plea; For it is Coram non Judice; As in the Court of Marſhalſie unleſs both the Parties are de Hoſtel de Roy; Per Croke J. Bulſt. 208. cites 22 E. 4. 31. 19 E. 4. 8. b. and 20 E. 4. 16.

Br. Judgment, 123. cites 20 E. 4. 15 S. P.

9. If any of the *Proclamations* upon a Fine be *entered to be made upon a Sunday*, *out of Term*, or *upon the 31ſt of June* (there never having been any ſuch Day) they may be avoided by Plea or Writ of Error. Dyer 181. a. 182. b. pl. 52. &c. Paſch. 2 Eliz. Fiſh v. Brokett.

Pl. C. 265. a &c. S. C. adjudged in Error in B. R. acordingly.

10. If a *Fine be impoſed in a Leet* be *unreaſonable or againſt Law, as Joint where it ſhould be Several*, it may be avoided by Plea and Judgment of the Court in which the Suit is depending, for there is no other Remedy; Reſolved. 11 Rep. 44. b. Godfrey's Caſe.

Roll Rep. 75. Bullen v. Godfry, S. C. & S. P. agreed per Cur.

11. The *Bail* cannot maintain a Writ of Error *upon a Judgment given againſt the Principal*, becauſe he was not privy to the Judgment, and therefore it ſhall be allowed him by Way of Plea in a Scire Facias. Arg. Godb. 377. in pl. 465. Paſch. 3 Car. B. R.

12. In *Debt upon a Bond againſt an Adminiſtrator* he *pleads a Judgment recovered againſt the Inteſtate, and that he has not Aſſets ultra* &c. the Plaintiff *replies that an Action was brought againſt the Inteſtate, and that he died before the ſaid Judgment, and that after his Death Judgment was given and kept on Foot per Fraudem.* The *Defendant traverſed the Fraud, but did not anſwer the Death of the Inteſtate.* It was urged for the Plaintiff that the Judgment was ill, and that he being a Stranger to it could neither bring Error nor Deceit, and had no other Way to avoid

avoid it but by Plea. The Court held that the Plaintiff might avoid the Judgment without a Writ of Error, especially in this Case, where it is not only erroneous but void. 2 Mod. 308. Trin. 30 Car. 2. C. B. Randal's Case.

In what Cases a *Fine* may be reversed by Plea without Writ of Error; See Tit. Fine. (G. b. 3)

(A. 2) Lies; In what Cases in General.

1. IN some Case of erroneous Judgment no Writ of Error lies, as where *Judgment is* given *against a Bastard*, and he *dies without Issue*. Br. Error, pl. 112. cites 15 Aff. 8.

S. P. Br. Conusance, pl 13. cites 44 E. 3. 37.

2. Of a *Fine levied in a Franchise without Authority* Writ of Error lies. Br. Error, pl. 24. cites 44 E. 3. 37.

3. If *Matter of Error which is not apparent is not objected to*, but passes without Challenge, as a Venire Facias returned by a Bailiff of a Franchise where Part of the Lands are guildable, Error will not lie. See Br. Error, pl. 34. cites 3 H. 4. 6.

4. Error may be *in suing Execution*. Br. Error, pl. 7. cites 9 H. 6. 38.

5. Writ of Error lies *of a void Judgment* in any Case. Br. Judgment, pl. 123. cites 20 E. 4 15.

6. This Writ lies when a Man is grieved by any Error *in the Foundation, Proceeding, Judgment or Execution*, and thereupon it is called Breve de Errore corrigendo. But *without a Judgment, or an Award in Nature of a Judgment, no Writ of Error does lie*; for the Words of the Writ be, Si Judicium redditum fit; and that *Judgment must regulary be given by Judges of Record, and in a Court of Record*, and not by any other inferior Judges in base Courts; for thereupon a Writ of false Judgment does lie. Co. Litt. 288. b.

7. Error will not lie *on a Conviction for keeping a Gun* on the 33 H. 8. 6. Vent. 33. Trin. 21 Car. 2. B. R. Anon.

8. *Nor* on a Conviction *of forcible Entry upon View* of the Justices of Peace, but it may be examined on a *Certiorari*. Vent. 171. Mich. 23 Car. 2. Anon.

9. Supposing there was a *general Pardon*, and the *Party did not plead, nor the Judges did not take Notice of it*, the Party might not have Remedy by Writ of Error. Ellis said, They could *allege nothing* for Error *but what did appear in the Record*; to which Vaughan assented. Freem. Rep. 84. pl. 103. Pasch. 1673. in Case of Phillips v. Crawly.

10. It is merely a Matter of Favour that *Judgment in inferior Courts, in Causes not arising within their Jurisdiction*, are not avoided without Writ of Error, and the bringing such Writ does not affirm their Jurisdiction. 2 Jo. 209. Pasch. 34 Car. 2. B. R. Copping v. Fulford.

11. Upon the *Denial* of B. R. *to grant a Prohibition* the House of Lords was moved for a Writ of Error, but there held that Error did not lie. 1 Salk. 136. Pasch. 11 W. 3. in Case of Bishop of St. David's v. Lucy.

12. Error will not lie *on a new created Jurisdiction* unknown to Common Law; For they *need not proceed pursuant to the Methods of Law*, nor need they Indictment or Jury, nor in their Judgments, say ideo consideratum est, but *may say they judge him guilty, and that*

he

he ought to pay ſo much Money &c. and it is like the Caſe of Convictions by Juſtices of Peace, and in both Caſes the Party has a good Remedy by Certiorari, and that is a Conſequence neceſſary on all ſuch particular Juriſdictions, that the Record of their Proceedings may be brought up to B. R. that this Court may examine whether they have kept themſelves within their Juriſdiction; Per Holt Ch. J in delivering the Judgment of the Court. 12 Mod. 390. Paſch. 12 W. 3. Dr. Greenvill v. The College of Phyſicians.

13. Since the Statute 9 Annæ, cap. 20 which allows ſpecial Pleadings to a *Mandamus*, it was admitted that Error lies of a Judgment thereon, becauſe it *is now in Nature of an Action, and Coſts are given* by the Statute for that Side which prevails; *But* then it was ſaid further, that this is no Argument that Error lies of a Mandamus *where there is no Plea to it, and only a Rule awarded for the Mandamus*, which is not in Nature of a Judgment; And Ld. Ch. J. Parker (who with others aſſiſted Ld. C. Cowper at the Motion) ſaid, that Chancery might ſuperſede ſuch Writ of Error, Quia improvide emanavit, if it were ſo; And that a Mandamus now is in Nature of an Action, and where Judgment was given on ſpecial Pleadings upon the late Statute, it was admitted lately in B. R. in a Caſe there, that Error lay. Wms's Rep. 350. Paſch. 1717. in Caſe of Dean and Chapter of Dublin v. Dowgatt.

14. Where a *Reference* is *to the Judges on a Caſe ſtated*, no Writ of Error will lie *on their Judgment*, but if they certify their Reaſons for their Opinions, this Court may conſider of it. 9 Mod 5. Trin. 8 Geo. Gore v. Gore.

15. No Writ of Error lies in Caſes of *Mandamus* or *Procedendos*, For the Mandamus gives the Party that tries it no better Right than he had before, which ſtill remains examinable and triable in a proper Action, and there being no Coſts, the Party that ſues the Writ of Error can have no Benefit by it. MS. Tab. March 18. 1725. The King v. Herle.

(B) In what Caſes an erroneous Judgment may be avoided *by Entry* without a Writ of Error.

1. If an Infant ſuffers a Common Recovery, in which he comes in as Vouchee in his proper Perſon, and not by Attorney or Guardian, though this ſhall not bind him but that he may in a Writ of Error avoid it, becauſe it is Error in Law, yet at his full Age he cannot enter into the Land and avoid it by his Entry, before he has reverſed it in a Writ of Error, becauſe he himſelf is privy to the Judgment, and may reverſe it by ſuch Means, and he is not a Stranger to the Judgment, for Judgments ought not to be ſubverted by Matter of Pais without Matter of Record; as a (*) Recognizance or Fine by an Infant, nor any Judgment in other Actions given againſt an Infant, where he appears by Attorney and not by Guardian. Hill. 1650 between *Ayliff and Walker* adjudged per Curiam, upon a ſpecial Verdict for Land in Eſſex. Intratur Trin. 1649. Rot. 200.

Sty. 246 Ailet v Walleſs, S C adjudged Niſi. — See tit Enfant (G) pl. 2. S.C. — See tit. Recovery Common (D) pl. 6. S.C.

* Fol. 743.

2. If *an Infant makes an Attorney which is recorded, and pleads* a Plea *to Issue*, which is *found against him*, this is no Matter in Arrest of Judgment, but is put to his Writ of Error. Br. Error, pl. 79. cites 22 H. 6. 31. per Newton.

3. *So* per Portington, if the Infant be permitted to *levy a Fine*, if this be *recorded* it cannot be defeated but by Writ of Error; Quod nemo negavit. Ibid.

(C) In what Cases Judgments shall be reversed *without a Writ* of Error.

In what Court.

1. IN Banco Regis in no Case, neither in the same Term, nor in another Term, shall an Outlawry be reversed without Writ of Error on the Crown-Side. Mich. 14 Jac. The Clerks said, that so at all times had been their Course, and the Court agreed thereto, and adjudged accordingly. * 19 H. 6. 2. adjudged; and by the Clerks it is the Course.

* Fitzh. Error, pl. 26. cites S. C. in B. R. and that the Ch. Justices and Clerks held that it could not be reversed in that Court without Writ of Error, but says that otherwise it is in C. B. if he comes the same Term. ——— Br Error, pl. 199. cites S. C. that he who comes in by Exigent may the same Term reverse Utlawry for Matter apparent by Plea, As for Omission of Process in C. B without Writ of Error; but otherwise upon Matter in Fact; But that the Usage in B. R. is, that in both Cases he is put to his Writ of Error. ——— Br. Error, pl 81 cites 15 E 4 7 8. same Diversities. ——— Outlawry in Personal Actions cannot be reversed in B. R. without Writ of Error, by the Course of the Court; But otherwise it is in C. B Per Broome, Secondary of B R. 2 Roll Rep. 25. Pasch. 16 Jac. B. R. Anon. cites 4 E. 4. 10 b. 11. a. and 42 b. 43. a.

In what Cases Utlawry shall be reversed by Writ of Error, or by Plea, See tit. Utlawry (G. b).

2. One *convicted of Felony prayed his Clergy*, and had it. The *Indictment was removed into the Crown-Office*; A Writ of Error does not lie to avoid it, because he is a Clerk convicted only, and not attainted; For *when he prayed his Clergy, which was allowed him, there never was any Judgment afterwards given*, and of that Opinion was the whole Court; But upon Exceptions taken to the Indictment, the same was discharged and Restitution awarded. Cro. E. 489, 490. pl. 6. Mich. 38 & 39 Eliz. B. R. Long's Case.

(D) [Reversed.]

For what Cause

1. AT the Exigent returned in Banco, if the Defendant says the Plaintiff appears by the Attorney, and the Attorney has no Warrant, this is not Cause to reverse the Judgment without Writ of Error, for perhaps he has a Warrant in Chancery. 11 H. 4. 34.

Br. Utlagary, pl. 11. cites S. C. — Fitzh. Utlagary, pl. 40. cites S. C.

2. But

2. But a Judgment may be reversed in a Writ of Error for an Outlawry after a Supersedeas and Mainprise. * 11 H. 4. 34. || 8 H. 6. 37. 9 H. 6. 8. Contra Mich. 37 El. B. per Curiam.

* Br. Utlagary, pl. 11 cites S. C.

|| Where one is outlawed contrary to a Supersedeas, the Court in the same Term may reverse the Outlawry without a Writ of Error. Br. Utlagary, pl. 19. cites 8 H. 6. 37.

3. So if the Exigent bears Date before the fourth Day of the Pluries Capias issued to the Sheriff. 11 H. 4. 34.

Br. Utlagary, pl. 11. cites S C. —— Br Error, pl. 48. cites S. C.

4. A Man outlawed of Felony shall not avoid the Outlawry, because he was in Prison at the Time, without a Writ of Error. 1 H. 7. 13. b. Contra * 7 H. 6. 25.

* Br. Utlagary, pl. 18. cites S. C. per Hals. Quod Nota.

5. [So] if a Man be outlawed, where it appears by the Record that there were * not two Capias's awarded this may be annulled without a Writ of Error. (8 H. 6. 37. 11 H. 6. † 11.) though the Statute says it shall be void. Contra M. 37 El. 6.

* In the large Edition of Brook, the Word is (tamen) but in the other Editions is (tantum) viz. that there were two Capias's only; But the Year Book is as in Roll, viz. that there were not two Capias's awarded. See Brook Utlagary, pl. 19. cites 8 H 6. 37.

† This is misprinted in Roll, and it seems should be (15. b pl. 6.) and there the Objection was, that there were but two Capias's issued where there should have been a third.

6. So if a Man be outlawed, and no Mention is made of what County he was, this may be reversed without a Writ of Error. 8 H. 6. 37. Curia.

S. P. where the Defendant came the same Term in Person and prayed a Reversal, because it is in the same Term; Per Cott For the Statute says, that such Process shall be held for null, to which the Court, except Babb. Ch. J. agreed. Br. Utlagary, pl. 19 cites 8 H. 7 37. —— Fitzh. Error, pl. 19. cites S. C.

7. [But] if a Man be outlawed without Addition given to him in such Action, in which Action there ought to be an Addition by the Statute, he shall not avoid it by Plea without Writ of Error, though the Statute says that such Outlawry shall be void. 11 H. 5. 15.

8. [But] if a Man comes in Ward upon the Capias Utlagatum, he may reverse the Outlawry, because he is named J. S. de A. whereas he was abiding at the Writ purchased at B. and not at A. and this without Writ of Error, because if he should bring a Writ of Error, it ought to agree in the Name with the Record, which would be against himself. 19 H 6. 80.

9. But otherwise it would be if he had rendered himself Gratis. 19 H. 6 80.

10. [But] if a Man comes in Ward upon the Capias Utlagatum, he may avoid the Outlawry without Writ of Error, because he is called J S. de D. where there is no such Vill in the County, because if he should bring a Writ of Error it ought to agree with the Record, and so he should admit that there is such a Vill. 22 E. 4. 38.

And a Sci. Fa. was granted against the Plaintiff to say if he would maintain the Writ, per Newton and Paston J. For the Sheriff did wrong to arrest him; because if he be of B. he is not the same Person, Nota; and shall not be forced to a Writ of Error; For per Paston the suing a Writ of Error will affirm the Name because it must be according to the Record; And so he was suffered to make Attorney, and was dismissed. Br Utlagary, pl. 22. cites 19 H. 6. 80.

S. C. cited, 2 Jo. 167. Mich. 33 Car. 2 B. R. in Case of * Fol. 744 The King v. Briggs, which was on a Conviction for Hunting in a Park contrary to the Statute, and Judgment for the Penalty of 20 l. given by the Statute; But Pemberton Ch. J. held, that the Party ought to be put to his Writ of Error, and he was not then permitted to reverse or quash it by Motion upon the Certiorari, but afterwards Pemberton assenting Exception was taken to the said Judgments by Motion on the Certiorari.

11. If a Man be convicted upon the Statute of Jac. cap. 11. by two Justices of the Peace for killing of Partridges with Nets upon Proof or Confession of the Party without Indictment, this Judgment may be reversed in B. R. this being removed there by Certiorari without any Writ of Error. Hill. 12 Car. * B. R. *Berry's Case*, Per Croke and Berkley, and they seemed in some Manner that such Conviction upon the Statute for Shooting, or such like, might be so reversed without Writ of Error.

12. A Man shall have Writ of Error *upon an erroneous Execution*; As upon an Outlawry, as well as upon the principal Judgment; Per Paston. Br. Error, pl. 70. cites 7 H. 6. 44.

13. If an *erroneous Judgment* be given *upon an Indictment of Barretry* at the Sessions of Peace, and the Party fined thereupon, and committed till he pays it, and he removes the Indictment and Proceedings by Certiorari, and himself by Habeas Corpus, yet he cannot be discharged, because Judgment being given thereupon he cannot discharge it unless he brings a Writ of Error; Adjudged. Cro. J. 404. pl. 2. Trin. 14 Jac. Rice's Case.

14. But a *Record of Force* made *by Justices of Peace upon the View*, if the same is insufficient, may be quashed upon Motion without Writ of Error; Agreed per Cur. 1 Lev. 113. Mich. 15 Car. 2. the King v. Chaloner.

(E) At what *Time* a Judgment may be so reversed without Writ.

[Outlawry.]

Fitzh. Error, pl. 26. cites S. C. —— Br. Error, pl. 199. cites S. C. —— Br. Utlagary, pl. 20. cites 19 H. 6. 1 2.

1. AN Outlawry in Banco Regis in another Term cannot be reversed without a Writ of Error. 19 H. 6. 2. My Reports 14 Jac. *Hamon*.

* Br. Utlawlawry, pl. 20. cites S. C. Contra, and he was put to his Writ of Error. —— Fitzh. Error, 20. cites S. C. accordingly. —— And Br. Error, pl. 158. cites 4 E. 41, 42. that in B. R. the Defendant shall be put to his Writ of Error, and says that the same Term the Outlawry was reversed in B. R. upon an Exigent issuing there, a Writ of Error was brought out of Chancery, directed to the Justices of B. R. Brooke says, Quod nota, that they reversed their own Error at the same Term.

2. [But] an Outlawry in Banco Regis may be reversed in the same Term without Writ of Error, for all the Term the Judgment does not remain in Pectore of the Judges, this being an Outlawry and Judgment before the Coroner. * 19 H. 6. 2. Tr. 14. Jac. B. R.

* Fitzh. Error, pl. 19. cites S. C. —— † Fitzh. Error, pl. 26. cites S. C. —— Br. Error, pl. 199. cites S. C. —— See (C) pl. 1. and the Notes there

3. So in the same Term an Outlawry returnable in Banco may be reversed in Writ of Error. * 8 H. 6. 37 † 19 H. 2.

4. But not there in another Term without a Writ of Error. 19 H. 6. 2.

5. In

5. An Outlawry after a Supersedeas cannot be reversed in Banco the same Term of the Return without a Writ of Error. M. 37 El. B. per Curiam, because this is not their Judgment, but the Judgment of the Coroner.

6. *In the same Term* and Outlawry may be reversed in C. B. for Error. Het. 93. Pasch. 4 Car. C. B. Anon. Litt. Rep. 150. S. C.

7. Or *in any Term if* it be *void upon any Statute*; As for want of Proclamations &c. Het. 93. Ibid. Litt. Rep. 150. S. C.

(F) *Upon what Judgment.*

1. If the Plaintiff be nonsuit at the Nisi Prius, upon which Costs are taxed by the same Jury, by the Statutes of H. 8. and Ja. and Judgment given for them against the Plaintiff, the Plaintiff may have a Writ of Error upon this Judgment. Tr. 3 Jac. B. R. admitted per Curiam.

2. If a Man brings a Writ of false Judgment in Banco upon a Judgment given in Ancient Demesne, and reverses the Judgment there, a Writ of Error lies upon this Judgment, for this is a Matter of Record. M. 40 & 41 El. B. R. by two Justices.

3. If a Manor Court holds Plea of a Thing out of their Jurisdiction, and gives Judgment thereof, though this is void, being Coram non Judice, yet a Writ of Error lies, and Error may be assigned in this. M. 3 Ja. B. R. between *Quarrels and Searle*, for by the Writ of Error he shall be restored to all that he hath lost, where, by the Action of Trespass, he shall recover all in Damages. Cro J. 95. 96. pl. 24. Quarles v. Searle, S. C. held accordingly by three Justices, contra Williams; And though a Writ of Error be brought that does not affirm the Jurisdiction of the inferior Court, nor is any affirmative, but that it may be said to be a void Judgment, and yet the Writ of Error well lies of a void Judgment.

4. If a *Verdict* passes *against the Vouchee*, yet he shall have a Writ of Error notwithstanding the Stat. 32 H. 8. cap. 30. Per the Justices of C. B. Bendl. 37. pl. 67. Mich. 1 & 2 P. & M. in a Nota. But in a Præcipe quod reddat T. S. was vouched, who entered into Warranty, and pleaded to *Issue*, which was *misjoined or some other the like Default*, and it was found against him; now if Judgment is given against him, in such Case he cannot have a Writ of Error, by all the Justices in Bank, notwithstanding the Statute 32 H. 8. cap. 32. [30.] for this is out of the Statute, which only gives the Writ where a Verdict is found for or against the Demandant or Tenant, and a Vouchee is neither of them. And 26, 27. pl. 60. Hill. 7 E. 6. Anon.

5. And also note, That if any *Default is in any Original Writ, or* in the *Return thereof, or* in the *Verdict, or* in the *Judgment, or* in the Count, *so that it plainly appears by the* Count *that the Plaintiff has no Cause of Action*; And if a Verdict and Judgment is given upon such Originals for the Plaintiff, yet the Defendant shall have Writ of Error, notwithstanding the said Statute, and these Defaults are not remedied by the same Statute. Bendl. 37. pl. 67. Mich. 1 & 2 P. & M. Bendl. in Keilw. 207. b. S. C. in totidem Verbis. —— Insufficient Trials are not remedied by any Statute, for the Stat. 32 H. 8. cap. 30 does not extend to Verdict given between the Demandant and Vouchee, nor to any Default in the original Writ, or in the Return thereof, or the Want of an Original, or in the Count, or to any Insufficiency in the Trial, Verdict, or Judgment &c. And the Stat. 18 Eliz. salves many such Defects, but does not remedy any insufficient Trial, but this remains as at Common Law. 5 Rep. 36. b. Trin. 30 Eliz in the Exchequer, in Baynham's Case, als', Baynham v. Brook.

6. It doth not lie of a Judgment upon an *Assise of Fresh-force*; but a Writ of false Judgment, as it seems. F. N. B. 19 (I)

7. If one be *outlawed upon an Indictment of Treason, Felony or Trespass*, but the *Process* and Order *prescribed by the Statute of* 6 *H.* 8. *cap.* 1. *and* 8 *H.* 6. *cap.* 13. are not observed, the Outlawry may be reversed by Writ of Error, which Writ ex merito Justitiæ ought to be granted. 3 Inst. 31. cites it as adjudged, Mich. 26 & 27 Eliz. in Writ of Error Coram Rege in Ninian Menvil's Case.

8 A Writ of Error lies to reverse an *Attainder of High Treason*, tho' some have held the contrary by reason of 33 H. 8. cap. 28. [20.] That every Attainder of Treason by the Common Law should be as effectual as if by Authority of Parliament, for the Statute *is to be intended of lawful Attainders by due Course of Law, and not of erroneous or void Attainders*; and so it was held in a Parliament held the 28 Eliz. when it was enacted, That no Attainder of High Treason, where the Party was executed for the same, should be avoided by Plea or Error, But this Act extended only to Attainders before that Time where the Party had been executed, not to Attainders after. 3 Inst. 215.

If the Judgment be given by him that has Authority, and it be erroneous, it was at Common Law reversible by Writ of Error, only the Stat 25 Eliz. cap. 2 secures all former Attainders, where the Party is executed; from Reversal by Writ of Error, but meddles not with other Attainders, neither doth the Stat. 33 H. 8. cap. 20. take away Writs of Error upon Attainder of Trrason, as hath been resolved against the Opinion of Stamf. P. C. lib. 3. cap 19. Ca P. C p. 31. But it is true that the Statutes 26 H. 8. cap. 13. and 5 & 6 E. 6. cap. 11. take away from a Person outlawed in Treason the Advantage of Reversal of an Outlawry, because the Party outlawed was out of the Realm, but extends not to other Offences. Hales's Hist. of Pl. Cr. 353, 354. cap. 26.

9. If a Man be *attainted by a Judgment upon an Indictment* he shall not have Writ of Error without making a *Petition to the King* for the having it; because it so highly concerns him; Per Coke and Doderidge. Roll Rep. 175. pl. 12. Pasch. 13 Jac. B. R. Gargrave's Case.

Ibid says that so are 22 E. 3. 3. and 32 E. 3.

10. Error was brought to reverse a *Judgment upon an Indictment for Recusancy*; It was doubted whether any Exception be good upon such Conviction; For the Statute 3 Jac. is precisely that it shall not be void or discharged for Default of Form, or other Matter, until after conforming himself by coming to the Church. But afterwards, because the *Judgment was not Ideo capiatur*, and the Omission thereof is apparent to the King's Prejudice, and for that upon every Conviction in Indictment, the Judgment is Quod capiatur, for this Cause the Judgment was reversed. Cro. C. 504, 505. pl. 6. Winchester (Marquis's) Case.

Jo. 4[illegible]. pl. 5. The King v Ld. St. John, S. C and reports that the Writ of Error was brought by *the King*; and held that it would lie for him. For he *is not concluded by the Statute* 3 Jac.

11. Error was brought to reverse a *Judgment* entered *in an inferior Court, that the Plaintiff recuperare debeat*, whereas it ought to be recuperare debet. Roll Ch J. said, that this is no Judgment, and so no Writ of Error lies thereupon, for the Writ supposes a Judgment, because the Words of the Writ are Si Judicium redditum sit. Sty. 265. Pasch. 1651. Shedlock v. Lapere.

Ibid Roll Ch. J said that 3 Jac. in Cam. Scacc. the very Case was so adjudged.—See (M) pl. 15. where it is held that *recuperare debeat is only an Award.*

12. It was said by the Attorney-General that no Writ of Error lies upon a Judgment given *upon the Statute of Winton.* Freem. Rep. 435. pl. 588. (bis) Mich. 1676. Anon.

13. A Writ of Error lies not upon an *Indictment of Recusancy and Conviction by Proclamation.* Vent. 355. Trin. 33 Car. 2. B. R.

Because it is no Judgment but the Statute 3 Jac. cap. 4 gives Process upon it for the Forfeiture, and the Party's Remedy is in the Exchequer to quash it there. Raym. 433. Pasch. 33 Car. 2. B. R. Phorbes's Case.

14. The

14. The Defendant was *convicted at the Sessions for a Scold*, and adjudged to be ducked; She brought a Writ of Error (by Leave of the Attorney-General) and the Ch. J. said, The Court was well enough possessed of the Cause by Writ of Error, but the *best Way was by Certiorari to remove it into the Crown-Office, and then bring a Writ of Error coram nobis resident*, and upon that the Course is to give a Rule to assign Error, and then to move for a peremptory Rule, and in Default thereof to have a Non Pros. and then an Award of Execution. 1 Salk. 266. pl. 12. Trin. 3 Ann. B. R. The Queen v. Foxby.

6 Mod. 178. S. C. held accordingly.

15. A Writ of Error does not lie on a *Mandamus*. 8 Mod. 29. Hill. 7 Geo. D. and Chapter of Dublin's Case.

As to Reversing of *Attainders*, See Tit. Attainder (D)

(G) *Of what* Judgments. [In respect of the Court where given.]

1. **In Judgment** in Pleas upon Patents, **Pleas of** Debt, Attachment of Trespass, **and such like**, given in Chancery, **among them of Chancery, and upon** Scire Facias upon Recognizances, **a Writ of Error lies.** * 37 H. 6. 14. b. D. 14 El. 315. 100. 11 E. 4. 9.

Br. Error, pl. 95. cites 37 H. 6. S. C. & S. P.

2. But **no Writ of Error lies** upon a Judgment upon a Subpœna in in Chancery, **for as to this it is not a Court of Record.** 37 H. 6. 14.

Br Error, pl. 95 cites 37 H. 6. S. C. & S. P.

3. **A Writ of Error lies upon a Judgment** given in a Franchise **by Virtue of Conusance of Pleas.** 2 H. 4. 4. b.

Br. Error, pl. 32. cites S. C.

4. **No Writ of Error lies upon a Judgment** given by the Justices of the Peace. 4 H. 6. 24.

See (D) pl. 11.

5. **A Writ of Error lies upon a Judgment** in Bank. 4 H. 6. 24.

6. If the *Sheriff refuses the Challenges the Party shall have Error.* Br. Waste, pl. 58. cites M. 2 H. 4. 2.

7. Of *Error in the Court of Pie-powders* lies Writ of Error, and not Writ of false Judgment, which proves that it is a Court of Record; and this per Littleton, quod non negatur. Br. Error, pl. 162. cites 6 E. 4. 3. and 7 E. 4. 23.

8. Where false Judgment is given upon a *Writ of Justicies* directed to the Sheriff, no Writ of Error lies, though the Judgment be of Debt or Trespass above 20 s. F. N. B. 18. (H)

9. Upon a Judgment in a Re-disseisin *before* the Sheriff a Writ of Error lies. 6 Rep. 12. a.

10. A Writ of Error lies upon a Judgment given in a Court of *Pie-powders*. Jenk. 211. pl. 48.

11. A Writ of Error lies *out of the Petty Bag* into B. R. upon an Error in Fact. Vent. 103. Mich. 22 Car. 2. B. R. Foxwith v. Tremain.

12. If there be a *Conviction of Forcible Entry upon View of the Justices of the Peace* no Writ of Error lies upon it, but it may be examined in a *Certiorari* Vent. 171. Mich. 23 Car. 2. B. R.

13. Upon a Judgment given *by the Censors of the College of Physicians against one for Male-Practices* no Writ of Error will lie, because it is a *Court instituted de novo*, and by the Institution they are not bound up to the Formalities of other Courts, viz. as to draw up their Judgments

 with

with *Ideo Consideratum &c.* But it is sufficient for them to shew the Conviction in other Words. But the *Conviction may be remov'd into B. R. by Certiorari, and there quash'd for Insufficiency.* Per Holt Ch. J. Carth. 494. Pasch 11 W. 3. B. R. Dr. Groenvelt v. Dr. Burnell.

(H) In what *Court* [it lies.]

* Fol. 745.

S. P. by Coke Ch. J. Roll Rep. 287. pl. 5. Hill. 13 Jac. B. R. in Case of the Bp. of Bristol v. Proctor ——— 4 Inst. So. Cap. S. S. P.

1. D. 14 El. 315. 100. A Judgment given in Chancery upon a Scire * Facias upon a Recognizance, was reversed in Banco Regis, yet both Courts were before the King himself. 29 Ass. 47 adjudged. My Reports, 11 Jac. B. R. per Coke.

2. It lies in Parliament. 37 H. 6. 13. b. 11. E. 4. 9.

3. No Writ of Error lies in Banco or Banco Regis upon a Judgment given within the Cinque Ports. D. 23 El. 376. 23. adjudged.

As to Errors in Judgments in Cinque Ports, See tit. Courts of Cinque Ports. (E 7)

4. But by the Custom of the Cinque Ports a false Judgment given there may be reversed per Custodem sive Guardianum 5 Portuum apud Curiam Shepeway D. 23 El. 376. 23.

Br. Error, pl. 175. cites 18 E 4 12. S P. [and Roll seems misprinted (El.) for (E)]

5. A Writ of Error lies of Banco Regis of a Judgment given in Lancaster. 18 El. 4. 12.

As to Writs of Errors to the Counties Palatine, See tit. Court of County Palatine (S. 6)

6. So of any County Palatine, for this is excepted out their Charters. Davis 1. County Palatine. 62. D. 15. El. 320. 19.

* Br. Error, pl 74. S.C. —That Error in County Palatine shall be redressed here in England; [but says not in what Court whether in C B or B. R]——— Br. Cinque Ports, pl 8. cites S. C.

7. A Writ of Error lies in Banco upon Judgment in a County Palatine because these Counties were derived out of the Crown * 19 H. 6. 12. 6. H. 4. 4.

Doderidge said, that it had been adjudged by all the Justices in own Trewman's Case, that no Writ of Error lies of a Judgment given in the Stanneries in Cornwall. Win. 8. Pasch. 19 Jac. in the Case of Ewrr v. Vaughan.

8. If the Judgment be given in the Court of Stannaries of the Dutchy of Cornwal, no Writ of Error lies upon this in Banco, or Banco Regis, because it hath not been used; but of this there may be an Appeal to the Guardian of the Stannaries, and from him to the Prince, and when there is no Prince to the King's Counsel. M. 13 Jac. B. R.

* Br. Error, pl. 127 cites S. C.——— Per Cur. Le. 55. in pl 69. cites 15 E 3 Error 72.———And 3 Le. 159. pl. 207. cites S. C.———Upon a false Judgment, in C. B. in Ireland Error must be sued in B. R. there, but on Judgment given in B. R there, Error must be sued in B. R. in England. F. N. B. 22 (E)—Vaugh. 290. Vaughan Ch. J. cites it as said by Sir

9. A Writ of Error lies in B. R. upon a Judgment given in Banco Regis in Hibernia. D. 1. County Palatine. 62. * 34 Ass. 7. adjudged. 37. Ass. 5.

Sir Edward Coke in Calvin's Cafe, fol 18. a that Albeit no Refervation were in King John's Charter, yet by Judgment of Law a Writ of Error did lie in B. R. of England of an erroneous Judgment in B. R. in Ireland. Whereupon Lord Hobert obferves, that a Writ of Error lies not therefore to reverfe a Judgment in Ireland by fpecial Act of Parliament, for it lies at Common Law to reverfe Judgments in any Inferior Dominions; and if it did not, Inferior and Provincial Governments, as Ireland is, might make what Laws they pleafed; for Judgments are Laws when not to be reverfed.

10. A Writ of Error lies in Parliament upon a Judgment in Banco Regis, given either in a Writ of Error or upon an Action originally commenced there. D. 23 El. 375. 19. * 1 H. 7. 19.

* Br. Error, pl. 137. cites S. C.

11. If a Judgment be in any Court in Wales, a Writ of Error lies thereof before the Justices errant. 19 H. 6. 12.

Br. Error, pl. 74 cites S. C.——Br. Cirque Ports, pl. 8. cites S. C.

12. But no Writ of Error lies thereof in any Court at Common Law at Weftminfter, because it lies before the Justices errant. 19 H. 6. 12. b.

Br. Error, pl. 74. cites S. C. but by Newton if there are no fuch Juftices there it fhall be redreffed here in Curia Regis; but Brooke fays, Quære inde; For by Fortefcue and others it fhall be redreffed in Parliament.——Br. Cinque Ports, pl. 8. cites S. C. accordingly.

13. And if a Judgment be given before the Juftices Errant in Wales no Writ of Error lies thereof in any Court at Weftminfter, because the Court of Justices Errant is as high as any of the King's Courts, except the Parliament. 19 H. 6. 12.

Wales was a Kingdom by itfelf and never derived from the Crown, as Lancafter, Chefter and Durham were; Per Fortefcue. Br. Cinque Ports, pl. 8 ——S. P. and therefore regularly no Writ of Error did lie of a Judgment in Wales, but otherwife of the Counties Palatine 2 Inft 223. Cap 42—But Keilw 202. b. in pl. 19. Mich. 11 H. 8. it was faid by Brudenell, Ex affenfu Brook, Fitzherbert, and all the King's Counfel, that Wales is Parcel of the Realm of England, and that Writ of Error lies in England for an erroneous Judgment given in Wales, tho' not of fuch Judgment given in the Ifle of Man which was no Parcel of the Realm, and fo of Gafcoigne and Calice.

14. But a Writ of Error lies in Parliament upon a Judgment given before the Justices Errant in Wales, because the Parliament is more high. 19 H. 6. 12.

But as to more relating to Error of Judgments in Wales, See tit. Wales (C) and the Notes there, on Stat 34 & 35 H. 8. cap. 26

15. A Writ of Error lies in Banco upon a Judgment given before the Judges of Affife. 11 H. 3. Rot. 7. admitted that it was well brought.

Le 55. pl. 69. Pafch 29 Eliz. C. B. The A. Bp of York v. Morton S. P. adjudged that it did not lie in the faid Court.——3 Le 159 pl 207 S. C. in totidem Verbis.

16. A Writ of Error does not lie in Chancery upon a Judgment given in Banco.

17. But vide 17 E. 3. 5. 19. 21. where a Writ of Error upon a Judgment in Banco was returnable in Chancery, and there the Record was returned accordingly, and the Chancellor delivered it over to the Chief Juftice de Banco Regis. 17 E. 3. 46. 30 E. 3. 14.

18. A Judgment in Affife cannot be reverfed by the Chancellor before the Council, for this is not any Place for it. 34 E. 3. 14. by the Justices.

There is no fuch Year in the Year Book.

19. Upon a Judgment given in the Huftings of London a Writ of Error lies at St. Martins before certain Juftices. 18 E. 3. 8.

20. Where

20. Where Writ of Error is sued in London of Error before the Mayor, this shall be sued at *St. Martins*, and then the Mayor and Aldermen shall have *Day of 40 Days to be advis'd* of their Records, and then the *Recorder shall record it Ore tenus*, and there were diverse Opinions if the Party after this might allege *Diminution* or not. Br. Error, pl. 18. cites 34 H. 6. 42.

The Chancellor and Treasurer are Judges, and the other are only Assistants Br. Judgment, pl. 125. cites 8 H. 7. 13

21. 31 *E.* 3. *Stat.* 1. *cap.* 12. Enacts, That *where a Man complains of Error in the Exchequer, the Chancellor and Treasurer shall cause to come before them in any Chamber of Council nigh the Exchequer, the Record of the Process taking to them the Justices and other sage Persons; and shall caus'd to be called before them the Barons of the Exchequer, to hear the Causes of their Judgments; and if Error be found, they shall correct and amend the Rolls, and send them into the Exchequer to make Execution.*

16 Car. 2. cap 2. S. 2. *The not coming of the Ld. Chancellor and Ld Treasurer at the Day of the Return of any Writ of Error on the Statute of 31 E. 3. cap. 12. shall not cause any Abatement or Discontinuance; but if either of the Chief Justices, or the Ld. Chancellor or Ld. Treasurer shall come to the Exchequer-Chamber at the Day of the Return the Suit shall proceed.*

S. 3 *Provided that no Judgment be given, unless both the Ld. Chancellor and Ld. Treasurer be present.*

Br Contempt, pl. 7. cites S. C.—

22. Writ of Error lies in England of a Judgment in *Calais*. Br. Process, pl. 181. cites 21 H. 7. 31.

4 Inst. 282. cap 63. S. P. —— S. C. & S. P. cited Raym. 174. Arg. —— Vaugh. 291. cites 2 R. 3. 12. S. P.

23. If *false Judgment* be given *in London, or other* Place which is a *Court of Record*, the Party grieved shall have a Writ of Error, and this Writ may be returned into C. B. or B. R. at the Pleasure of him who sues the same. F. N. B. 20 (D)

24. Judgment in a *Quare Impedit before Judges of Assise*, and a *Writ awarded to the Archbishop*, and for Damages *a Scire Facias to the Sheriff*; the Defendants bring Error, and remove the Record into Banco Regis, and the Writ was directed to the Chief Justice de Banco. Dyer 76, 77 Mich. 6 E. 6. Henslow v. Keble.

And. 12. pl. 26. S. C. awarded accordingly, after Argument and Consideration

25. Error was brought in C. B. by A. and B. against J. S. of a *Judgment in an Assise of Novel Disseisin given by the Justices of Assise at Monmouth*; The Defendant demurred, and adjudged that a Writ of Error did not lie here. Mo. 78. pl. 208. Trin. 8 Eliz. Price v. Jones.

—— Bendl. 153. pl 213. Ap-Richard v. Jones S. C. awarded accordingly.—— D 250. pl. 85. &c S. C. held accordingly.

26. It was held by all the Justices that a Writ of Error does *not lie in C. B. upon* an Erroneous *Judgment given in any inferior Court of Record.* And this was, as was said, upon great Advice. Cro. E. 26. pl. 6. Pasch. 26 Eliz. C. B. Roe v. Hartly.

Administrators are within the Benefit of this Act. 6 Rep. 80. cites it as adjudged in the Exchequer Chamber 36 Eliz. in Ld Mordant's Case.

27. 27 *Eliz. cap.* 8. *S.* 2. *Reciting that Erroneous Judgment in B. R. were only to be reformed in Parliament*, enacts, that *where any Judgment shall begin in B. R. in any Action of Debt, Detinue, Covenant, Account, Action upon the Case, Ejectione Firmæ or Trespass, first commenced there, other than such only where the Queen shall be Party; the Plaintiff or Defendant against whom Judgment shall be given, may sue forth out of Chancery a special Writ of Error directed to the Ch. J. of B. R. commanding him to cause the said Record, and all Things concerning the said Judgment, to be brought before the said Justices of C. B. and Barons of the Exchequer into the Exchequer-Chamber, to be examined by the said Justices of C. B. and Barons; which Justices of C. B. and such Barons of the Exchequer as are of the Degree of the Coif, or Six of them, shall thereupon*

A *Scire*

upon have Power to examine all such Errors as shall be assigned or found in such Judgment, and thereupon to reverse or affirm the Judgment other than for Errors concerning the Jurisdiction of the Court of B. R. or for want of Form in any Writ, Return, Plaint, Bill, Declaration or other Pleading, Process, Verdict or Proceeding; and after that the Judgment shall be affirmed or reversed, the Record and all Things concerning the same shall be brought back into B. R. for Execution &c.

S. 3. Such Reversal or Affirmation shall not be so final, but that the Party grieved may sue in Parliament *for the further Examination of the Judgment.*

Facias was awarded against the Defendants upon a Recognizance, which they entred into as Bail for a Plaintiff in a Writ of Error that he should prosecute it with Effect, or pay the Money, if the Judgment was affirm'd; They plead, That he did prosecute it with Effect, and that the Judgment was not yet affirmed; The Plaintiff replied *Protestando*, That they did not prosecute with Effect, *Pro Placito*, That the Judgment was affirmed by the Justices of the Common Bench, and Barons *De Gradu de la Coif*, *et hoc paratus est verificare per Recordum*; To which the Defendants demurred generally, Because it was *not alleged*, *That there were six Justices and Barons present when the Judgment was affirmed*; For 27 Eliz. cap. 8. which gives them Authority, requires that there should be six at the least. Sed non allocatur; For the Defendant should then have pleaded *Nul tiel Record*; For if there were not six, their Proceedings were *Coram non Judice*. Vent. 75. Pasch. 22 Car. 2. Barret v. Milward.

28. A *Statute Merchant* was *by Mittimus removed out of the Chancery into C. B.* and *Execution awarded there super tenorem Recordi*. Resolved that Error lies in B. R. although the Original be in the Chancery, and the Judgment of Execution given in C. B. Mo. 570. pl. 778. Trin. 41 Eliz. B. R. Worsley v. Charnock.

Cro. E. 448 pl. 18. and 472. (bis) pl. 36 S. C. but S. P. does not appear. —— Ow. 106. S. C. but S. P. does not appear.

29. In *Durham*, if an erroneous *Judgment* be *given either in Canc.* there according to the Common Law, *or before the Justices of the Bishop*, a Writ of Error is to be brought before the *Bishop* himself; and if he *gives an erroneous Judgment*, a Writ of Error shall be sued returnable in the King's Bench. 4 Inst. 218. cap. 38.

30. When *Judgment* is given *in B. R. upon Writ of Error*, *no Writ of Error* thereupon *lies in the Exchequer-Chamber*; Per Coke Ch. J. Roll Rep. 65. pl. 10. Mich. 12 Jac. B. R.

S. P. by Coke Ch. J. 2 Bulst. 162. Whether the Judgment so given in B. R. be in Affirmance or Disaffirmance of the Judgment before given. But in Trespass, Detinue, Ejectione Firmæ, where the Judgment is originally here upon a Suit here begun, a Writ of Error lies in the Exchequer Chamber, but not otherwise.

31. *Bail upon a Judgment in Scire Facias* cannot have Error in the Exchequer Chamber; For it is out of the Statute of 27 Eliz. Held per Cur. Cro. J. 354. pl. 14. Mich. 13 Jac. in Cam. Scacc. in Case of Sandelow v. Deverton.

32. Error cannot be brought *in one Inferior Court on a Judgment in another*; Per Cur. Keb. 318. pl. 42. Trin. 14 Car. 2. B. R. Marchant v. Short.

33. Error lies *in B. R. of a Judgment in Attainder before the Ld. High Steward*; but the Plaintiff in Error ought to assign the Errors in Person; Per Twisden and Windham, and not denied. Lev. 149. Mich. 16 Car. 2. B. R. in Cornhill's Case.

S. P. by Twisden, Sid. 208. pl. 2. in S. C.

34. Writ of Error *on a Judgment in Indictment of Perjury in B. R. was brought in Parliament*, Arg. cites the Case of **Read v. Dawson**, as about two Years before, and Per Cur. this proves that it may be brought in Parliament but not that it must; and they affirmed their Jurisdiction that *Error may be brought in B. R. in Criminal Cases upon Judgments given in this same Court*; but *not in Civil Cases*, *unless* it be *of Errors in Fact* triable by Jury; but in Cases Criminal, as well of Errors in Law as in Fact. Lev. 149. Mich. 16 Car. 2. B. R.

If the *Indictment* had been *of Treason* &c. and the Defendant had been erroneously outlaw'd, and so return'd a Writ of Error may be brought in B. R. for the Reversal thereof. 3 Inst. 214. cap. 101.

35. A.

35. A Writ of Error *out of an Inferior Court lies as properly in C. B. as in B. R. but* generally Writs of Errors for many Years have not been brought in C. B. the Reason is Matter of Conveniency, because *if you bring a Writ of Error in C. B. and the Judgment is affirmed, yet it may be brought into B. R. and be there reversed*; though indeed if a Writ be brought in C. B. we must proceed upon it; But no Man will advise his Client to bring it in C. B. but rather into B. R. where it is final; Per Vaughan Ch. J. Cart. 222. Pasch. 23 Car. 2. C. B. Anon.

36. Upon a *Judgment in the King's Bench Error may be* brought either *in the Exchequer Chamber or Parliament* at the Election of the Party, *but* upon a Judgment *in the Exchequer Chamber*, the Writ of *Error must first be brought before the Lord Chancellor, and cannot come per Saltum into Parliament.* Parl. Cases 56, 57. in Case of Phillips v. Bury.

2 Keb. 91. Mich. 18 Car. 2. B. R. the Court conceived that no Writ of Error lay in Parliament on a Judgment in B. R. affirmed in Cam. Scacc. And per Windham, the Stat. 27 Eliz. cap. 8. was made to prevent Delays in Parliament.

37. In the Court of Exchequer Chamber for reversing a Judgment given in the Court of Exchequer, according to the Statute 31 Ed. 3. cap. 12. the Lord Keeper Somers did then declare, That the Question had been put to all the Judges in England, *Whether the Judgment of that Court ought to pursue the Opinion of the Majority of Judges?* And he said the Judges had delivered to him their Opinions in Writing. Holt Ch. J. Powell and Eyre Justices, were of Opinion, *that the Majority of the Judges should govern this Judgment.* But the Ch. J. Treby, Ch B. Ward, Nevell, Rokeby, Turton, Letchmere and Powis, were of a contrary Opinion; and therefore the Ld. K. pronounced a Reversal of the Judgment in the Court of Exchequer merely upon his own Opinion, and of Treby Ch. J. and Baron Letchmere, against the Opinion of all the rest of the Judges. Carth. 388. Mich. 8 W. 3. B. R. The King v. Hornely and Williams.

38. *Mayor and Commonalty of London sued in the Sheriff's Court for a Fine for refusing the Office of Sheriff*, according to a By-Law; *Error brought into the Hustings, which is a Court held before the Mayor, or six Aldermen in his Absence*; It was objected that the Writ of Error did not lie, because the Mayor was both Judge and Party; but not allowed, because the Court might be held without the Mayor; Adjudged in B. R. Holt dissentiente, and Judgment affirmed. MS. Tab. March 18, 1707. Mayor of London v. Markwith.

(I) Lies where.

In the *same Court* where the Judgment was.

1. A **Writ of Error does** not **lie in Banco Regis** for an Error in a Judgment **given in the same Court.** 7 **H.** 8. 6. 29. **agreed.**

But in the same Term they may reverse their own Error without suing to the Parliament. Br. Error, pl. 68. cites S. C. —— Fitzh. Error, pl. 16. cites S. C.

2. But

2. But if the Error be not in the Judgment but in the Process, there the Writ of Error lies in the same Court de Banco Regis where the Judgment was, and they may reverse it. 7 H. 6. 30.

Br. Error, pl. 68. S. P. cites 7 H. 6 28. S C. —— Fitzh. Error, pl 16. cites S. C.

3. As they may reverse their own Judgment for false Latin, because this is not the Default of the Court but the Clerks. 7 H. 6. 30.

Br. Error, pl. 68 S. P. cites 7 H. 6. 28. S. C. ——Fitzh. Error, pl 16. cites S. C.

4. So upon a Judgment in a Real Action, if they award an Habere Facias Seisinam of two Messuages and Lands in one Town, where the Demand is in two Towns, this erroneous Execution may be there reversed upon a Writ of Error brought in another Term than that in which the Execution is awarded. Hil. 38 El. B. R. between *Hanmer and Thomas* adjudged.

5. If a Man comes in B. R. the same Term the Exigent is returned, and notwithstanding this the Court gives Judgment against him, this may be reversed by Writ of Error in the same Court, because this is not the Act of the Court, but of the Sheriff or Coroner. 7 H. 6. 28.

Br. Error, pl. 68. cites S. C.

6. If the Court de B. R. awards Exigent where they ought to award a Pluries Capias, and thereupon the Party is outlawed in the Country, this may be reversed in the same Court, because it is the Judgment of the Coroner. 7 H. 6. 28.

Br. Error, pl 68. cites S. C.

7. If a Distringas and Octo Tales be returnable in B. R. where the Award is made de Octo Tal', and after Judgment is given, this may be reversed by Writ of Error in the same Court, because the Error is in the Process, and made by the Sheriff. 7 H. 6 28.

Br. Error, pl. 68 cites S C. and that it was in the same Court in the same Term, and that the Error assigned was, that he had a Distringas Juratores after Issue joined, and the Sheriff returned the Distringas & octo Tales where no Tales was awarded by the Roll. But Cheyney Ch. J. said, that the same Term that Judgment is given, the Record is in the Breast of the Justices, and not in the Roll; For the Roll the same Term is not the Record, but the Remembrance of the Justices, and by this Amendment we shall not force the Party from any Action, for though the Roll be vicious, the Record is in us Justices, therefore we will amend the Roll, and not the Record, for the Record is in our Breasts all this Term, and I myself well remember that Octo Tales was awarded, and I think that where good Judgment is given in C. B which is entered in the Roll erroneously, and Writ of Error comes the same Term, the Justices ought to amend the Roll according to their Remembrance and the Truth, and then to sign the Record; But contra in another Term; For then the Record is in the Roll, by which he commanded the Clerk to amend the Roll; Quod Nota. —— Br. Amendment, pl. 32. cites 7 H. 6. 29. S C —— Br. Record, pl 20. cites 7 H. 6. 30. S C. —— Fitzh. Error, pl 16 cites S. C. —— If a Judgment is pronounced in B. R. and is not entered, the Judges may alter it the next Term; Per Jones J. which was not denied Poph. 181.

8. If a Partition be made in Chancery, this may be reversed by Writ of Error in the same Court without going to Parliament. 42 Ass. 22. adjudged.

Br. Error, pl. 131. cites S. C.

9. If after a Judgment a Capias ad Satisfaciendum be awarded in B. R. where no Capias lies in the Original, and thereupon the Party is outlawed, he may have a Writ of Error in another Term and reverse it in the same Court for the Error in Process in Promulgatione Utlagariæ, because this was the Judgment of the Coroners, and not of the Court. Dyer 3 El. 195. 37. adjudged.

10. If in an Action upon the Case in B. R. an Award is made upon Non sum Informatus quod querens damna recuperare debeat, sed quia nescitur quæ damna &c. a Writ of Inquiry of Damages is awarded, but it is never returned, nor any final Judgment given, and yet

yet afterwards a Writ of Capias ad Satisfaciendum is awarded for the 8 l. Damages, and upon this an Exigent, and the Party is outlawed, no Writ of Error lies in Banco Regis in another Term for this Error in the Judgment, because they cannot correct their own Error, but the Party has his Remedy in Parliament only. Dyer, 3 El. 195. 37. adjudged.

Br. Error, pl 121 cites S. C.

11. If a Man brings a Writ of Error in B. R. upon a Recovery in an Assise of Darrein Presentment in Banco, and is nonsuit therein, upon which a Writ to the Bishop is awarded for the Recoveror, yet afterwards the Recoveree may have a new Writ of Error in the same Court, though they ought to reverse by Consequence their own Award of the Writ to the Bishop if they reverse the first Judgment. 23 Ass. 8. adjudged.

* Fol 747

Roll Rep. 64, 65. pl. 10. S. C. per tot. Cur.

12. If Judgment be given in an Action in Banco Regis, and there also Execution is awarded, a Writ of Error quod coram vobis resident does not lie in B. R. in Adjudicatione Executionis, because they cannot reverse their (*) own Error. M. 12 Jac. B. R. between *Cheston* Plaintiff, *against Bunn and Serle*, adjudged.

* Cro. E 106 in pl. cites Gourney's Case. S. C. adjudged accordingly.
† S. C. cited Sty 218. per Roll Ch J as adjudged.
‡ Sty. 216 S. C. argued, but adjurnatur.——Ibid. 218 212. S. C. accordingly.

13. If the Defendant in an Action, being an Infant, appears in B R. by Attorney, and Judgment is there given against him, a Writ of Error to reverse this Judgment lies in the same Court for this Error. M. 25. 26 El. Rot. 98 B. R. adjudged between * *Saer and Gurney*. Mich. 5 Ja. B. R. between † *Watkin and Griffin* adjudged Rot. 386. Tr. 1650. between ‡ *Dawkes and Peyton* adjudged, and the Judgment reversed accordingly between *Dawkes and Peyton*, where the Case was, that *Peyton* being a Clerk of the Petit Bag of Chancery, declared there by Force of his Priviledge, but not by Attorney or Guardian, and yet was within Age, and after he came of full Age, and after they pleaded to Issue, and after it was transmitted in B. R. and there was a Verdict and Judgment given for the Plaintiff, the Action being a Trespass of Battery, and so the Case was more strong than the other Cases, because the Error in this Case was committed in Chancery before the Record came in B. R.

In an Assumpsit against two mean between the Verdict and the Judgment, one of them dies, and notwithstanding Judgment was given, and upon this it was demurred, if Error lies here; For it was said, that this Court cannot reverse their own Judgment, except it be for Error in Process, and not for Error en fait; But it was adjudged that the Writ of Error was well brought here; For the Death &c. was by the Act of God, and a Thing that did not lie in their Cognizance; And it was clearly agreed, that the Death of one of the Parties did abate the Writ, and the Judgment was reversed. Cro. E. 105, 106 pl. 19. Trin. 30 Eliz B. R Meggot v Broughton ——2 Le. 54. pl. 77. S. C. but no Resolution—— 4 Le. 60. pl. 151. Megot v. Davis. S. C. in totidem Verbis, & adjornatur.

14. If two bring a Writ of Error in B. R. upon a Judgment in an Assise, and pending the Writ one of the Plaintiffs dies and after the Court not knowing of the Death of one of them reverses the Judgment, and after he against whom the Judgment was reversed brings a Writ of Error in the same Court de B. R. and assigns the Death of one of the Plaintiffs in the first Writ of Error, which was the Act of God, not the Error of the Court, it seems the Writ well lies. Vide 2 R. 3. 1. a. b. and 20. where this is reported uncertainly, but Davisor in the End said, that he would shew them Precedents.

Jones upon F. N. B 21. (I) took this *Difference*, true it is that B R. cannot re-

15. *Error in B. R. in the Process where it is the Default of the Clerks* shall be reversed in the same Court *by a Writ of Error* sued by the Party before the same Justices, but not without suing of a Writ of Error, altho' it be the same Term. F. N. B. 21. (I)

16. *But in C. B.* after Judgment given in the same Term the Justices may reverse their own Judgment upon Error in the Process, or for Default

Default of the Clerks, *without any Writ of Error* sued forth; but in another Term the Party ought to sue forth a Writ of Error thereupon returnable into B. R. F. N. B. 21. (I).

17. But of an *Error in Law* which is the Default of the Justices, the same Court cannot reverse the Judgment by a Writ of Error, nor with a Writ of Error, but this Error ought to be redressed in another Court before other Justices by a Writ of Error. F. N. B. 21. (I).

verse a Judgment altho' it be in the same Term without a Writ of Error, but this is *where Error lies in the same Cause in the same Court* as upon Outlawry, *but if no Error lies in this Court for the same Cause, but in Parliament*, then B. R. may reverse the Judgment without Writ of Error being the same Term. Poph. 181. Trin. 2 Car. B R.

18. The Court of *B. R. cannot reverse Errors in Law* before themselves, tho' it be in the same Term; *But* Error *in Fact or in Process* they may; Per Cur. Mo. 186. pl. 332. Mich. 26 Eliz. B. R. Anon.

Yelv. 157. Trin. 7 Jac. B. R. Williams J. seemed that B. R. cannot reform Error in Process unless in the same Term.

19. If A. B. be *indicted of Treason or Felony in B. R. or* if he be indicted *before Commissioners of Oyer and Terminer, or any other*, and *the Indictment* of Treason or Felony *is removed into B. R.* and *by Process out of B. R. he is erroneously outlawed*, and so returned, a Writ of Error may be brought in B. R. for Reversal thereof. 3 Inst. 214.

20. A Writ of Error was brought of a Judgment *in B R. upon an Indictment in B R.* and held good, and that there are more Precedents of Writs of Error in such Cases brought there than in Parliament, and cannot be elsewhere than here, being Matter in Fact, and Non Constat till Error assigned if it be for Error in Fact or not. Sid. 208. pl. 2. Trin. 16 Car. 2. B. R. The King v. Cornwall and Ux.

(I. 2) In Exchequer Chamber.

1. A Writ of Error is *not maintainable* in the Exchequer Chamber by the Statute of 27 Eliz. upon a Judgment in B. R. *upon a Rescous*, because it is not within the Words of the Statute, altho' it be a Trespass; but *it is more than a Trespass*, and the Party that brings Rescous could not have had Trespass because the Cattle rescued were the Defendant's own Cattle; Per all the Justices clearly. Mo. 694. pl. 963. Trin. 37 Eliz. Ody v. Yate.

Cro J. 171. in pl. 12. Mann the Secondary shewed to the Court a Precedent of such Writ of Error brought but resolved not allowable, it not being an Action mentioned in the said Statute.

2. By the Statute 27 Eliz. the Exchequer Chamber hath Power to examine Errors of Judgments in B. R. and after such Judgments are affirmed or reversed, then to send back *the Record* into B. R. so that by the Words of this Statute, it is *not to be sent back unless the Judgment be affirmed or reversed*; but yet, by the Equity of that Statute, if the *Plaintiff* in the Writ of Error is *nonsuit, or if the Suit is discontinued*, the Record shall be sent back into B. R. and the Court of Exchequer shall give Costs and Damages to the Plaintiff in the original Action for his Delay and Vexation upon the Statute 3 H. 7. cap. 10. but if the Plaintiff in Error was Plaintiff in the original Action, then no Costs shall be given. 2 And. 122. pl. 68. 40 Eliz. Anon.

3. Error in the Exchequer Chamber, upon a Judgment in B. R. for that *one of the Parties died before Judgment*; it was objected, they had

no Authority to examine such Errors; but it was held by all the Judges and Barons that they had Authority, tho' they had none to bail the Defendant, because their Power was only to examine Errors. Cro. Eliz 731. pl. 70. Mich. 41 & 42 Eliz. in Cam. Scacc. Price's Case.

4. Error in the Exchequer Chamber of a *Judgment in B. R. in an Ejectione Firmæ*, the *Error assigned was, that the Plaintiff was an Infant and sued by Attorney, where he could not make Attorney*, but ought to have sued by Guardian; It was resolved by all, except Anderson, that altho' this was an Error in Fact, yet it might be well assigned in that Court of Exchequer Chamber for Error, altho' it was urged, that their Authority given them by the Statute, was not to examine Matters in Fact, but only Errors in Law, which appeared in the Record, and to reverse or affirm the Judgment; whereupon the Defendant said, that the Plaintiff at the Time of his Action brought was of full Age; upon which, Issue being joined, the Court of Exchequer Chamber awarded Nisi Prius. Cro. J. 5. pl. 5. Pasch. 1 Jac. Rew v. Long.

It was afterwards moved in B. R. that they had proceeded in the Exchequer Chamber without Warrant of the Statute to try Error in Fait; For the Statute does impower them only to examine Errors in the Record; and of that Opinion were all the Justices; wherefore for this Cause they would not re-grant Restitution upon this Judgment to the Defendant, who was put out by the first Judgment. Ibid.——Cro. C. 514. at the End of pl. 11. cites S. C. that Error in the Exchequer Chamber in Fait was assigned and tried by Nisi Prius and found, and for that Cause reversed.

5. Error was brought by the Bail in the Exchequer Chamber upon the Statute of 27 Eliz. *of a Judgment in a Sci. Fa. against him*; It was the Opinion of all the Justices, that it was not an Action mentioned in the Statute, whereof a Writ of Error did lie in that Court, nor is he Party that can have Error of the first Judgment. Cro. J. 171. pl. 12. Trin. 5 Jac. in Cam. Scacc. Vaughan v. Williams.

6. In *Sci. Fac. against the Bail* who upon the second Sci. Fac. was condemned for not having the Body of the Principal, and *Judgment was given that the Plaintiff recover super Recuperationem prædictam*, where it should be super *Recognitionem prædictam*; Per Cur. no Writ of Error lies into the Exchequer Chamber; nor does it lie into B. R. as upon Error in Process; For *this is no Error in the Process*; For that is where the Process is mistaken, viz. one Process for another, which it is not here; but *the Error is only in Point of Judgment*, viz. *Recuperationem instead of Recognitionem*, which is clearly another Matter, and *no Remedy*, as it seems, *but in Parliament*. Yelv. 157. Trin. 7 Jac. B. R. Prowse v. Turner.

Per Cur no Writ of Error lies in the Exchequer Chamber, because *Sci. Fac is a Judicial Writ*, and Judgment is given therein, and it is *not expressley named in the Statute* 27 *Eliz.* which gives Error in the Exchequer Chamber. Yelv. 157. Trin. 7 Jac. B. R. Prowse v. Turner.——In Sci. Fac. against Bail, or *on a Recognizance*, a Writ of Error was never allowed in the Exchequer Chamber; Agreed by all. 2 Keb. 833. pl. 58. Mich. 23 Car. 2. B. R.

7. *Judgment* in Debt was given *in C. B.* which *was affirmed* upon a Writ of Error brought *in B. R.* Afterwards the Defendant died, and then a *Scire Facias was brought against the Son and the Ter-tenants, and Judgment against them*; and upon a Motion for a Writ of Error in the Exchequer Chamber, upon the Judgment in the Scire Facias, it was denied, because the Record came into B. R. by Writ of Error, and not originally by Bill, as by the Statute 27 Eliz. cap. 8. is required. Roll Rep. 264. pl. 35. Mich. 13 Jac. B. R. Harvey v. Williams.

8. Writ of Error does not lie in the Exchequer Chamber on a *Judgment* given *in a Writ of Ravishment of Ward*, by the Statute 27 Eliz Sic dictum fuit, and not denied. 2 Roll Rep. 134. Mich. 17 Jac. B. R. in Case of Barnefield v. Hutchins.

9. It was agreed that Error upon a *Judgment* in B. R. *in Replevin* does *not lie* in the Exchequer Chamber, *but in Parliament* only, because

Replevin

Replevin is out of the Statute. 2 Roll Rep. 434. Trin. 21 Jac. B. R. Farnell's Case.

10. No Writ of Error lies in the Exchequer Chamber by Force of the Statute 27 Eliz. on a *Judgment in B. R. in an Action De Scandalis*, for it is not included within the Words of the Statute, for though the Statute says, such Writ shall lie upon Judgments in Actions of the Case, yet it does not extend to that Action, altho' it be an Action on the Case, because it is an Action of a far higher Degree, being founded specially upon a Statute. 2 Ld. Raym. Rep. 954. Trin. 2 Ann. in Case of Ashby v. White, by Holt Ch. J. cites Cro. C. 142. pl. 19. [Mich. 4 Car. B. R. Say (Ld. Viscount) v. Stephens.]

Cro. C. 142. S. C. held accordingly by three Justices, but Crooke J. doubted. — Jo. 194. pl. 5. S. C. held accordingly. — Ley 82. S. C. resolved. — Palm 565. S. C. but S. P. does not appear. — S. C. cited by Jones J. Jo 423 — S. C. cited and S. P. resolved accordingly per tot. Curiam. Sid. 143. pl. 20. Pasch. 15 Car. 2. B R. Stamford Earl) v. Nedham — S. C. cited Sid 240. in pl. 13 Hill. 16 & 17 Car. 2. B. R. — S. P. cited as adjudged accordingly. 5 Mod. 250.

11. Error of a *Judgment in B. R.* lies in B. R. *in Criminal Cases* upon Judgments in the same Court, as well of Errors of Law as Errors of Fact; *but not in Civil Cases, unless of Errors in Fact triable by Jury.* Lev. 149. Mich. 16 Car. 2. B. R. Cornhill's Case.

Sid. 208. pl. 2. The King v. Cornwall, S. C. & S. P and it cannot be brought elsewhere than here for Matter in Fact, & non constat till Error assigned whether it be for Matter in Fact or not.

12. In *Debt upon the Statute of Usury*, the Plaintiff had Judgment in B. R. and the Defendant brought a Writ of Error in the Exchequer Chamber. It was moved that it should not be allowed, because it is not within the Statute 27 Eliz. which gives a Writ of Error there; for no Action which *concerns the King* is within it, and therefore an Action upon the Statute of Scandalum Magnatum is not within the Statute, and cited Ld. Say's Case. But on the other Side it was said that it hath been adjudged to lie *on a Judgment in an Action on the Statute for Tithes*; Ideo Quære. Sid. 240. pl. 13. Hill. 16 & 17 Car. 2. B. R. Whitton v. Preston.

Keb. 828. pl 5. S. C. per Cur the Writ of Error must be superseded, and the King being here to have a Part, he may be said a Party; but Hyde and Twisden absentibus, adjornatur. — 5 Mod. 250. Arg. cites S. C. that *the Writ of Error was disallowed.*

13. *Mandamus to restore* Dr. Patrick *to the Mastership of Queen's College in Cambridge*, to which there was a long Return of Charters and local Statutes; and upon the arguing it several Times the Court was divided, Whether it might be adjourned into the Exchequer Chamber, for Difficulty it being amongst the Pleas of the Crown as well as civil Pleas might, was the Doubt, but *the Court seemed* that it might, and *that Pleas of the Crown, as well as other Pleas, might be adjourned thither*, and that 4 Inst. 68, 69. seems to warrant it, and that it extends to all Pleas, except to those of the Ecclesiastical Courts. Sid. 340. pl. 12. Mich. 19 Car. 2. B. R. The King v. Dr. Patrick.

Raym. 108. to 113. Hill 16 & 17 Car 2 Patrick's Case, S. C argued, but Curia advisare vult. But in the Marg. it is said that this Case was solemnly argued by four Judges, and that Norton [Moreton] and Keeling were for the Plaintiff, and Twisden and Windham contra — Lev 165 Queen's College Case alias Dr. Patrick's Case, the Court being so divided it was considered if it being a Cause of the Crown Side, it might be adjourned into the Exchequer Chamber, and it seemed to some that it might, but it was not

14. In *Trespass upon the Statute 8 H. 6.* the Plaintiff had Judgment. It was moved whether a Writ of Error would lie of this in the Exchequer Chamber; for though a Trespass is one of the seven Cases mentioned in the Statute which gives this Writ of Error, yet it may be intended common Trespasses only, and not those which are founded on a Statute; Curia advisare vult. Vent. 34. Trin. 21 Car. 2. B. R. Skirr v. Skies.

15. Writ

But where Judgment was given in B. R. in Debt on the Stat. 1 Eliz. cap 3. and 23 Eliz. cap. 1. for *absenting from Church for eleven Months*, resolved that Error well lies in the Exchequer, because *the King is not properly a Party*, though he is to have Part of the Penalty. Raym. 275. Pasch. 31 Car. 2. in Scacc. Scot v. Knapton.

15. Writ of Error in the Exchequer Chamber doth not lie *to reverse a Judgment given in an Action Qui tam &c. because the King is Party.* Vent. 49. Mich. 21 Car. 2. B. R. Anon.

16. *Scire Facias issued against the Bail,* and *upon two Nichils returned, there was a Judgment against them.* Resolv'd, that no Writ of Error can be brought into the Exchequer Chamber upon that Judgment, but in Parliament only; and that after such a Return of two Nichils, it cannot be assigned for Error, that there was no Capias against the Principal; but in that Case *the Bail is relievable only by an Audita Querela.* Vent. 38. Trin. 21 Car. 2. B. R. Wingate v. Stanton.

S. P. in a Nota, Sid. 424 Mich. 21 Car. 2. B. R. at the End of the Case of Redman v. Edolph.

17. Where an *Action commences by original Writ out of Chancery* a Writ of *Error does not lie* in the Exchequer Chamber by the Stat. 27 Eliz. cap. 8. *but only in Parliament.* Saund. 346. Mich 21 Car. 2. at the End of the Case of Mellor v. Spateman.

2 Keb. 849, 850 pl. 99. S. C. held accordingly; For by the Judgment which recites the Affirmance in the Exchequer Chamber, and Execution here all the rest is determined, and the Supersedeas was set aside and Execution granted —— Per Twisden J clearly no Writ of Error lies in the Exchequer Chamber on Judgment in Sci. Fa. &c. 2 Keb. 842 pl. 79. Mich. 23 Car. 2. B. R. in Case of Jones v. Anderson.

18 *Judgment in B. R. in an Action on the Case, and a Scire Facias quare Executionem* &c. and there was a *Judgment upon that*; upon which a Writ of *Error was brought in the Exchequer Chamber,* and the *Judgment in the Sci. Fa. was affirmed*; then the *Defendant died*, and a *Sci. Fa. (reciting the Judgment and Affirmance of it in the Exchequer Chamber) was brought against an Administrator, and Judgment had upon that*, and the *Administrator brought a Writ of Error upon the Judgment in the last Sci. Fa.* The Court held that it did not lie in the Exchequer Chamber, because it was brought upon a Judgment affirmed in the Exchequer Chamber, which is therefore privileg'd from any other Writ of Error to be brought upon it there, so that *this Writ can be brought only upon the Judgment given in the Sci. Fa.* and therefore lies not into the Exchequer Chamber. Vent. 168, 169. Mich. 23 Car. 2. B. R. Skinner v. Webb.

19. Note, it was said by the Court, That if there be a *Conviction of forcible Entry upon the View of the Justices of the Peace*, no Wsit of Error lies upon it; but it may be examined upon a Certiorari. Vent. 171. Mich. 23 Car. 2. B. R. Anon.

2 Lev. 38. Hopkins and Prior v. Weigglesworth, S. C. the Error assigned was the Death of one of the Plaintiffs, and Judgment was affirmed; upon which the Plaintiff brought Writ of Error Coram vobis resident' in B. R. and assigned the same Error and entered it on the same Roll; and now Hale Ch. J. said this Writ does not lie here, for this ought to be brought upon and recite all the Proceedings in the Exchequer Chamber.

20. Error was brought of a Judgment in this Court into the Exchequer Chamber, and *Error in Fact* was then assigned; and the Court being there of Opinion, That Error in Fact would not be assigned there, they affirmed the Judgment; upon which the Record with the Affirmation was remitted hither, and a Writ of Error was brought here Coram vobis resident' (as is usual for Error in Fact.) Vent. 207. Pasch. 24 Car. 2. B. R. Prior v. .....

21. No Writ of Error lies in the Exchequer Chamber *on a Sci. Fa. against Bail.* 12 Mod. 112. Hill. 8 W. 3. Coniers v. Manucaptors of Rawlins.

22. *Judgment*

22. *Judgment in Case* upon a Bill of Exchange *was affirmed upon a* Writ of *Error in Cam. Scacc. and remitted into B. R.* and then a *Sci. Fa. issued, and Judgment thereupon was, that the Plaintiff should have Execution.* Then the *Defendant brought Error in Cam. Scacc. tam in Redditione Judicii quam in Adjudicatione Executionis*, and the Writ was allowed, *yet the Plaintiff was taken in Execution*, whereof Complaint was made to the Court, but without Relief; For per tot. Cur. no Writ of Error lies in Cam. Scacc. in such Case, and therefore the Execution is well taken out. Comb. 393. Mich. 8 W. 3. B. R. Hartop v. Holt.

12 Mod. 105. S. C. ruled accordingly. —— 5 Mod. 229. S. C. adjudged that the Writ of Error does not lie and is no Supersedeas. —— 1 Salk. 263. pl. 4. S. C. adjudged accordingly. —— Ld. Raym. Rep 97 S. C. adjudged accordingly, that the Intent of the Statute of 27 Eliz. was only to relieve the Party grieved upon the Merits of the Cause as it was at the Time of the first Judgment, and not upon any Matter subsequent which arises afterwards, when therefore the first Judgment was affirmed the Merits of the Cause were allowed, and the Exchequer Chamber, who ought only to affirm or reverse the first Judgment, have executed their full Power. It is true that if a Sci. Fa. be brought to revive a Dormant Judgment in B. R. Error will lie in the Exchequer Chamber tam quam because it is only in Execution of the first Judgment, and is Quasi an Original Action; but if a Judgment in B. R. be once affirmed in the Exchequer Chamber, and then a Sci Fa is brought upon it, it is privileged from any other Writ of Error, otherwise the Law would be infinite and without End. And the Sci. Fa is not in Nature of Debt at Common Law; for the one is brought to obtain another Judgment, and the other to obtain Execution.

(K) *What Persons* shall have a Writ of Error.

[And in what Cases *jointly*.]

1. THE Writ of Error shall be brought by him who should have the Thing for which the Judgment is erroneously given, if the Judgment had not been given. Dyer 1 Ma. * 9. 5.

* This should be D. 90. a. pl. 5. Mich. 1 Mar. in Case of Reynolds and Verney & al' v. Dignam & al'.

2. As the Issue Female shall have it if intailed to her. 3 H. 4. Dyer 1 Ma. * 9. 5.

* D. 90. a. pl. 5. cites 3 H. 4. S. P. and Hill. 10 E. 3. —— Br. Error, pl. 35. cites 3 H. 4. 16. S. P. and also 9 H. 7. 24. Contra and that the Heir at Common Law shall have the Action, and that after the Judgment reversed, the Heir in Tail may enter. —— S. P. per Cur. Le. 261. pl. 346. 18 Eliz. B. R.

3. None shall have a Writ of Error unless he be Party or Privy to the Judgment. 22 E. 4. 31.

Godb. 377. Arg. cites S. C. and 9 E. 4. 13. 9 H. 46. b. —— Privies in Record may join in a Writ of Error; Per Roll Ch. J. Sty. 190. Hill. 1649. —— There is a difference if one be Party to the Writ, although not Party to the Judgment; A Quare Impedit was brought by the King against the Patron and the Incumbent, and Judgment was had against the Patron only, and the Incumbent Parson brought a Writ of Error; but if he had not been Party to the Writ, he could not have maintained Error. Arg. Godb. 378. pl. 465 Pasch. 3 Car. B R. in Brooker's Case cites Error 72. —— S. had Judgment against W. and afterwards acknowledg'd a Statute to B. then S. sued Execution, and B. brought Error on the Judgment, but adjudg'd that it would not lie, 1st. because he was a Stranger, and secondly, Because he came in under and after the Title of Error. Arg Godb. 378. cites 43 Eliz. C. B Sherrington v. Worseley.

4. But all that were Parties to the Fine, though they shall have nothing it reversed, yet shall join with him that shall have the Thing for Conformity. Dyer 1 Ma. 89. 2.

D. 89. b. pl. 2 Reynolds and Verney v. Dignam.

5. Writ of Error may be brought by him that is made Party by the Law, though he was not originally Party, as every of the Vouchees shall have a Writ of Error. * 22 E. 4. 31. 8 H. 4. 3. b.

* Br. Error, pl. 187. cites S. C. —— Br. Error, pl. 39. cites S. C. —— Fitzh. Error, pl. 61. cites S. C.

6. The Tenant shall have a Writ of Error also of an Error between him and the Demandant. 8 H. 4. 3.

Br. Error, pl. 39 cites S. C. —— Fitzh. Error, pl 61. cites S. C —— See (R) pl. 1. and the Notes there.

7. But the Tenant shall not have a Writ of Error of an Error between the Demandant and the Vouchee. 22 E. 4. 32. Contra 8 H. 4. 5.

Fitzh. Error, pl 61 cites S. C. —— Jenk. 69 pl. 31. S. P. accordingly, cites 8 H. 4. 4. and 9 H. 4. 1. —— See (R) pl. 2.

8. [But] The Tenant shall have a Writ of Error of an erroneous Judgment given against the Tenant by Resceit. 22 E. 4. 32.

Br. Error, pl. 187 cites 22 E. 4. 30, 31 S. P. —— In a Quod ei deforceat in Wales, in Nature of a Writ of Right Judgment was given upon the Default of the Tenant by Resceipt, and this was assign'd for Error, for that the Judgment ought always to be against the Tenant to the Action; and this was held a manifest Error, and Judgment was reversed. Cro. C. 262, 263. pl. 9. Trin 8 Car. B. R. Kiffin v. Vaughan.

9. But upon Default of the Tenant, if the Demandant says, that the Reversion is to J. and prays that he be resceived, there the Tenant shall not have a Writ of Error. Quære. 22 E. 4. 32.

10. If a Judgment be given against B. and the Money of C. is attached by Force of a foreign Attachment in London, C. shall not have a Writ of Error, because he comes in by Garnishment by the Custom, and is not Party nor Privy. 22 E. 4. 31.

Br. Error, 187. cites S C. but it is held by some the Garnishee upon foreign Attachment &c. may have a Writ of Error, and that the *Plaintiff in Attachment of Debt* in another's Hands in London by the Custom may; For the Judgment is not only against the Garnishee but against the Defendant also, that the other shall be discharged against him which is Extinguishment of the Debt of the Defendant against the Garnishee.

11. If he in the Remainder be made privy to the Record by Aid-Praier * he shall have a Writ of Error during the Life of the Lessee. Co. 3. Marquess of Winchester. 4.

* Fol. 748.

12. So if he be resceiv'd he shall have a Writ of Error. Co. 3. Marquess of Winchester's Case. 4. * 8 H. 4. 5.

* Fitzh. Error, pl. 61. cites S. C. —— Br. Error pl. 39. cites S C

13. So if he in the Reversion or Remainder be made Privy by Voucher. Co. 3. 4.

14. So if a Recovery be against Lessee for Life, he in the Reversion shall have a Writ of Error after his Death. 18 E. 3. 25 b. 17 Ass. 24.

Same Cases cited 3 Rep 4. a.

15. So if the Feme be resceived by the Default of the Baron, and loses the Land by Judgment, the Baron and Feme shall have a Writ of Error thereupon. 49 E. 3. 21. b.

16. If the Baron and Feme levies a Fine, they may by Error reverse the Fine for Nonage of the Feme during the Life of [illegible] Baron. Co. 2. Beckwith 57. b. * Worsly. 77. b. Contra 50 E. 3. 6.

* Cro E 120. pl 1 Charnock v Worsley. S C adjudg'd. —— Le. 114. pl. 157. S C. adjudged. —— F. N. B. (D) S. P —— Br. Error, pl. 28 cites S. C. But *Cesset Executio during the Life of the Baron*; For he has Authority to give it during his Life. —— Fitzh. Error, pl. 67. cites Hill. 50 E. 3. 5. S. C.

17. If the Conusor of a Statute aliens the Land, and Execution is sued against the Alienee, he may have a Writ of Error upon the Execution. * 18 E. 3. 25. adjudged. Quære, for he is not privy thereto; for the Execution goes of the Land of the Conusor. Dyer. 4 H. 8. 1. 5. † 17 Ass. 24. the same Case, because he is ousted by the Execution.

* Fitzh. Error, pl 71. cites S. C. ——— S. C. cited D. 1. b. pl. 5. — † Fitzh. Error, pl 71. cites S. C. ——— Godb. 377. Arg. cites S C. and 18 E. 3 25. and says that the Feoffee is privy to that which charges him, the Land being extended in his Hands, and if the Feoffee in such Case should not have Error, the Law should give him no manner of Remedy; For the Conusor himself cannot have Error, because the Lands are not extended in his Hands.

18. If an Action be brought against A. as a Feme sole, where she is a Feme Covert, and she pleads to Issue as a Feme sole, and after a Judgment is given against her, and she is took in Execution, she and her Husband may bring a Writ of Error; for otherwise the Husband shall be prejudiced in the Consortship of his Wife, and of her Care concerning his Business and Family, and he has no other Means to help himself; But in the Case of a Fine the Husband may enter and avoid it. Tr. 1651. between * *Hayward and Williams* adjudged in a Writ of Error. Intratur Hill. 1649. Rot. 824. † 18 E 4. 4. per Curiam. M. 15 Car. B. R. per Curiam, between *Edwards and Simpson*, in a Writ of Error upon a Judgment in the Marshalsea.

* Sty. 254. S. C. adjornatur ——— Ibid. 280 S. C. and after it was moved several Times, and the Court advised, they at last said, that a Stranger to a Record may not bring a Writ of Error to reverse it, but that is only where he may have another Remedy to avoid the Prejudice he may receive by it; But in this Case the Baron has no other Remedy; For his Wife is taken in Execution, and by this Means he shall lose her Society; and therefore reverfetur, nisi inte &c

† Br. Error, pl 173. cites S C. but that is of an Action brought against a Feme Covert who appeared, because she did not know whether her Baron (who was beyond Sea) was dead or not, and she was condemned upon Plea, but the Baron came back, and they brought a Writ of Error, and all the Justices held that it well lay; And if she is outlawed they shall join in Error, otherwise it cannot be reversed. ——— Br. Joinder en Action, pl 88. cites S. C as to Outlawry; for Feme Covert cannot sue without her Baron. ——— S. C. cited 2 Roll Rep. 53. Mich. 16 Jac. B. R. in the Case of Haydon v Miller, but in that Case, because it did not sufficiently appear to the Court that she was Covert at the Time of the original Process sued out, and which ought to be expresly averred in the Assignment of the Error the first Judgment was affirmed. ——— Same Cases cited 2 Ld. Raym. Rep. 1525 1527. Trin. 2 Geo. 2. in Case of King v. Jones, but the Court took a Difference between the Defendant's being a Feme Covert at the Time of suing the Writ, and her being then and after a Feme sole, and cited the Case of Haydon v. Miller, and Judgment in the principal Case affirmed accordingly.

19. So in the said Case, if the Action be brought against A. and others, they all with the Husband may join in a Writ of Error in the said Case of *Hayward and Williams*; Adjudged per Curiam, and the Judgment reversed accordingly.

Sty 254. & 280 S. C. but S. P does not appear.

20. If pending a Real Action the Tenant aliens in Fee, and after a Recovery is had against him, he himself may have a Writ of Error, though he hath nothing in the Land, because he is privy to the Judgment after his Alienation and Tenant in Law.

S. P. for the Feoffee has no other Remedy in this Case, because he cannot have Writ of Right, nor other Remedy; Quod Nota. Br. Error, pl 111. cites 12 Ass. 41. ——— Ibid. pl 118. S. P. cites 20 Ass 2 ——— In such Case the Feoffor shall have Error, and when he is restored the Feoffee shall enter upon him; Per Richardson J. Palm. 247. Mich. 19 Jac. B R. cites 6 H 8 Brooks's Case, and 12 Ass 4 20 Ass 2. 21 E. 3. Error 41. ——— The Feoffor in such Case shall have Error, and yet there is no Right nor Privity in him. Ibid. 254. per Doderidge J. cites 12 Ass. 41. 17 Ass. 24. 20 Ass. 2. 21 E. 3 54 38 E 3. 10. and 11. 1 Rep. 11x. [Albany's Case.] ——— See (A. c) pl. 8. S. P.

21. So if he had aliened in Fee pending the Writ, and re-purchased it for Life, and after Judgment had passed against him, he should have had a Writ of Error.

See (A. a) pl. 6. S. P.

22. So

22. So his Heir after his Death shall have a Writ of Error, tho' he shall have nothing in the Land, for the Privacy which he has to the Judgment. Contra 50 Aff. 3.

Br. Error, pl 112 cites 15 Aff. 8. S. P. obiter. ——— Ibid. pl. 132 cites 50 Aff 3. and fays that fo it feems to him. ——— Jenk. 161. in pl 6. S. P.

23. But if the Tenant aliens, pending the Writ, and after Judgment paffes againft him, the Alienee cannot have a Writ of Error upon this Judgment for want of Privity.

Br Error, pl 132. cites S. C.

24. So if the Tenant aliens, pending the Writ, and re-purchafes it for Life, and after Judgment paffes againft him, and after he dies, it feems he in Reverfion fhall have a Writ; For though he had nothing in the Land at the Time of the Writ purchafed, yet he had a Reverfion at the Time of the Judgment, and fo privy thereto. Dubitatur 50 Aff. 3.

‡ Jo. 396. pl. 4. S. C. the Bail cannot join in a Writ of Error to reverfe the Judgment againft the Principal, and another Judgment againft the Bail; But the Bail fhall have Error alone to reverfe the Judgment againft them, and the Principal fhall have another Writ to reverfe the firft Judgment, and a Writ brought by the Bail to reverfe the firft and fecond Judgment was held ill. ——— Cro C. 481. pl. 4. S. C. held accordingly by Berkley and Crooke, contra Jones (abfente Brampfton) that the Writ fhould abate in toto, becaufe it was grounded on the firft Judgment, and alfo upon the Judgment in the Scire Facias, and fo coupling them together all is void; But if the Bail in their Writ of Error had recited the firft Judgment, (as of Neceffity they muft mention it) and the fecond Judgment in the Scire Facias, and alleged Error in that Judgment, and in the Execution thereof &c it had been well enough.

25. In an Action againft J. S. if certain Perfons become Bail for him, and after Judgment is given againft J. S. the Bail cannot have a Writ of Error upon the firft Judgment, if Judgment be not alfo given againft the Bail in Scire Facias. H. 11 Ja. B. R. per Curiam. Hill. 11 Car. B. R. between *Hardy and Brown*, per Curiam, adjudged in a Writ of Error upon a Judgment in Rippon. Intratur Tr. 10 Car. Rot. 979. But the Judgment upon the Scire Facias (*) reverfed upon this Writ for Error in the Judgment upon the Scire Facias. But Mich. 13 Car. B. R. between ‡ *South and Griffith*, fuch Writ brought by the Bail upon the firft Judgment againft the Principal, and upon a Judgment in a Scire Facias againft the Bail was abated, and he put to a new Writ. Intratur, Hill. 12 Car. Rot. 559 Mich. 15 Car. B. R. between || *Williams and Worral*, fuch Writ abated, being brought upon fuch Judgments in the Marfhalfea. Intratur Tr. 15 Car. Rot. 1200. Mich. 24 Car. B. R. between *Jeffrys and Scot*, adjudged the Writ fhall abate. Intratur, M. 23 Car. Rot. 218.

* Fol 749.

It has been a Queftion heretofore, whether a Writ of Error brought upon the principal Judgment, and alfo upon the Judgment given againft the Bail together be good in Part, and ill for other Part; But of later Times it has been ruled that it ought to abate for all; Therefore let the Party fhew Caufe why the Writ fhall not be abated here. Sty. 174. Mich. 1649 Shafer v Bigg. ——— S. P. by Glyn Ch. J. Sty. 471. Mich. 1655 in Cafe of Busfield v Norden, but the principal Judgment ought to be reverfed by the Principal, and not by the Bail, and therefore the Writ of Error is not well brought by the Bail, therefore let it abate.

The Bail cannot have a Writ of Error of the principal Judgment, which was agreed by the Court, but then the Queftion was, the Record being removed, Whether he may have a Writ of Error, Quod coram vobis refidet? And thereof the Court doubted and would advife. Cro. C. 561. pl. 5. Mich 15 Car. B. R Anon.

26. In a Writ of Annuity againft an Heir, upon an Annuity granted by his Anceftor in Fee, upon Non eft Factum pleaded, if a Verdict be found for the Plaintiff, and thereupon Judgment is given that the Plaintiff fhall recover his Cofts, Damages and Arrears of the Lands defcended from the fame Anceftor, and thereupon a Writ of Execution is awarded to levy it of the Lands defcended, but no Return thereof appears upon the Record, and after the Heir dies inteftate, his Adminiftrator cannot have a Writ of Error upon this Judgment, inafmuch

much as he loses nothing thereby, for if it be levied it is of the Lands descended, the which, nor the Profits thereof, he cannot have, nor be restored to it if he reversed the Judgment. Hill. 11 Car. B. R. between *Franke and Stukely*, per Curiam, in a Writ of Error upon a Judgment in Banco. Intratur Hill. 10 Car. Rot. 990

27. If a Judgment be given against the Principal, and after a Judgment against the Bail in a Scire Facias against them, the Principal shall not have a Writ of Error upon the first Judgment and the Judgment against the Bail. Mich. 13 Car. B. R. between *Griffith and South* Dubitatur, Hill. 15 Car. in Camera Scaccarii, in a Writ of Error between *Coke and* upon a Judgment in Banco Regis such Writ of Error was abated per Curiam.

Cro. C. 481. pl. 4. S. C. but S. P. does not appear. —— —— Jo. 396. pl. 4. S. C. but S. P. does not appear.

—— If the Sureties be amerced where they ought not to be amerced by the Law, yet the Defendant shall not have a Writ of Error thereupon, for he is not the Party grieved by the Amercement; and upon that Reason it is, if in a Scire Facias against the Bail erroneous Judgment be given, the Defendant in the Action shall not have a Writ of Error; Arg. 2 Le. 4. pl. 4. Mich. 31 & 32 Eliz. B. R. in Savacre's Case. —— Keb. 256. pl. 30. Pasch. 14 Car. 2. B. R. Spencer v. Mouke, S. P. held accordingly.

28. Where one *recovers in Assise against the Tenant*, and the *Disseisors named* in the Assise *were acquitted* of the Disseisin, yet the *Tenants who lost, and those Disseisors, may join* in Writ of Error. Thel. Dig. 32. lib. 2. cap. 13. S. 1. cites Hill. 2 E. 3. 31. and that so it is agreed in False Judgment Pasch. 3 E. 3. 80. and Trin. 19 E. 3. Joinder en Action 30. and 19 Ass. 7. if the Disseisors are convicted of the Disseisin; And says see such like Matter Pasch. 3 H. 4. 16.

29. If the *Tenant in Præcipe quod reddat aliens pending the Writ*, and the *Demandant recovers* by Judgment, the *Tenant may well bring Writ of Error*. Br. Entre Cong. pl. 51. cites 12 Ass. 41.

30. It was adjudged, where *two Brothers Parceners in Gavelkind* were *forejudged in Writ of Mesne*, that *the Survivor* of them, *and the Sons of the other*, should be received to join in Writ of Error, inasmuch as one of the Brothers was dead before the Judgment. Thel. Dig. 32. lib. 2. cap. 13. S. 3. cites 19 Ass. 8.

31. A *Stranger to a Recognizance of Statute Merchant* may sue Writ of Error to reverse Execution awarded of this Recognizance, *if he be Tenant of the Land at the Time of the Execution sued.* Thel. Dig. 33. lib. 2. cap. 42. S. 1. cites Trin. 18 E. 3. 25. 17 Ass. 24.

32. And it was held, where Writ of *Error is brought by two Tenants*, and the *one dies*, the *Survivor and the Heir of the other shall have* a Scire Facias in Common ad audiendum Errores. Thel. Dig. 32. lib. 2. cap. 13. S. 2. cites 19 E. 3. Joinder en Action 30. and 19 Ass. 7.

33. 9 *R. 2. cap. 3. S. 1. If Tenant for Life, in Dower, by the Curtesy, or in Tail after Possibility, be impleaded, and lose by Verdict or otherwise, he* in Reversion *shall have an Attaint or Writ of Error upon a false Verdict found, or an erroneous Judgment given against the* Particular Tenant.

The King shall take Advantage of this Statute not withstanding that he is not named in it. Pl. C. 343. b. Trin. 10 Eliz. Brett v. Rigden. —— It was resolved, that tho' the Statute speaks only of Reversions, yet it shall be taken to *extend to Remainders.* 3 Rep. 4. a. Trin. 25 Eliz. The Marq. of Winchester's Case.

It extends *not to* a *Reversion or Remainder* expectant *upon an Estate Tail,* for by enumerating the four particular Estates for Life, it appears to be the Intention of the Legislature to exclude Estates expectant upon an Estate Tail; and it would be unreasonable to give a Writ of Error to such Reversioner or Remainder-man during the Life of the Tenant whose Estate is an Estate of Inheritance, and by Possibility may continue for ever. Resolved. 3 Rep. 4. a. b. Marq. of Winchester's Case. —— 3 Rep. 61. a. Mich. 37 & 38 Eliz. C. B. Lincoln College Case. —— 10 Rep. 44. b. in Jennings's Case.

It may be collected from hence, that the Parliament adjudged such Recovery by Covin and Consent to be a *Forfeiture*, otherwise it would be hard to restore him not only to the Possession but likewise to the mesne Profits; Per Coke 3 Rep. 4 b. Trin. 25 Eliz. in the Marquis of Winchester's Case.

34. *And if the Oath be found false, or the Judgment erroneous, and the Tenants still in Life, he shall be restored to his Possession and* Issues, *and the Reversioner to the* Arrearages; *But if he be dead, or be found of* Covin *with the Demandant, the Reversioner shall have all, yet the Tenant may traverse the Covin by* Scire Facias *out of the Judgment or Writ of Attaint if he please.*

35. In *Assise against an Infant and two others,* there *each took the Tenancy severally and pleaded in Bar,* and the *Plaintiff elected the Infant for Tenant and made Title, and were at Issue,* and *demurred upon the others,* and *it was found that the Infant was Tenant, and the Title for the Plaintiff, and that the two disseised the Plaintiff to the Use of the Infant, he being a Year and half old,* and the Plaintiff recovered, and the two brought Writ of Error, inasmuch as they ought to adjudge the Plaintiff to be barr'd for mis-electing of his Tenant. Hornby said they severed in Pleas in Assise, therefore they cannot now join in this Action; but Tirwhit contra, and Markham doubted, therefore Quære his Intent of the Tenancy, inasmuch as *an Infant of that Age cannot agree to the Entry.* Br. Joinder in Action, pl. 107. cites 3 H. 4. 16.

36. *Several Outlaws in Appeal* may join or sever in Writ of Error at their Election, by the clear Opinion of Gascoign. Thel. Dig. 32. lib. 2. cap. 13. S. 4. cited Pasch. 7 H. 4. 39. and 40.

37. Where the *Tenant vouches in Præcipe quod reddat,* or Damages are to be recovered, and the *Vouchee enters into the Warranty and loses,* the Damages shall be recovered against the Vouchee, therefore he shall have Writ of Error; Per Horton. Br. Damages, pl. 45. cites 8. H. 4. 5.

38. *Successor of a Parson* shall have Error or Attaint of a Recovery adjuged against his Predecessor. Br. Error, pl. 198. cites 8 H. 6. 25.

39. *Trespass against two* who are condemned by erroneous Judgment, they may join or sever in Writ of Error at their Election; Per Cur. Br. Joinder in Action, pl. 77. cites 14 H. 6. 9.

40. In *Recovery in Writ of Trespass against the Ancestor, the Heir* shall not have Writ of Error nor Attaint; for this does not descend to him there, but yet *if Franktenant come in Debate,* the Heir of it shall take Advantage *by way of Estopple.* Br. Discent, pl. 4. cites 33 H. 6 18, 19.

41. If *Trespass* be brought against J. N. who dies, his *Heir* shall not have Error nor Attaint; For it was upon a Personal Action, which shall not descend to the Heir. Br. Error, pl. 14. cites 33 H. 6. 19. 51, 52.

Br Estoppel, pl 15. cites S C. Per Ashton.

42. Trespass *against four* in B. R. by one, and *one died* mesne *between the Nisi Prius and the Day in Bank,* and therefore the Plaintiff prayed Judgment against the others; But Markham said, that he might have *Judgment against all*; For none can have Error but the Executors of the Deceased, and not the other Defendants. Br. Brief, pl. 357. cites 5 E. 4. 6. 7.

43. Where a *Feme Covert was sued as a Feme sole,* and condemned *and put in Execution,* and afterwards *her Baron returned from beyond Sea,* it was held that *he and his Feme should have* a Writ of *Error* to reverse this Judgment. Thel. Dig. 32. lib. 2. cap. 13. S. 5. cites Pasch. 18. E. 4. 4.

44. In *Debt upon Escape after Recovery of Debt, or Damages, or other such Action founded upon Record, against a Stranger to the Record,* the Defendant shall not Falsify by Error in the first Record. Br. Error, pl. 196. cites 21. E. 4. 27.

45. If Erroneous Judgment be given *againg Tenant by the Curtesy* and after *he dies without Issue*, if *his Heir reverses the Judgment by Error*, the Heir of the Part of the Feme may enter. Br. Error, pl. 154. cites 9 H. 7. 24.

46. *And* by all the Justices if *a Man seised of Land has Issue two Sons, and the Eldest enters into Religion* and the *Father dies*, and the *Youngest* Son *loses by Erroneous Judgment* and the *Eldest is deraigned*, he has no Remedy. Ibid.

47. *But if the Youngest reverses the Judgment* by Error *the Eldest may enter*; Quod Nota; And this tho' the Youngest enters after the reversal or not; And so in the other Case above, as appears there. Ibid.

48. *Tenant in Tail suffered a Recovery, and released all Errors*; now, tho' this Release shall bar him to bring a Writ of Error, yet it seemed to divers Justices that *it shall not hinder the Issue in Tail*, but then the Question was, whether, if there are no such, *he in Remainder in Tail shall have Error* by the Statute Rich. 2. or by the Common Law, he not being privy in Blood to him who lost the Land erroneously? And it seemed by the Opinion in Pasch. 4 H. 8. fol. 1. that he may. D. 188. pl. 8. Mich. 2 & 3 Eliz. Sir Ralph Rowlet's Case.

49. Error and Attaint always descend to *such Person to whom the Land would descend*, if such Recovery or false Oath had not been. Le. 261. pl. 346. 18 Eliz. B. R. in Case of Heningham v. Windham.

50. *So* if a Man *has Lands of the Part of his Mother*, and loses it by erroneous Judgment, and dies, the Heir of the Party of the Mother shall have the Writ of Error. Le. 261. pl. 346. 18 Eliz. B. R. in Case of Henningham v. Windham.

Ow. 68 S. C. & S. P. —— *No Man* shall have Error or Attaint *but he who may be restored to Thing lost* by the Verdict or Judgment. Mar 210 pl. 247. Pasch. 18 Car. Per Mallet J. and said that you shall never find it otherwise in all our Books.

51. If *Tenant in Tail Male has Issue a Son and a Daughter by one Venter, and a Son by another, and dies*, and the *eldest Son makes a Feoffment*, and a *Common Recovery is had against the Feoffee, in which the eldest is vouched, and he vouches over the common Vouchee*, and after the *eldest dies*, the *youngest Son may have Writ of Error*; for though the eldest should have rendered a Fee Simple to the Feoffee according to his Loss, yet he should have recovered but an Estate Tail, viz. such an Estate as he had when the Warranty was made, which would have descended to the youngest, and consequently the Writ of Error shall be brought by him. Le. 261. pl. 346. 18 Eliz. Henningham v. Windham.

52. He who is *special Heir* by the Custom, *as of Borough-English* Land, shall have the Writ of Error, and not the Heir at the Common Law; Adjudged. 4 Le. 5. pl. 19. 18 Eliz. Henningham's Case.

53. *In a common Recovery four Husbands and their Wives were vouched*, and the *Plaintiff brought a Writ of Error as Heir to one of the Husbands*, Exception was taken because he *did not make himself Heir to the Survivor of the four Husbands.* But a Difference was taken between a Real and a Personal Covenant, for if two are bound to Warranty, and one dies, the Survivor and the Heir of the other shall be charged, and said, that each of the four and their Heirs are charged, and then the Heir of each being chargeable the Heir of any of them may have Writ of Error. And the Writ of Error was adjudged good. But upon Suggestion that the Writ of Error was not well brought, for the Voucher being of four Husbands and their Wives, it shall be intended in Right of their Wives according to 20 H. 7. 1. b.

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46 E. 3. 28. 29 E. 3. 49. So the Plaintiff here should intitle himself as Heir to the Wife; wherefore the Plaintiff relinquished his Writ and *brought a new Writ and intitled himself as Heir to the Wife.* Le. 291. pl. 718. Mich. 26 & 27 Eliz. B. R. Gravenor v. Massey.

54. The Plaintiff had a *Verdict in* an Action on the *Case for Words and* 1000 *l. Damages*, and afterwards he *took out Execution by Elegit on the Lands of the Defendant*, *who died*, and his *Administrator brought* a Writ of *Error* in the Exchequer Chamber; the Defendant in Error pleaded in Abatement this Execution, by which he intended, that the Administrator not having any Loss but the Heir only, therefore a Writ of Error would not lie by the Administrator; but upon a Demurrer to this Plea, it was *adjudged for the Administrator*; *for upon Eviction of the Lands the Plaintiff might resort to the Goods.* Mo. 686. pl. 949. Trin. 29 Eliz. Lord Mordant v. Bridges.

Cro E. 67. pl. 17. S. C. Mich. 29 Eliz. but S. P. does not appear. —— Ibid 204. pl. 10. Scroggs v. Ld Mordant. Hill. 35 Eliz. in Cam. Scacc. S. C. & S. P. resolved that the Writ of Error did lie, and that the Administrator is privy to the Record, and may have Loss by it in futuro.

55. *Lessee for Life and Infant in Remainder join in a Fine*, the Infant alone may bring Error. D. 89. b. pl. 2. Marg. cites Hill. 30 Eliz. C. B. Pigot's Case.

56. In a *Quare Impedit* against the Bishop and S. brought by the Queen, in which the *Bishop pleaded*, *that he claimed nothing but as Ordinary*; after Judgment for the Queen *Error was brought by the Bishop and S.* It was objected that the Bishop ought not to join in the Writ, because he had no Loss; But it was adjudged that the Writ was well brought, for Wray said, the *Bishop has Loss*; for the Writ shall be to the Archbishop for Admission and Institution, and so he has Loss. Cro. E. 65. pl. 11. Mich. 29 & 30 Eliz. B. R. The Bishop of Gloucester v. Savacre.

3 Le. 176. pl. 228. The Queen v. the Bishop of Gloucester, S. C. Per Wray, the Bishop *shall join for Conformity of Law and for Privity of Record*; and the Plea of the Bishop is not so strong as a Disclaimer; and afterwards the Writ was awarded good —— And. 200. pl. 236. S. C. but S. P. does not appear. —— 3 Mod. 134. S. P. obiter per Cur. says they must join in Error unless where the Bishop claims only as Ordinary.

57. *Husband and Wife Tenants for Life*, *Remainder to an Infant in Fee*, *all three levied a Fine*, and the *Infant alone brought Writ of Error to reverse it for Non-age.* It was objected, that since all joined in the Fine they should likewise join in the Writ of Error; and that the Husband and Wife should be summoned and severed, and then the Infant might proceed alone to assign Errors; but adjudged that the Writ of Error is well brought by the Infant alone, because the Error assigned is not in the Record, but without it, viz. in the Person of the Infant, and that is the Cause of the Action by him, and for no other. Leon. 317. pl. 445. Mich. 30 & 31 Eliz. B. R. Pigott v. Harrington.

Cro. E. 115. pl. 15. Pigot v. Russel, S. C. and the Writ held well brought it being for an Error in Fait, viz. his Non-age, and of that no other can take Advantage. And if two Infants bring Error they must assign the Errors severally, and therefore if one be within Age he must bring the Writ alone.

58. A *Conusor of a Fine canot assign Error in the Grant and Render* by which he takes Estate, any more than the Conusee shall do in the Conusance; for this would be to defeat the Estate which by the Fine is given to himself; *so a Recoveror shall not bring* a Writ of *Error to defeat a Record by which he himself recovered*, for the Judgment in the Writ of Error is to restore the Party to all which he lost by the Fine or Judgment, and not to avoid or lose that which he had gained by the Fine or Judgment. 5 Rep. 39. b. Trin. 34 Eliz. B. R. in Tey's Case.

59. The

59. A Man was *outlawed of Felony* and died, his *Executor brought a Writ of Error* to reverse the Outlawry, and the Question was whether it lay; The same was argued, Sed adjornatur. Cro. E 225. pl. 10. Pasch. 33 Eliz. B. R. and Ibid. 273. pl. 2. Pasch. 34 Eliz. B. R. Marsh's Case.

Ow 147. S. C. argued. —— Le. 325. pl. 359. S. C. Wray Ch. J. held clearly that the Executor might have and pursue this Writ of Error, and afterwards the Outlawry was reversed accordingly. —— S. C. cited as resolved accordingly. 5 Rep. 111. a. —— Godb. 380. Jones J. cited 5 Rep. 111. but said that Marsh's Case never was adjudged. —— Cro. E. 358. S. P. cited by Popham and Gawdy as ruled accordingly in B. R. in Nicholson's Case.

60. The Plaintiff had a *Judgment in Debt*, and afterwards the *Defendant made a Feoffment to J. S. of his Lands*, then the Plaintiff sued an *Elegit* upon the Judgment; before it was executed J. S. brought a Writ of Error, and assigned Error in the Judgment; Adjudged, that a Writ *of Error would not lie for J. S. unless* it be *for Error in suing out Execution*, which was not done in this Case, for before Execution he is not a Party grieved, which is the true Reason why *he in Reversion* or Remainder *shall not have* a Writ of *Error in the Life-time of the Tenant for Life* upon a Judgment given against such Tenant for Life, because neither of them can be a *Party grieved* in his Time. Cro. E. 289. pl. 6. Mich. 34 & 35 Eliz. B. R. Charnock v. Sherrington.

61 If *Execution* upon a Judgment *is sued by Elegit, and Lands only extended*, and no Goods taken in Execution, and after the *Defendant dies* his *Administrator may have a Writ of Error*, for he is privy to the Record, and may in futuro have Loss by it. Cro. E. 294. pl. 10. in Cam. Scacc. Hill. 35 Eliz. Scrogs v. Ld. Mordant.

Mo. 687. pl. 949. Trin. 29 Eliz. B. R. the S. C. ruled that the Writ well lay for the Administrator, because it might be that the Land might be evicted, and then the Plaintiff might resort to the Goods. —— And at the End of the Case in Cro. E. is a Nota added to the same Purpose.

62. In many Cases *he that has no Loss nor can have Loss* may maintain a Writ of Error; *as the Tenant which makes a Feoffment pending the Writ against him*; *So in Trespass against two, and Execution of the Damages is had against one only*, and the Plaintiff is satisfied, and *he, against whom the Execution was, died*, yet the *Survivor may sue a Writ of Error*; Per Cur. Cro. E. 294, 295. pl. 10. Hill. 35 Eliz. B. R. in Case of Scroggs v. Ld. Mordant; and as to the last Point cites 20 E. 3.

63. *Judgment in Quare Impedit* was given *against the Incumbent and Bishop Defendants.* The *Bishop pleaded that he claimed nothing but as Ordinary.* *Error was brought in the Name of the Incumbent and Bishop*, but the *Incumbent only assigned the Errors* (without Summons and Severance.) *Afterwards the Incumbent and the Bishop assigned the same Errors*, and the Defendant pleaded in Nullo est erratum. All the Court held the *Assignment by one only was ill*, and all the Plea discontinued, and not aided by the second Assignment after. And afterwards a new Writ of Error was brought. Cro. J. 92. pl. 20. Mich. 3 Jac. B. R. Lancaster v. Low.

But Mod 134. Trin. 3 Jac. 2 B. R. in the Case of Hacket v. Herne it is said obiter, that if a Quare Impedit be brought against a Bishop and others, and Judgment be against them all, they must likewise all join in a Writ of Error, unless it be where the Bishop claims only as Ordinary.

64. An *Assise* was brought *against five* for 100 Acres of Land, *three of the Defendants were found not Tenants, and acquitted* of the Disseisin; *two other were found guilty*, quoad three Acres, and for the Residue not guilty, but the Verdict was entered for 100 Acres, and Judgment given accordingly A Writ of Error was brought, in which all of them

Noy 116. Vaughan's Case. S. C. adjudged to be Error

them joined; Adjudged, that it onght to have been brought *only by those two who were found guilty*, and the three who were acquitted had not any Loss, and therefore ought not to have joined. Cro. J. 138. pl. 15. Mich. 4 Jac. B. R. Vaughan v. Lorriman.

65. *Trespass against several*, they *all appear by Attorney and plead several Pleas*; *three not guilty*, *two of which are found guilty*; the *others justify by Force of a Statute made* 12 *Car.* 2. *that three of them being Officers pursuant to the Direction of the Governor* &c. and *according to the Statute took the Goods, and that the other Defendants, as their Servants, and by their Command, assisted them in it.* Upon a Writ of Error brought the *Error assigned* is, *That A. who was Servant, was an Infant*, and under Age. It was mov'd the Infant's Appearance by Attorney is erroneous for all; for it is a joint Judgment, and joint Damages are given, and cited the Case of Oate v. Aylett. The other Side agreed, that in all Cases where an Infant ought not to appear by Attorney, if he doth, it is Error. But whether it is Error here, he only acting as a Servant, I must submit. The Reason why an Infant cannot appear by Attorney is, because he is thought not to be able to make known his Case; now he being a Servant must plead as the others, and stand or fall by that. Per Holt Ch. J. The Case is the same whether he is Master or Servant, for the Servant is equally liable to Damages with the Master. Powell J. It is a joint Judgment, and entire Damages which cannot be divided. Per Cur. the Judgment was reversed. Holt's Rep. 360. pl. 5. Trin. 8 Ann. Greek v. Mew.

66. In *Trespass against three one pleads to Issue*; The *Plaintiff has a Verdict against him and Judgment*; The *other two demur*; A *Nolle Prosequi is entered as to them*; *The three Defendants cannot join* in a Writ of Error; For the two against whom the Nolle Prosequi is entered are not damnified. Jenk. 309. pl. 87.

Hob. 70. pl. 81. Hill. 11 Jac. in Cam. Scacc. Parker v. Lawrence.—If in *Trespass against three, Judgment was against the Plaintiff as to one, and as to the other two for the Plaintiff*, the two only without the third may have a Writ of Error, for he for whom the Judgment was given cannot say that the Judgment was to his Damage; Per Cur. præter Twisden, who held that the Writ ought to be brought by all. 1 Lev. 210. Pasch. 19 Car. 2. B. R. Cannon v. Abbot.

67. The *Son and Heir was outlawed upon an Indictment for Felony in the Life-time of his Father, who was seised in Fee, and upon his Death the Son entered and devised it to C. in Fee*, who conveyed it to B. who brought a Writ of Error to reverse the Outlawry; Doderidge and Jones J. seemed to incline that it did not lie for B. For that none can restore the Blood, but he who is privy in Blood; Sed adjornatur. Godb. 376. pl. 465. Pasch. 3 Car. B. R. Brooker's Case.

68. The *Principal and Bail* ought not to *join* in a Writ of Error to avoid the Principal Judgment, nor the Judgment against the Bail. Cro. C. 408. pl. 1. Trin. 11 Car. B. R. Bushell v. Yaller.

Jo. 360. pl. 1. Pollex v. Bushell S. P. adjudged, and seems to be S. C.——S. P. adjudged Hob. 72. pl. 85. Forest v. Sandland.——Cro. J. 384 pl. 14 Mich. 13 Jac. B. R. Sandelow v. Deverton in Cam. Scacc. S. P. held accordingly.——Roll Rep. 294. pl. 9. Verten v Sandelow. S. C. & S. P. accordingly.——Cro. C. 300. pl. 2. Lancaster v. Keyleigh. Pasch. 9 Car. B. R. held accordingly.——S. C. & S. P. resolved Jo. 325. pl. 3 ——Godb. 440. pl. 507 S. C. held accordingly.——Cro. C. 574, 575. pl. 17. Hill. 15 Car B. R. Smith v. James S. P. held accordingly.——Bulst. 125. Pasch. 9 Jac. Hooker v. Robinson. S P. agreed.——Lev. 137. Trin. 16 Car. 2 B R. Atherton v. Hole S. P. and the Writ was quashed.——Writ of Error by Principal and Bail was held ill, and that they cannot join, and cites Forest v. Sandland, Hob. 72. Show. 8. Pasch. 1 W. & M. Evans v. Pettifer——Comb. 108. S. C. held accordingly.

69. *Nor* can *those returned in one Writ take Advantage* of any Error in the Proceedings on the other Writ, because the Actions are several. Carth. 201. cites Cro. C. 517. [pl. 19. Mich. 14 Car. B. R.] Angel v. Cooper.

70. If

70. If *J. S. binds himself and his Heirs in a Bond*, and thereupon *Judgment is obtained against J. S.* and *J. S. makes his* Will, and his *Heir at Law Executor and dies, leaving Lands which descend* to his Heir, yet he *shall not have a Writ of Error as Heir*, for he is not privy to the Judgment, and when an Extent is made upon him it is as Tertenant, but after the Lands are taken in Execution he may have a Writ of Error; Per Roll J. Sed adjornatur. Sty. 38. 39. Trin. 23 Car. White v. Thomas.

71. By Roll Ch. J. if an *Action* be brought *against three, and one of them is an Infant*, and they *all appear by Attorney*, and an *intire Judgment is given against them all*, and they all join in Writ of Error to reverse this Judgment, this Writ is well brought; for the Judgment was erroneous, because it is an entire Judgment, for as to the Infant it cannot be good, and so it is naught to the rest, and he cited one **Byre's Case** 9 Jac. in the Point. Sty. 406. Hill. 1654. Anon.

S.P. by Roll Ch. J. Judgment reversed. Sty. 400. Bocking v. Symons.

72. Judgment was had in *Debt upon a Bond against Father and Son*, and afterwards the *Father alone brought a Writ of Error*, and the *Error assigned was, that his Son was under Age*; but because the *Son did not join in the Error*, the Court ordered the Writ to be abated. 3 Mod. 134. Trin. 3 Jac. 2. Hacket v. Herne.

73. There is a *Difference where* a Writ of *Error is brought by the Plaintiffs in the original Action, and when by the Defendants*, for *if two Plaintiffs are barred by an erroneous Judgment, and* afterwards *bring* a Writ of *Error*, the *Release of one shall bar the other*, because they are both Actors in a personal Thing to charge another, and it shall be presumed a Folly in him to join with another, who might release all; *But where the Defendants bring a* Writ of *Error it is otherwise*, for it being brought to discharge themselves of a Judgment the Release of one cannot bar the other, because they have not a joint Interest, but a Joint Burthen, and by Law are compelled to join in Errors. 3 Mod. 135. Trin. 3 Jac. 2. B. R. in Case of Hacket v. Herne.

Ibid Marg. cites 5 Rep. 55. a. Ruddock's Case [but it should be 6 Rep. 25. a. b] where the same Diversity is taken per Curiam.

74. Where *several Writs of Sci. Fa. issue into several Counties*, against several Tertenants, upon one and the same Judgment, in such Case they cannot all join in one Writ of Error, for the Actions are several. Carth. 200. Mich. 3 W. & M. in B. R. in Case of Blake v. Gell.

75. *But* where a Scire Facias issued against the Tertenants *in the same County*, and upon a Scire Feci returned against several, they pleaded that J. S. is another Tertenant and not summoned, and then a second *Scire Facias issued against the said J. S.* who was returned an Infant &c. and the *Parol demurred for Infancy*, and after his full Age a *Resummons* issued against all the Tertenants; But one of the Tertenants who was returned summoned was dead before the Day of the Return, and this was assigned for Error, and the *surviving Tertenants and the Heir of him who was dead joined in the Writ* of Error, and held good, for the last Scire Facias is only *supplemental* to the first, and then both make but one Action. Carth. 200. Mich. 3 W. & M. in B. R. Blake v. Gell.

76. Judgment was had against the Principal, and afterwards upon a Scire Facias, *Execution was awarded against the Bail*, and one of the *Bail* for the Defendant in the original Action brought a Writ of Error *Tam in redditione Judicii quam in adjudicatione Executionis against the Bail* &c. But the Writ was *quashed quoad all that related to the Judgment in the original Action, and no more*, and was ruled to stand good quoad the Judgment against the Bail upon the Scire Facias and the Bail (Plaintiff in Error) proceeded therein accordingly. Carth. 447. Pasch. 10 W. 3. B. R. Burr v. Atwood.

1 Salk 89. pl 11. Atwood v. Burr. S. C. but S. P. does not appear. —Ibid. 402. pl. 10. S. C. but not S. P. —3 Salk. 369 pl 6. S. C. and adjudged naught, and that it should have been in adjudicatione Executionis Recognitionis prædictæ, because a Recognizance is not such a Judgment as might or would be intended on the Face of the

Writ

Writ of Error.——— Mod. 3. S. C and same Exception taken by Raymond at the End of the Case fol. 8. and the Court were of Opinion to quash the Writ of Error for this Exception.—— Ld. Raym. Rep. 553. S. C. and the Writ of Error was quashed for the same Reason.——Ibid. 328. S. C. stated as in Carth. and ruled accordingly.

77. Error upon a Judgment in C. B. in an *Action against two*, and *one of the Defendants was outlawed*; And exception was taken to *the Writ of Error*, because it *mentioned the Writ to be brought against one only*; But it was held good, because the Writ as to the other was determined by the Outlawry; Ex relatione M'ri Jacob. Ld. Raym. Rep. 691. Trin. 13 W. 3. Oliver v. Hunning.

78. If an *Appeal of Murder* be brought *against three* Persons, they may all join in a Writ of Error, for *it is ad damnum ipsorum respective*, and yet the Attaint of one is not the Attaint of the other two; Per Holt Ch. J. Holt. 277. pl. 22. Hill. 4 Ann. in Case of Bradell v. Sawbridge.

Ibid. says that the like Judgment was given in Hill Term, 6 Geo. B. R. in the Case of Brewer v. Turner.

79 The Plaintiff obtained *Judgment against two Defendants in* an Action of *Debt*, and *one of them brought a Writ of Error*, when it should be brought by both, *and then he who would not prosecute ought to be summoned and severed*, which not being done, this was held to be a Fault not amendable, and thereupon the Writ of Error was quashed. 8 Mod. 305. Mich. 11 Geo. Cowper v. Ginger.

(L) *Against whom* it lies.

Br. Error, pl. 9. cites S. C.—— Or his Heir, be he Ter-Tenant or not. For Nontenure is no Plea in Writ of Error. Br. Error, pl. 131. cites 42 Aff. 22. Per Fulthorp.——— It is agreed that Writ of Error does not lie *but against Parties or Privies*, viz. The Party or his Heir, be he Tertenant or not, and if another be Tertenant Scire Facias shall issue against him, for otherwise Assise lies for him if he be ousted. Br. Error, pl. 9. cites 9 H. 46.

1. IT does not lie against any but against him who is Party or Privy to the first Judgment. 9 H. 6. 46. b. Curia.

2. It does not lie against any who is not Party or Privy, though he be Tenant of the Land. 9 H. 6. 46. b. Curia.

Br. Error, pl. 9. cites S. C.—— Br. Error, pl. 131. cites 42 Aff. 22. Per Fulthorp.

3. The Writ lies against him who is Party or Privy to the Judgment, though he hath nothing in the Land. 9 H. 6. 46. b. Curia.

Br. Error, pl. 9. cites S. C. and says, Quære what Remedy in such Case.

4. If a Man recovers and dies without Heir, Quære against whom the Writ of Error shall be brought. 9 H. 6. 49. b. Quære.

5. Writ of Error lies well *against him who was Tenant at the Time of the Judgment given*, notwithstanding that he is not his Tenant at the Time of the Writ of Error acquired; Contra of Attaint; For this shall be against the Tenant of the Franktenement &c. Br. Error, pl. 109. cites 6 Aff. 6.

Br. Nontenure, pl. 8. cites S. C.

6. *H. recover'd*, and had *Issue Isabel and died*, and *she took Baron and had Issue T. and dyed*, and Writ of Error was *brought against the Tenant by the Curtesy and the Heir*, and admitted, and yet per Candish, the Usage has been to bring the Writ of Error against the Party to the Record or his Heir, and when the Judgment is revers'd to bring Scire

Facias

Facias against the Tertenant, if he can say any Thing why the Plaintiff should not have Execution, quod nota. Br. Error, pl. 27. cites 47 E. 3. 7.

7. Where *Error* is su'd *in Parliament of a Judgment given in B. R.* or if Error be su'd in B. R. upon a Fine levied in C. B. the Transcript shall go, and shall be certify'd, and not the Record itself. Br. Record, pl. 48. cites 2 H. 7. 19.

Br. Error, pl. 157. cites 1 H. 7. 19, 20. S. C.

8. If an erroneous *Judgment is given for the Queen in a Writ of Intrusion*, the Party shall have a Writ of Error against the Queen without any Petition; Per Coke, Arg. 2 Le. 194. Hill. 29 Eliz. in Hurlston's Case.

9. Many *Outlawries* have been *reversed* for Error *without any Petition, and yet* in such Case *the Queen has an immediate Interest*; Per Wray. 2 Le. 194 Hill. 29 Eliz.

10. Error does not lie against *the Queen* upon a Petition, *where she is immediate Party to the Recovery*; but otherwise where she is Party only as for Conformity, as in an Action upon the Statute, or in a Popular Action; Per Curiam. Noy. 56. Anon.

2 Le. 194. pl. 244. Hill 29 Eliz. B. R. Hurlston's Case. Same Cases cited, and seems to be S. C of **Glazier v. Hudleston**, and the Case was, That Judgment was given for the Queen in a Sci. Fa to reverse the Patent of the Constableship of the Castle of Chester But Clench said, That there needs no Petition, because both Patentees claim from the Queen, and whether there be Error or not the Queen is not prejudiced.

11. Adjudged, That a Writ of Error lies *against the King without Petition*, though antiently the Course was by Petition, and was a Decency, but since the Year 1640 Writs of Error have been Ex Officio. 1 Salk. 264. pl. 7. Pasch. 11 W. 3. B. R. Anon.

(M) At what *Time* it may be brought.

[Before Writ of Enquiry. Pl. 2. 3. 9. 10. 11. 14.]

1. A Writ **of Error** bearing Date before the Judgment given **is not good, for it lies not before the Judgment given, for the Writ is, Si Judicium redditum sit, &c.** 22 **H.** 6. 7. **Contra** * 1 **R.** 3. 4.

Br. Error, pl. 76 cites 22 H. 6. 5. 7. S. P. but says, that aliter dicitur in B. R. 5 E. 6. —— Mo. 461. pl. 647. Hill. 39 Eliz. is a Nota that a Writ of Error was delivered Instanter when the Judgment was given, but held not good, because it was procur'd before the Judgment given —— Mar 140. pl. 112. Mich. 17 Car. in Case of **Dale v. Worthye**, the Court agreed that a Writ of Error bearing Teste before Judgment is good, as is the Book of 1 E. 5. 4. because there the Foundation stands good, and it is the usual Course of Practice for preventing and superseding Execution —— Vent 255. Hill 25 & 26 Car. 2. B. R. the Court held that a Writ of Error bearing Teste before the Judgment given is good to remove the Record, so as Judgment be given before the Return of it. —— Mod. 112. pl. 9. S. P. by Hale Ch. J. and seems to be S. C

* Noy 54 cites S. C. but there it was said by the Court in the Case of **Jennings v. Bragge**, that a Writ of Error bearing Teste before the Judgment is entred of Record is void, although the Judges have pronounc'd the Judgments, viz. quod intretur Judicium

Writ of Nisi Prius was returnable Octab' Hillarii at which Day it was return'd, and at the first Day thereof the Plaintiff had Judgment to recover, the Defendant brought Writ of Error, *bearing Date the third Day of the said Return, and before the fourth Day*, viz. Mesne *between the first Day and the fourth Day*, and because Judgment was given the first Day, and so it is after Judgment as it ought to be, therefore well; Per Cur. Br. Error, pl. 17. cites 34 H. 6. 27. —— Br. Jours. pl. 10. cites S. C.

2. **In an Assise of** Darrein Presentment **if the** Parties demur upon the Title, **and it is** adjudged for the Plaintiff, and that he shall have

 a Writ

a Writ to the Bishop, a Writ of Error lies upon this Judgment before the Damages inquired of, because there were no Damages at the Common Law, and then the Writ would be presently, and the Addition of Damages given by the Statute to be inquired of to the Sheriff, shall not stay the Writ of Error, and if it be affirmed, it may be inquired of the Damages where it is affirmed. 17 E. 3. 5. 19. 21. adjudged 33.

3. So if a Man recovers by Default in a Writ of Cousinage or Aiel, a Writ of Error lies upon this before the Damages are inquired of, because the Damages are but an Addition to the Common Law given by the Statute, (*) and so the Judgment for the Principal continues as it was at Common Law. 17 E. 3. 21. 33.

* Fol. 750.

4. No Writ of Error lies upon a Judgment to account before the last Judgment, because the Plea is not ended till he hath accounted. 21 E. 3. 9. adjudged. Co. 11. * Metcalfe 38. adjudged. Vide Noy's Reports 68. two Executors have Judgment against B. quod computet the Writ shall not abate by the Death of one of the Executors.

Br. Error, pl. 58. cites S. C. —— Per Stouf; and Brook adds, that in Account there are 2 Judgments, and Writ of Error is *Quod si Judicium redditum sit tunc* &c For Writ of Error does not lie before Judgment. ——- Cro. E. 636. in pl 32 cites S. C. & S. P. For the Plaintiff might be nonsuited before the second Judgment, as 1 H. 7. 2. is; And that so it was adjudged in 11 Eliz. Harding v. Wine. And so 7 R. 2. in Formedon where the Tenant was ousted of Aid, Error lies not till the Judgment of the Principal. —— Le. 104. in pl. 277. cites 21 E. 3. 9.

* Cro J. 356 pl. 14. Metcalf v. Wood. S C. resolv'd. —— D. 291. b. Marg. pl. 68. cites 40 Eliz. B. R. Bill v. Matthews S. P.

5. So no Writ of Error lies upon an Award before the Original be determined. 17 E. 3. 21.

Award Quod computet is but barely as an Award, As Award that Assise shall be taken, Award in Waste, Writ to inquire of Waste, of Trespass &c. Writ of Inquiry of Damages in Partitione Facienda, Award Quod Partitio Fiat, in Writ of Admeasurement Award Quod Admensuratio Fiat, Award that one shall be ousted of Aid, and such like, are only Awards of the Court, and are but Interlocutory, and not Definitive, whereof no Writ of Error lies till the last Judgment is given; Per Cur. 11 Rep. 40. a. Mich. 12 Jac. in Metcalf's Case.—In Accompt no Error lies before the second Judgment. Palm. 2. cites 21 E. 3. 9. Award.

6. As it does not lie upon an award of a Capias, Summons, or Resummons before the Original determined. 17 E. 3. 21.

7. In a Writ of Partition, if the Judgment be given Quod Partitio Fiat, and thereupon a Writ is directed to the Sheriff to make a Partition before it is executed and returned, no Writ of Error lies upon the first Judgment for that before the last Judgment, which ought to be Quod Partitio Præd' foret firma, and stabilis in perpetuum the Plaintiff may be nonsuit, or he may, upon the Return of the Sheriff, suggest to the Court that the Partition is not equal, and so have a new Partition, and also he may release before the last Judgment. Mich. 40, 41 El. B. R. between the * *Lord Barkly and the Countess of Warwick* adjudged. M. 10 Ja. B. 20. between † *Ballad and Rawlins*, per Curiam, P. 13 Car. B. R. between *Williams and Watkins* adjudged, and such Writ abated, being brought upon the first Judgment given in Cardigan.

* Cro. E. 635 pl. 32. and 643. pl. 46. the Countess of Warwick v. Ld. Berkley, S. C. held per tot. Cur. that till the second Judgment given, Quod Partitio Stabilis fit the Record is not full, nor the Judgment perfect, and therefore the Record should not be removed. ——— Mo. 643. pl 888 S. C. but no Judgment. ——— Noy 71. S C. held accordingly; and this is not like other Real Actions, where Error lies before the Habere Facias Seisinam be returned; For that is a final Judgment, and no other to be given; besides, there needs no Return of an Habere Facias Seisinam; For the Party that recovers may execute his Judgment by his Entry, and cites D. 67. a ——— Roll Rep. 85. Mich. 12 Jac. B R. Coke Ch. J. said, that in the Countess of Warwick's Case of Partition there was not any Resolution, but that it seems in such Case before the second Judgment no Writ of Error lies, Quod fuit concessum per Doderidge, but Crooke and Haughton doubted of it. ——— S. C. cited by Doderidge, as ruled to be brought too soon before the second Judgment. 2 Bulst. 104. —— S. C. cited 2 Roll Rep. 125. as held accordingly.

† Cro. J. 324. pl. 4. Rawlins v. Barret, S. C. & S. P. resolved. —— 2 Bulst. 104. S. C. & S. P. agreed. — 2 Bulst. 19. Arg. S. P.

8. A Writ of Error lies in Camera Scaccarii after an Award of the Court of King's-Bench for Judgment, and the Roll signed for Judgment by the Clerk before any Judgment entered; for otherwise the Plaintiff in the Writ of Error should be at great Prejudice, for the use of the Court is not to enter the Judgment till the Vacation after, but to award Execution presently after the Signing the Roll for Judgment, and before Entry thereof; And so if the Writ of Error shall not be allowed after Signing, and before the Entry, the Plaintiff in the Writ of Error should not have any Benefit of the Supersedeas of the Execution, which is incident in the Writ of Error. Mich. 15 Jac. B. R. between *Smith and Bowles*, by all the Clerks, that this is the common Course, and per Curiam adjudged.

See tit. Execution (M. a) pl. 1. S. C. —— See supra the Case of Jennings v. Bragg, in the Notes pl. 1.

9. If a Woman recovers in a Writ of Dower, a Writ of Error lies before the Writ of Inquiry of Damages awarded, and before the third Part assigned by Metes and Bounds; for the Judgment is perfect as to the Realty, and the Damages given by the Statute by way of Addition. P. 17 Car. B. between *Steward and Steward*, per Curiam adjudged, and the Inquiry of the Damages, after the Writ of Error brought, quashed.

Mar. 83. pl. 142. S. C. resolved that the Error was well brought. — Brownl. 127. Hill. 13 Jac. Glefold v Carr, S. P. per tot. Cur. held that it would not lie; For the Judgment is not perfect till the Value be inquired of.

10. In an Ejectione Firmæ, if the Plaintiff recovers per nihil dicit, in which Judgment is given that the Plaintiff shall recover his Term, and a Writ awarded to inquire of the Damages, a Writ of Error lies upon this Judgment before the Return of the Writ of Damages, and Judgment thereupon, for the Judgment is perfect as to the Recovery of the Term before by the first Judgment, and the Plaintiff may presently have Execution for the Possession, and perhaps he will never have Judgment for the Damages, and so the Defendant should be ousted of the Possession without Remedy. Tr. 3 Car. B. R. between *Newton and Terry*. Intratur Mich. 2 Car. Rot. 110. per Curiam, in a Writ of Error Judgment reversed. Nota, Mr. Hoddesdon the Secondary de B. R. said to me, that this is now agreed by both Courts, scilicet, the Common-Pleas and King's-Bench.

Noy 95. Terry v. Newton, S. C. resolved. —— Lat. 212. Terry v. Newton, S. C. accordingly.

11. So if a Man recovers in a Quare Impedit upon a Demurrer, the Defendant may have a Writ of Error before the Writ of Inquiry of Damages (*) returned, for such Writ may be awarded out of the King's-Bench if the Judgment be affirmed there. Note, this was the *Lord Arundel's Case against Edmonds*, about 15 Car. admitted, and so is the constant Practice of the Court, for no Damages were given at the Common Law, but given by the Statute. Contra Noy's Reports 66. the *Bishop of Gloucester and Vele*.

S. P. by Bankes Ch. J. Mar. 89. in pl. 142. Pasch 17 Car.

* Fol. 751.

12. If an Execution upon a Statute-Merchant be awarded where a Stranger is seised of the Land by Feoffment of the Conusor, yet he shall not have a Writ of Error of the Execution before he is ousted by the Execution. 18 E. 25. because he is not privy to the Record before this, nor before the Return of Execution, and after the Ouster of him by Force of the Writ by the Sheriff. Dubitatur 18 E. 3. 25.

Fitzh Error, pl. 71. cites S. C. — D. 1. b. pl. 5 cites S. C. —— See (K) pl. 17. S. C.

13. If a Man recovers in a Præcipe quod reddat against me, I may have a Writ of Error before Execution is sued. 18 E. 3. 26. 17 Aff. 24

* Noy 35. Terry v. Newton, S. C resolved — Lat 212. Terry v. Newson, S. C. accordingly. — Where an Assise or an Ejectment is brought where the Land is the Principal, if Judgment be given for it, although Damages are to be recovered, yet before a Writ of Inquiry for them Error lies; because the Damages are but Accessory; Arg Cro. E 636. in pl 32 ——— For the Judgment is, Quod querens recuperet terminum, and upon this Judgment the Plaintiff may have an Habere Facias Possessionem, and if Error would not lie on this Judgment, the Plaintiff after he had got Possession upon an erroneous Judgment would never sue a Writ of Inquiry, and so the Defendant would be without Remedy. Lat. 212 Pasch. 3 Car. Smith v. Amys ——— S. P. by Roll Ch. J Sty 283. Trin. 1651, in Case of Giles v. Timberley. ——— S. P. adjudged, there being no Return of Damages, nor a Capiatur, the Commonwealth may by this Means be cozened of the Fine, and the Defendant barred from bringing a Writ of Error. Sty. 346 Mich 1652. Acton v Ayres. ——— If Error be brought in Ejectment before the last Judgment on the Writ of Inquiry, and no Capiatur entered, it is Error; Per Twisden, and so he said it had been often ruled. Keb 527. pl 59 Trin 14 Car. 2. B. R. Oliver v. Hardwick.

14. If a Man recovers in an Ejectione Firmæ by Confession, Nihil dicit, Non sum Informatus, or Demurrer, a Writ of Error lies before the Damages taxed by Writ of Inquiry I had the Precedents of Master Haddesdon, Secondary de B. R. Pasch. 13 El. B. R. Rot. 52 between *Taverner and Fawcet* Error brought upon a Judgment in Banco, and a Writ of Inquiry awarded in B. R. The like between *Bach and Errington*, P. 13 El. B. R. Rot. 51. Tr. 35 El. B. R. Rot. 696. *Wimark's Case*; And same Case Co. 5 *Wimark's Case*, 74. where Judgment upon Demurrer in B. R. and before the Return of the Writ of Inquiry Error was brought in Camera Scaccarii, and there affirmed and remanded, P. 44 El. Rot. 438. B. R. between *Howie and Layton.* Error brought in Camera Scaccarii before Damages assessed, and this affirmed Mich. 25, 26 El. B. R. Error brought after Judgment, and before Damages assessed, and this reversed for Error in Fact, Tr. 3 Car. between * *Newton and Terrye*, per Curiam, in a Writ of Error. New Entries 191. between *Dun and Lowe.* But note, this is there but an Award. Hill. 1649. between *Broad and Barnet* adjudged in a Writ of Error upon a Judgment by Nihil dicit in Banco. Intratur Tr. 1649. Rot. 1535.

15. But in an Ejectione Firmæ, if Judgment be given, Ideo consideratum est quod querens Possessionem suam Termini adhuc venturi de Tenemento præd' recuperare debeat, no Writ of Error lies before Damages taxed, because there is but an Award; but otherwise it had been if it had been recuperet. M. 5 Ja. B. R. Rot. 269. between *Lane and Alexander*, per Curiam, in a Writ of Error in Camera Scaccarii upon a Judgment in B. R. and the Record remanded in B. R. accordingly for the Cause aforesaid.

16 If a Man recovers in a Quare Impedit, and after brings a Writ of Quare non admisit against the Bishop, a Writ of Error may be after brought upon the Judgment in the Quare Impedit, and the Record shall be removed, though the other Writ of Quare non admisit be not yet discussed. Dubitatur 26 E. 3. 75.

A Writ of Error was delivered to the same Court before a Writ to the Bishop was awarded to admit the Clerk; Per tot. Cur the Writ of Error ought to be allowed. Godb. 439. pl 505. Trin. 5 Car. B. R. The Earle of Pembroke v. Bostock.

17. If a Man recovers Damages, and after a Year sues a Scire Facias of the Damages, a Writ of Error lies after of the Judgment, and the Record shall be removed. 26 E. 3. 75.

18. If an Infant suffers a Common Recovery by Guardian, in which he is Tenant to the Præcipe, at full Age he may have a Writ of Error as well as within, and assign for Error that he was within Age at the Time of the Recovery suffered; for if he had brought this

Cro C 307. pl. 8. The Earl of Newport v. Mildmay, S. C.

this Writ within Age, it should not have been tried by Inspection. P. 9 Car. B. R. between *the Earl of Newport and the Duke of Buckingham*, per Curiam resolved, and not suffered to be argued at the Bar, where the Question in Law was, whether he could avoid the Recovery by Writ of (*) Error which was suffered by Guardians when he was within Age? and it was adjudged quod non.

but S. P. does not appear. —— Jo. 318. pl. 4. S. C. but S. P. does not appear. —— 2 Saund. 94. Pasch. 22 Car. 2. Hesketh v. Lee, S. P. In Error to reverse a Judgment in a Common Recovery in the County Palatine of Lancaster, notwithstanding Exceptions taken to the Admittance and Appearance of him by Guardian, the same were over-ruled, and the Judgment affirmed by the whole Court. —— Mod. 48. pl. 104. S. C. adjornatur —— If Infant comes in and suffers a Common Recovery, this shall not be reversed for Error, per Cur. Sid. 321. Hill. 18 & 19 Car. 2. B. R. cites Ld Newport's Case. —— And in the principal Case there of Raby v. Robinson, the Court on Conference with the other Judges held, that where an Infant comes in as Vouchee in Person, and suffers a Common Recovery, a Writ of Error does not lie after full Age; But if he appears by Attorney and suffers a Common Recovery, this may be reversed for Error after his full Age, because it shall be tried per Pais, whether the Warrant of Attorney was made when he was an Infant &c. and this is the Reason that Judgments so obtained against Infants may be reversed after their full Age, viz. because the Trial is not by Inspection but per Pais, and cites Cro E. 569. Mo. 460. Co. Litt. 380. b. and F. N. B. 104 (K) —— Lev. 142. Reby v. Robinson, S. C. the Parties agreed before Judgment given, but the Opinion of the Judges was said to be, that Error lay not after his full Age.

* Fol. 752.

See tit. Trial (C) per totum

19. In Account, Writ of Error came *after Judgment given that the Defendant should account, and after Capias ad Computandum was awarded, and before that he had accounted in Fact*, and therefore per Cur. this shall not be sent till he has accounted; For the Plea is not ended before he has accounted in Fact. Br. Accompt, pl. 39. cites 21 E. 3. 9.

Writ of Error cannot arrest Execution, because Judgment was given before when he was adjudged to account, and all Times after he shall be adjudged in Ward, and he who is in Ward cannot be taken out by Writ of Error. Br. Accompt, pl. 15. cites 21 H. 6. 20

20. 9 *R. 2. cap. 3. S. 1. If Tenant for Term of Life, Tenant in Dower, Tenant by the Curtesy, or Tenant in Tail after Possibility be impleaded, and plead to Inquest, and lose by the Oath of twelve, or lose by Default, or in other manner, he to whom the Reversion pertains at the Time of such Judgment given, his Heirs and Successors, shall have an Attaint, and also a Writ of Error, as well in the Life of such Tenants as after their Death.*

21. If a *Quare Impedit* is brought *against two*, and *one pleads to Issue*, and the *other confesses the Action*, upon which Judgment is given, *he shall not have a Writ of Error till the Matter is determined as to the other*, for the Writ of Error must rehearse all that are Parties to the Original, and then the Writ says, Si Judicium inde redditum sit tunc Recordum illum habeatis, and as to one Judgment is not given, and if the Record should be removed before the intire Matter is determined, there would be a Failure of Right; Per Curiam, 11 Rep. 39. a. b. in Metcalf's Case, cites 34 H. 6. 41. a. in Humfrey Bohun's Case.

Fitzh. Error pl. 35. cites S. C. and Prisot cited it as lately adjudged in Ld Cornwall's Case, where Trespass was brought against two, and own appeared and pleaded, and was attainted, and Judgment given against the other, that he could not have Writ of Error till the Matter was determined against the other &c. —— Br. Error, pl. 15. cites S. C. and Prisot cited it as lately adjudged in Ld Cromwell's Case.

22. Writ of Error was *discontinued*, and the *Plaintiff after the Record removed into B. R. brought another Writ of Error* there, quod *coram vobis* residet; Quod nota. Br. Error, pl. 140. cites 2 H. 7. 12.

23. *Information* was made in the Exchequer *against the Merchants of the Still-Yard for diverse Merchandises Shipp'd not Custom'd*, and Judgment given against them, upon which they sued *Writ of Error*, which was *discontinued for the not coming of the Chancellor and Treasurer*, to whom it was directed secundum formam Statuti, by which they sued to

have *another Writ of Error*, which was *discontinued in the same Manner*, and *they sued the third*, and then the Kings Attorney pray'd Execution, and could not have it; For the Writ of Error is a Supersedeas in itself, and the *Party cannot compel the Judges to come*, and a Man who is nonsuited in Writ of Error may have another Writ of Error, but not with Supersedeas as the first Writ was; For this is his own Default; Contra here by the not coming of the Justices. Br. Error, pl. 147. cites 6 H. 7. 15, 10.

24. *So* of Demise of the King, or Death of the Party, or *by Adjournment of the County*, in those Cases the Party shall have Supersedeas upon the second Writ of Error. Ibid.

25. An *Exigent* being *awarded in an Appeal*, a Writ of *Error was brought immediately*; For he by the Exigent awarded, in Case of Felony, forfeited all his Goods immediately; Wherefore for as much as he *was at present Loss* and Prejudice he might have a Writ of Error presently; Cited by Coke, Cro. J. 357. in Case of Metcalf v. Wood, as a Case he had seen a Precedent of 8 H. 8.

26. If *in a Formedon* the *Tenant as Judgment for Part*, no Writ of Error lies until the intire Matter in demand is determined; for the Judgment is, Si Judicium inde redditum sit, which Word inde goes to the intire Demand. 11 Rep. 39. b. per Curiam, cites Dyer 291. b. [D. 290. a. pl. 62. and 291. b. pl. 67. Trin. 12 Eliz. Fitzwilliams v. Copley.]

27. *Error in Process* cannot be alleged *after in Nullo est erratum pleaded*; For if it had been alleged the other Party might alledge Diminution. Cro. E. 83. Hill. 30 Eliz. in Case of Robsert v. Andrews.

28. J. S. had a Judgment against W. *in Debt*, and afterwards *W. made a Feoffment to C.* the Plaintiff *of his Land*; Then J. S. sued an *Elegit* upon the Judgment, but before it was executed C. brought a Writ of Error, and would assign Error in the Judgment. The Court thought that a Writ of Error *would not lie for C. the Feoffee unless* it be *for Error in suing out Execution*. 2dly Till Execution sued he is not a Party grieved, which is the true Reason why *he in Reversion* or Remainder *shall not have Error in the Life-time of the Tenant for Life* upon a Judgment given against such Tenant for Life, because he was not then a *Party grieved*. Cro. Eliz. 289. pl. 6. Mich. 34 & 35 Eliz. B. R. Charnock v. Sherrington.

29. Error *to reverse an Amerciament in a Court Leet*, because it was unreasonable; It was insisted that after an Amerciament is once affeered, the Writ of Moderata Misericordia doth not lie; And per tot. Cur. clearly this is no Error now to be assigned, and the same was affirmed. Bulst. 125. Pasch. 9 Jac. Stubbs v. Flower.

30. In *Action of Account* it was insisted, that a Writ of Error does not lie on the first Judgment, and Man secondary informed the Court upon a general Writ of Error, upon a Judgment given in an Account, the first Judgment that he shall accompt, and the second Judgment also, shall be reversed, if Error be therein. Doderidge J. said, By this it appears that *the general Writ of Error goes to both the Judgments*, as well to the one as to the other; The whole Court agree with him herein. 2 Bulst. 120. Trin. 11 Jac. Porter v. Agar.

Cro. J. 324. pl. 4. S. P. resolved by the whole Court in S. C. and likewise in the Case of Rawlins v. Barret.

31. In *Debt against divers by several Præcipes*, if there be Error in the *Judgment against one*, he may have Error before Determination of the Matter as to the others, for in those Originals in which are *several Counts*, and Error is against one, he shall have Writ of Error, and the Record of his Count and the pleading shall be severed from the Original, and removed in B. R. and yet the Original remains in C. B. as well because the Court of C. B. is in Possession of it as because otherwise the Court of C. B. could not proceed to determine the Residue

S. P. Arg. 2 Roll Rep. 125. cites S. C. and 12 E. 4. 1.

fidue without the Original. 11 Rep. 41. a Mich. 12 Jac. cites 36 H. 6. tit. Fieri Fac. 3. and in fuch Cafe Coke fays it feems to him, that if there be Error in the Original upon a Certiorari, the Ch. J. fhall only certify the Tenor of it. *But where the Original is one and one Count, he cannot have Writ* of Error *till all is determined*; For the Record cannot be in B. R. and C. B. at the fame time.

32. *Where feveral Judgments are to be given, the one dependent on the other*, there the Writ of Error does not lie till the laft Judgment is given of the Thing of which the Judgment is given before; Per Doderidge J. 2 Roll Rep. 126. Mich. 17 Jac. B. R.

33. Where a *Suit is of feveral Things*, yet *if the Damages are intire* the Writ of Error does not lie till all is determined, as in Trefpafs againft feveral &c. Per Doderidge J. 2 Roll Rep. 126. Mich. 17 Jac. B. R.

34. In *Debt, Detinue and Dower, by feveral Præcipes*, Writ of Error does not lie till all is determined; But otherwife in *Trefpafs*; Per Haughton J. 2 Roll. Rep. 126. Mich. 17 Jac. B. R.

All the Books ftand upon thefe *Differences*, 1ft *If Judgment be had after Judgment* he fhall *not have Error till the laft Judgment*, as in *Account, Admeafurement*, and fuch like. 2dly, When the *Things are feveral*, then he fhall not tarry till the laft Judgment. 3dly, *Though* they are *feveral Things in their Nature, yet if the Damages are intire*, there the Error fhall not be before Judgment be of the whole and final; Per Doderidge. And per Haughton, In *Debt, Detinue, Dower* &c. *if Defendant confeffes Part, and has Judgment for this, Error lies, becaufe it is feveral*, but *otherwife in Trefpafs, becaufe the Damages are entire.* Litt. Rep. 6. Mich. 17 Jac. B. R.

35. If in a *Quo Warranto Judgment be given as to Part of the Liberties claimed*, that they fhall be feifed, and that the Defendants capiantur pro Fine, *and as to the other Part, Curia advifare vult*, a Writ of Error lies before any Judgment given for the other Part. Pafch. 17* Car. 2. adjudged upon a Writ of Error upon a Judgment in a Quo Warranto againft the Corporation of Dublin. 3 Danv. 22. pl. 26. cites Palm. 1, 2, &c. 17 Jac. B. R. and fays fee a long Argument and the Judgment accordingly.

2 Roll 113. The King v. Cufack, S. C. adjornatur.

* This is mifprinted and fhould be 17 Jac.

36. In *Trefpafs* when the *Recovery is had by Default* no Writ of Error will lie before the Writ of *Inquiry of Damages is returned*; for the Defendant is not grieved until Judgment is given upon the Return of the Writ of Inquiry. Jenk. 25. in pl. 48.

37. Error lies *after a Confeffion or Retraxit*, but not after a *Difclaimer*. Jenk. 283. pl. 12. cites 8 Rep, 58. 6 Jac. Beecher's Cafe.

38. Writ of *Error bore Tefte before the Plaint there entered*, the Court viz. Mallet, Heath and Brampfton were clear of Opinion, without any folemn Debate, that *the Record was not removed by that Writ* of Error, becaufe if there be not any Plaint entered at the Tefte of the Writ, how can the Proceffus according to the Writ be removed, when there is no Proceffus entered? And that failing all fails; and befides it is meerly for Delay of Juftice. Mar. 140. pl. 212. Mich. 17 Car. Dale v. Worthy.

39. A Writ of Error *bearing Tefte before Judgment* is good, as is the Book of 1 E. 5. 4. becaufe in that Cafe the Foundation of the Writ ftands good, and it is the ufual Courfe of Practice for the preventing and fuperfeding of Execution; Agreed per Curiam. Mar. 140. pl. 212. Mich. 17 Car. Dale v. Worthy.

A Writ of Error that bears Tefte before the Judgment given, is good to remove the Record, fo as Judgment be given before the Return of it; Per Cur. Vent. 255. Hill. 25 & 26 Car. 2. B. R. Baker v. Bulftrode.

Judgment, when ever it is entered, *has relation to the Day in Bank*, viz. the firft Day of the Term; fo that a Writ of Error returnable after will remove the Record, whenever the Judgment is entered; Per Hale Ch. J. Mod. 112. pl. 9 Pafch. 26 Car 2 B. R. Anon.

40. A Writ of Error may be brought *before the Writ of Inquiry is returned in an Ejectment*; for in that Action the Judgment is compleat at the

the Common Law before it is returned; for the Judgment is only to gain Possession. And *so* it is in a Writ of *Dower*; *But in Trespass, where Damages only are to be recovered*, the Judgment is not compleat till the Writ of Enquiry is returned, nor can be made up before, as in this Case it may; but here being no compleat Judgment entered, there being no Capias which ought to be in all Actions Quare Vi & Armis, that the King may have his Fine, which he cannot otherwise have if the Party does not proceed in his Writ of Enquiry, the Writ of Error is brought too soon, and Plaintiff may proceed to Execution in C. B. because the Compleat Record is not here; Per Roll J. and bid them advise what to do in C. B. for it is mischievous either way. Sty. 109. Trin. 24 Car. B. R. Glide v. Dudeney.

41. Error *retornable the same Term* in which Judgment was given, is good when the Record is removed; Per Twisden J. Sid. 104. Hill. 14 & 15 Car. 2. B. R.

42. Defendants in *Indictment* in B. R. were found guilty, and after View Judgment there, brought Writ of Error there, but upon Search and of the Roll there was only *Judgment entered Quod Capiatur*, and therefore the Court directed that the Writ of Error shall *not* be *allowed till the Defendants come in proper Person*, and in the Interim Process shall be made against them to come in to hear their Judgments. Sid. 208. pl. 2. Trin. 16 Car. 2. B. R. The King v. Cornwall & Ux.

43. Hale said, that about three Years since at Norfolk Assizes, the *Defendant in an Indictment of Barretry brought a Writ of Error Teste before the Assizes*, and it was disallowed, because if such Practice should obtain it would disappoint all the Proceedings at the Assizes. Vent. 255. Hill. 25 & 26 Car. 2. B. R. in Case of Baker v. Bulstrode.

19. A Writ of Error will lie on a *Judgment in Ejectment quod recuperet* &c. *before a Writ of Inquiry executed*, for that is only as to the Damages; Per Holt Ch. J. Carth. 205. Hill. 3 W. & M. in B. R.

44. 10 *W.* 3. *cap.* 14. *S.* 1. *No Fine or Common Recovery, nor any Judgment in any real or personal Action, shall be reversed or avoided for Error, unless the Writ of Error, or Suit for the reversing such Fine, Recovery or Judgment, be brought and prosecuted with Effect within 20 Years after such Fine levied, or such Recovery suffered, or Judgment signed or entered of Record.*

45. Error of a Judgment in Debt *upon a Bond* in C. B. and the Error assigned was, that it was a Bond *for Appearance taken by the Plaintiff Colore Officii*, and it was no where said that the Plaintiff was a Sheriff but only that he took the Bond, *per nomen Vicecom'*; Holt said, then you should have pleaded the Statute and that matter, and now you are too late and Judgment was affirmed. 12 Mod. 634. Hill. 13 W. 3. Jones v. Sweetapple.

(N) *How* the Writ shall be *brought*.

1. **If a Writ of Error be brought in this Manner, videlicet, This is** directed to Sir Edward Littleton, (**he being** then Chief Justice **de Banco**) to certify a Judgment in Querela, quæ fuit coram Vobis et Sociis vestris **where** it was before Sir John Finch, **then Chief Justice** the Predecessor **of Sir Edward Littleton is, this Writ shall abate. Tr.** 16 **Car. B. R. between** *Lowes and Webble*, **adjudged per Curiam.**

2. So

. So if a Writ of Error be directed to Oliver St John, he being Chief Justice de Banco, to certify a Judgment in querele, quæ fuit coram Vobis et Sociis vestris, where it was before Edmund Reeves and Sociis Suis, there not being then any Chief Justice; this is not good, but the Writ shall abate. Hill. 1649 Several Writs abated for this Cause.

3. But if a Writ of Error be directed to Peter Pheasant, to certify a Judgment in Loquela quæ fuit Coram vobis et Sociis vestris, where it appears by the Record that it was held Coram Edmundo Reeves et Petro Pheasant, this is a good Writ; for though in the Return Edmund Reeves is first named, yet this is well enough, inasmuch as Peter Pheasant is also named, and it does not appear which of them was the eldest. Hill. 1649. between *Clarke and Sprigg* adjudged, Intratur P. 1649. Rot. 458.

4. If a Writ of Error be directed to the Mayor, Aldermen and Recorder of Lanceston in Cornubia, and the Record is certified by the Mayor, Aldermen, and Deputy-Recorder, the Court being held by Letters Patents, this is not well certified, inasmuch that this ought to be certified in the Name of the Judges of the Court; and it does not appear that the Recorder had Power to make a Deputy by the said Letters Patents. Hill. 1649. between *Sprye and Mill*, adjudged, and the Writ abated accordingly. Intratur P. 1649. Rot. 208.

Sty. 183. S. C. adjornatur —— Ibid. 203, 204. S. C. and the Writ was abated.

5. In a Writ of Error to *reverse an Outlawry*, it is *not mention'd at whose Suit* he was outlawed, *nor in what Action*, and yet held good, because of the many Precedents. 4 Rep. 93 b. cites 4 E. 4 44. Paston's Case.

In such Case he need not shew in what Action it was; Per Coke Ch. J. Roll Rep. 22. cites S. C.

6. But in the Principal Case where the Writ of Error was brought to remove a Judgment in quadam Loquela by Writ of certain Land and Pasture, and shews not in what Action this Plea was, the Court for that Reason adjudged, that the Writ should abate. Roll Rep. 22. pl. 27. Pasch. 12 Jac. B R. Watson v. Bernard.

2 Bulst. 212. Pasch 12 Jac Osborn v. Makeburne. S P. exactly, and the whole Court were clear of Opinion that it ought always to be shewn in what Action the Judgment was given, and for such Omission the Writ of Error was quashed.

7. A Writ of Error *directed to the Chief Justice de Banco* upon a Judgment given in a *Quare Impedit by Judges of Assise*, and held good; and the Plaintiff in Error had a Superſedeas, viz. non Molestandum to the Metropolitan to surcease Execution until the Error was discussed, and this issued out of the Common Pleas, and the Defendants sued a Scire Facias Quare Executio non &c. against the Bishop and Incumbent; at the Return whereof the Plaintiff came and assigned his Errors. Dyer. 76. b. 77. a. Mich. 6 E. 6. Hensloe v. Keble.

8. A Writ of Error was brought *directed to Sir A. Brown Ch. J. of C. B.* but *before the Return of the Writ Sir A. was remov'd, and Sir J. Dyer made Ch. J.* there, this was held ill, and the Plaintiff was forced to bring a new Writ of Error De Recordo quod Coram Vobis residet. D. 173. b. pl. 16. Mich. 1 & 2 Eliz. Kirk v. Parrott.

9. When a Writ of Error is brought to reverse a Fine, there *must be one Writ sent to the Ch. Justice de Banco*, another *to the Custos Brevium* to certify Transcriptum pedis Finis cum omnibus eundem Finis tangen'; and another *to the Chirographer* to certify Transcriptum Notæ Finis. 5 Rep. a. 39. b. Trin. 34 Eliz. B. R. Tey's Case.

Cro. E. 891. pl. 8. Andrews v. Ld. Cromwell. S. C. & S. P. resolv'd that the Writ was not good for that Reason, and that it should abate; but Fenner e contra. And though in 5 E. 6. D. Cro. b. 77. a. pl. 34 &c. Mich. 6 E. 6. Henflow and Stanby v. Keble.] where a Judgment was in Quare Impedit before the Justices of Nisi Prius, by the Statute of Westm. 2. and Error thereof being brought, Exception was taken, because he does not shew in the Writ where the Judgment was, and yet held to be good; For there the Record began, and remained in the Common Bench, and where the Judgment was, was not material; Bnt in this Case, the Record was not at first in the Common Bench, and therefore he ought to shew How it came thither. And Gawdy said, when the Record begins in one Place, and is finished in another, there of Necessity, in a Writ of Error, the Proceedings in both Places ought to be mentioned.

And Yelv. 3. a Diversity was taken between the Case of an Assise, and a Quare Impedit; for the Assise ought to be commenc'd originally before the Justices of Assise, and so by Presumption and Intendment, Judgment given also before them, and not in C B unless upon Adjornment; and therefore if Judgment be given in C. B. it ought to be appriz'd certainly how the Record of Assise came into C B. But in Error to remove a Record of a Quare Impedit the Writ is not of such Precise Form, because the Action originally commenc'd before the Justices of C B and by Intendment Judgment given there, though by the Statute to avoid a Lapse Judgment may be given before the Justices of Assise.

10. If an *Assise be summoned before the Justices of Assise*, and *they are after removed, and the Chief Justices of B. and another Justice, are made Justices of Assise in the same County, and the Assise is taken before them, and propter Difficultatem adjourned into B.* and Judgment there given for the Plaintiff, and a Writ of *Error is directed to the same Ch. J.* before whom the Assise passed, reciting the Assise summoned before the Justices of Assise by Name; & postmodum capt' before the Ch. J. &c. but does not recite how the Assise came in B. viz. by Adjournment or otherwise, this Writ of Error is not good, for as it took Notice of the Change of the Justices a fortiori it *ought to take Notice of the Adjournment*, for by that both the Judges and Court were changed. Yelv. 3. Pasch. 44 Eliz. Ld. Cromwell v. Andrews. Adjudged per totam Curiam against the Opinion of all the Cursitors; but Yelv. 6. in the same Case it was adjudged that *the Record was removed by this bad Writ, and* that *the Party might have a new Writ de Recordo quod coram nobis residet.*

11. In the 5 E. 6. where *Judgment in a Quare Impedit* by the Statute of Westm. 2. was given *by Justices of Nisi Prius*, and a *Writ of Error thereof brought without shewing where the Judgment was given*, it was held good; for the Record beginning and remaining in C. B. it was held not material where the Judgment was given, per Curiam; and Gawdy said, When the Record begins in one Place, and is finished in another, there of Necessity in a Writ of Error the Proceedings in both Places ought to be mentioned. Cro. E. 891, 892. pl. 8. Pasch. 44 Eliz. in Ld. Cromwell's Case.

12. Error brought *as Cosin and Heir of C. Earl of Devon to reverse a Fine levied by the said Earl*, and Errors were assigned, and a Scire Facias ad audiend. Errores but he does *not shew either in the Writ of Error or in the Sci. Fa. how he is his Cousin.* Resolved it was good enough without shewing the same in any of the said Writs, for the one is but a Commission to hear the Errors, and needs not such Certainty; And the other is but a Writ founded thereupon, and therefore *how Cousin, need not be shewed in them.* Cro. J. 160. pl. 15. Pasch. 5 Jac. B. R. Champernoon v. Godolphin.

13. *Nor is it requisite that the Title be shewed therein, unless* it be *in a special Case* varying from the Common Course; *As where an especial Heir in Tail brings a Writ of Error, or be in the Remainder*, because he is to entitle himself, he *ought to shew specially how Cousin, or how he has the Remainder*, but otherwise not. And although in some Writs it is shewn how Cousin, as in Dennet's Case, and is good enough, yet it is not of Necessity; And the omitting thereof is no Cause of abateing the Writ. Cro. J. 161. Pasch. 5 Jac. B. R. in Case of Champernoon v. Godolphin.

God 248. pl. 345. Heydon's

14. If a Writ of Error be brought *upon a Judgment in an Assise capt' coram J. Fleming nuper capital' Justiciar' ad placita*, & J. Doderidge

deridge uno Justiciar' ad placita coram nobis tenend' assignat' Justiciar' nostris ad Assisas, this Writ is naught, for there was no such Record before Fleming Justiciar' ad placita, the Words Coram Nobis Tenend' Assignat' being omitted, and those after Doderidge cannot refer to the first; adjudged per Curiam præter Doderidge. Cro. J. 341. pl. 7. Pasch. 12 Jac. Sir Christopher Heyden v. Godsalve.

Case S. C. & S P. and Crook agreed with Doderidge, but Haughton and Coke Ch. J. e contra.

15. A Writ of Error was brought *in Recordo & Processu Assisæ &c. inter A. and B. summons'* Exception was taken because he did *not shew which was Plaintiff* and which Defendant in the Writ of Error, nor in the Assise; Sed non Allocatur, because the Precedents are both Ways. Cro. J. 341. Pasch. 12 Jac. Heyden v. Godsalve.

16. A Writ of Error was brought *to remove a Record in Curia Manerii de Cuttinby*, where *the Record was in Curia Custodum Libertatis Angliæ Authoritate Parliamenti de Cuttingby*. It was moved that here was a *Variance* between the Writ and the Record; But per Roll there is no direct Opposition between them, for they both may stand together, and though de Facto it is the Court of the Lord of the Manor, yet Virtually and in Dignity it is the Court of the King. Sty. 344. Mich. 1652. Beckwith v. Moyle.

17. Writ of Error *to certify the Record of a Plaint held before the Mayor and Aldermen, and the Mayor and Constables of the Staple of Bristol, and also before the Sheriffs and Bailiffs*, Mayor and Commonalty of the said City &c. and this was *directed to them & eorum cuilibet*, and *the Record certified was only by the Sheriffs and Bailiffs*; but adjudged to be well, for that it shall be taken distributively, viz. That the Record of a Judgment, upon a Plaint held before the said Officers or either or any of them should be certified; And Judgment was affirm'd. 2 Sand. 291. Hill. 22 & 23 Car. 2. Gay v. Adams.

Vent. 109. Guy v. Adams, S C. but S P. does not appear —— S C. cited as held accordingly. 2 Ld. Raym. Rep. 1200.

(O) *What* shall be *a Removal of a Record.*

1. If a **Writ of Error be brought in Banco Regis** to remove a Recovery of the Manor of M. in M. cum pertinentiis, **where** the Record **of the Recovery** is of the Manor of M. cum pertinentiis, **yet the Record is well removed. Co. 3. Marquess of Winchester, 2. adjudged per Curiam, for upon such Writ the Recovery is reversed.**

2. *Debt* was brought *by F. against E. Feme and Executrix of J. N.* and he recovered, and she brought *Writ of Error* and removed the Record, and the Writ *made mention of Record between the Feme and J. N. the Testator*, and *not between the Feme and F. who recovered*, and it was doubted where the Record remains, and the Opinion was that it is in B. R. because the Roll in C. B. makes mention that it is removed; Quære; For Per Babb. it may be amended; Quære inde. Br. Error, pl. 5. cites 9 H. 6. 4.

3. In *Partition* the *Judgment was, Quod fiat Partitio*, but *before the final Judgment was given a Writ of Error was brought*, and it was held that the Record was not removed for that Cause, whereupon the Writ of Error was quashed. 3 Salk. 145. pl. 2. Mich. 12 W. 3. B. R. Finch v. Renew.

Ld. Raym. Rep. 610. Finch v. Ranow. S C. ruled accordingly.

4. A Judgment in C. B. given after the Return of a Writ of Error is not removed, and Nul tiel Record may be pleaded to a Scire Fac. Quare Executio non brought upon it to compel the Plaintiff to assign Errors. 2 Ld. Raym. Rep. 1179. Trin. 4 Ann. B R. Willson v. Ingoldsby.

5. One

5 *One of the Defendants brings a Writ of Error without the other*, tho' the Writ shall be quashed, the Record is removed. 2 Ld Raym. Rep. 1403. Trin. 11 Geo. Ginger v. Cowper.

(P) *Record removed.*

What Thing shall be *removed thereby.*

* Br. Record, pl. 46. cites S. C.

1. If a Writ of Error upon any Judgment but a Fine be brought in B. R. the Record itself shall be removed there and not the Copy only. 22 E. 3. 6. per Thorpe. * 40 Aff. 29.

‡ Fitzh Error, pl. 76. cites S C. ——Br. Protection, pl. 62. cites S. C. more fully

† Fitzh. Record, pl. 11. cites S C.

2. In a Writ of Error upon a Fine levied in Banco the Transcript only shall be removed in Banco Regis, because if the Record itself should be removed, there is no Chirographer in Banco Regis to engross it, and then no Quid Juris clamat could be brought, if it should be affirmed there, for this lies only in Banco and does not lie there, and this shall not be removed out of the King's Bench after it comes there. ‡ 21 E. 3. 24. † 22 E. 3. 6. adjudged.

—— S. P. by Coke Ch. J. Godb. 248. Pasch. 12 Jac. B. R.

* Fol. 753

Fitzh Error, pl. 76. cites S. C

3. But if in B. R. they conceive the Fine is to be reversed, they may * send for the Note itself and reverse it. 21 E. 3. 24. D. 1. Ma. 89. 4.

——Fitzh. Protection, pl. 62. cites S. C.

Fitzh Record, pl 11. cites S. C and says Vide 40 Aff and 16 E. 3.

4. Where they may send a Writ to the Treasurer and Chamberlains to draw the Fine off the File. 22 E. 3. 6. adjudged.

Br. Parol ou Ple &c. pl. 6. cites S C —— Br Conusance, pl. 61. cites S C

5. If a Writ of Error be brought in B. R. upon a Fine levied in the Hustings of Oxford, the Record itself shall be removed. 50 Aff. 9.

When a Writ of Error is brought, the Court said that there is no Occasion to bring it into B. R but only the Record, and the original Writ, and the Warrant of Attorney, and not the Essoin Roll, unless Diminution be alleged. Br. Error, pl. 138. cites 1 H. 7. 21. —— Fitzh. Error, pl. 10 cites S. C.

6. If a Writ of Error be brought in Banco Regis to reverse a Judgment given in Banco, the Original shall not be removed if it be not by Special Matter, as if Error be assigned in the Original. 24 E. 3. 24. b.

7. If a Writ of Error be brought in B. R. upon a Judgment in an Inferior Court against the Plaintiff, there the Court may reverse the Judgment, though the Original be not removed, no Error being assigned in the Original, for this is removed but to sue here upon the same Original. 37 Aff. 5. adjudged.

Br. Error, pl. 27. cites S. C. —— S. C. cited 2 Bulst. 163

8. If a Writ of Error be brought in B R. upon a Judgment in Ireland, the Original shall not be removed. 37 Aff. 5.

—— It is only a Transcript which is sent hither, because it must come over

over the Sea, and so in Danger of being lost; Arg. Quod fuit concessum, per Coke and Doderidge. Roll Rep. 1- Pasch. 12 Jac. B. R. —— Cro. J. 535. S. P. per Cur. Pasch. 17 Jac. pl. 19. in the Bishop of Osary's Case.

9. Upon a Writ of Error in Parliament upon a Judgment in B. R. the Roll in which the Record is shall be brought into Parliament by the Chief Justice himself. 22 E. 3. 3.

10. When a Writ of Error is brought in Parliament upon a Judgment given in B. R. the Chief Justice de B. R. shall carry with him in Parliament the whole Roll, in which is contain'd the Plea and Process in which the Error is supposed, and there shall leave a Transcript of the Record in which the Error is assigned, and shall carry in B. R. the Roll itself, because the Roll concerns other Matters &c. and for that if the Judgment be affirmed the Court of B. R. may proceed upon the Record, there to grant Execution, and therefore if the Record itself should be removed, and Judgment there affirmed, and the Parliament be dissolved, there could not be any Proceedings thereupon to have Execution. 1 H. 7. 19. D. 23 El. 375. 19.

Same Cases cited Godb. 249. but it was answered, that it is at the Pleasure of the Parliament to have either the one or the other. —— S. C. cited Cro. J. 341. pl. 7 —— 2 Bulst. 166.

S. P. —— Ibid. 173. same Cases cited, and 10 H. 6. —— 4 Inst. 21. cap. 1. S. P. and that after the Transcript is examined, the Ch. J. carries back the Record itself into B. R.

11. A Writ of Error *in all Cases (except* the Case *of a Fine)* removes the Record; for it takes it out of the inferior Court to the superior. In the Case of a Fine, the Transcript only is removed upon the Writ of Error. Jenk. 31. pl. 61. cites 26 Aff. 24.

12. The *Common Bench upon a Writ of Error* does not send but the *Transcript* of the Writ and Record, and not the Original itself; Per Knivet. Br. Error, pl. 127. cites 34 Aff. 7.

S. C. cited Arg. 2 Bulst. 163.

13. *But Ancient Demesne, Franchise,* and *Justices of Assise,* upon Writ of Error send the Original Writ and Record itself, and not the Transcript; Per Knivet. Br. ibid.

14. *But* by 37 Aff. 5. *Ireland* does not send the Original itself, but the Transcript; Per Finch there. Br. ibid.

15. Upon a Writ of Error the Record itself shall be removed, and not a Transcript of the Record, for *upon the Transcript Error cannot be assigned, unless* it be in a Writ of Error sued *upon the Transcript of a Fine,* that Errors may be assigned upon the Transcript of the Note of the Fine; and if the Justices think that this is Error then they shall send for the Note of the Fine and reverse it. F. N. B. 20. (F)

16. By the Writ of Error *all is certified which is with the Ch. J.* of C. B. *which is only the Body of the Record*; but the Original and Judicial *Writs remain with the Custos Brevium*; *and other Officers,* which are never certified but where Error is assigned for want of them. Cro. E. 84. Hill. 30 Eliz. B. R. in Case of Robsert v. Andrews.

17. In Case of Error *upon Indictments* to reverse them *the Body of the Record itself is to be removed*, and a Transcript of it is not sufficient; Per Williams J. And per Fleming Ch. J. If the Error be *assigned in the Outlawry*, only Dimunition may be alleged, there being only a Transcript of the Record, but if the Errors be *assigned upon the Outlawry, and also upon the Body of the Indictment*, here in this Case the Body of the Record ought for to be removed, and to be in Court, and a Transcript is not sufficient, and so it was in this Case, and therefore by the Rule of the Court, a Certiorari was granted for to remove the Record itself, and that afterwards Dimunition may be alleged. Bulst. 181. Pasch. 10 Jac. B. R. Baker v. Baker.

18. A Writ of Error *lies in Parliament upon the Transcript of the Record*, without bringing the Record into Parliament, for the Parliament is holden at the King's Pleasure, and may be dissolved before the Errors are discussed, and so the Record itself cannot be brought here again, because the Parliament, which is a higher Court, was once possessed of it; Agreed per tot. Cur. Godb. 247. pl. 345. Pasch. 12 Jac. B. R. and cites 8 H. 5. Error 88.

19. The *usual Form* of all Writs of Error *is to certify Recordum & Processum*, and *yet they do only certify the Declaration and the Pleas* omitting the Writs. And the Record shall be intended the Principal Record, and not the Writ and Process. Bridgm. 57. Hill. 12 Jac. cites 11 Rep Metcalf's Case, and the Words of the Writ of Error, "Si "Judicium inde redditum sit" shall be taken to be the Principal Judgment.

20. There is no *Difference between a Writ of Error upon a Fine, and* upon *another Judgment*; for where it is brought *to reverse a Fine the Transcript of Record is only removed*; for none can have the Record of the Fine but C. B. But otherwise it is where the Writ of Error is to reverse another Record there; And yet in both Cases the Record or Roll in C. B. is not sent out of C. B. for it remains there, but the Difference is in the entering of them; For when the Writ of Error is brought to remove the Record out of C. B. into B. R. the Entry is "Mittitur Transcriptum Recordi." Per Ley Ch. J. 2 Roll Rep. 253. [233] Trin. 19 Jac. B. R.

21. A Writ of Error was brought *upon two Judgments* given *in an in an inferior Court*, and *they returned two Records between the same Parties, but* it seems *not those which the Plaintiff intended*, and this was complained of to the Court; and it appeared that *those, which the Plaintiff brought his Writ of Error upon, were not determined*; *for Writs of Inquiry of Damages were returned, but no Judgments entered.* Per Curiam, If there be divers Records between the same Parties, the inferior Court may remove which they please, they being warranted by the Writ so to do; and here was an Omission in the Plaintiff, that he did not see that Judgment was entered; for after a Writ of Inquiry of Damages returned, the Court is to give Judgment at the Prayer of either Party, and not without. Vent. 96. Mich. 22 Car. 2. B. R. Prydyerd v. Thomas.

Sid 466. pl. 1. Bridier v. Thomas, S. C. says that there were four Causes between the same Parties, and the Plaintiff pray'd the Steward to certify the two last Causes, but he certified the two first, and omitted entering Judgments in the last till the Return of the Writ of Error was past. And per Twisden J. in such Case the Steward may certify which he pleases without any Contempt; But in Case no Judgment was given before the Return he may return the special Matter, viz. That the Writ of Error was returnable such a Day, before which no Judgment was. —— Raym. 189. Rinch's Case, S. C. resolved accordingly, and that the Steward could not certify the two last, because no Judgment was given upon them, and the Writ of Error commands to certify Si Judicium redditum sit, and the Defendant might have helped this by moving the Court below, after Costs taxed, to have Judgment entered in the two last Actions as well as the Plaintiff; For Judgment ought to have been given at the Request of either Party, and so the Contempt was discharged.

22. In an Action of *Wast brought in the Hustings* in London, there *was a Verdict for the Plaintiff*, which being after *quashed for the Insufficiency, and a new Venire awarded*, whereupon a *Verdict was given for the Defendant*, and Judgment for him, and a Writ of Error being thereupon brought before special Commissioners, it was resolved that *the first Verdict should be certified in the Record, because it was not set aside, for that the Jurors had found against Evidence, or for any undue Practice or Misfeasance of the Parties*, but only for the Insufficiency thereof in Point of Law, which the Court had adjudged upon the Verdict appearing before them upon Record. 2 Saund. 254. Mich. 22 Car. 2. Green v. Cole.

23. If

23. If the *Record varies from the Writ of Error*, yet the inferior Court ought to remove it. Vent. 97. in a Nota Mich. 22 Car. 2. B. R.

24. In *Debt upon a Record in an inferior Court*, if the Defendant *pleads Nul tiel Record*, they shall certify only Tenorem Recordi, and grant Execution afterwards. Vent. 212. Pasch. 24 Car. 2. B. R. Anon.

25. It is the true Record which *comes here out of Ireland*, and not the Transcript, but * *when it comes here* it is the true Record, and not before, and *that* which is in Ireland *ceases to be a Record*; And *so* it is of *a Record of C. B.* that comes hither by Writ of Error; Per Holt Ch. J. 12 Mod. 255. Mich. 10 W. 3. B. R. Coot v. Linch.

* Yelv. 118. S. P. —— S. P. and it is no Objection that it should be the Transcript for Fear of the Peril of the Sea, for one might object in the same Manner, that upon Error in C. B. the Transcript only is removed hither for Fear it should be burnt or lost before it comes into B. R. But in Fact, when the Record in both Cases arrives here, then it is the true Record, and not before; and that which is in Ireland or C. B. ceases to be the Record; Per Holt Ch. J. Ld Raym. Rep. 427. Hill. 10 W. 3. Coot v. Linch.

(Q) *Quod coram vobis resídet.*

When a Writ of *Error* shall *abate.*

In what Cases the Record is so removed, that this Writ lies.

1. If a Record be removed by Writ of Error out of one Court into another, if the Writ of Error be abated the Plaintiff may have a Special Writ of Error Quod coram vobis Residet &c. 3 H. 6. 3. 26.

Br. Error, pl. 4 cites S. C. —— Fitzh. Record, pl 16. cites S C.

2. If the Writ of Error be disagreeable to the Record of the Judgment or otherwise bad, yet if the Record be removed by it, another Writ Quod coram vobis residet lies. M. 3 Ja. B. R. per Curiam.

3. If the Writ of Error mentions the Judgment to be in loquela inter A. and two others, where it was between A. and the two Persons, and another Person also not named, the Writ shall abate, and the Record is not removed to have a Writ of Error, Quod coram vobis residet, but he ought to have a new Writ. H. 1649. adjudged in a Writ of Error. Intratur M. 23 Car. B. R. Rot. 242. between *Worgon and Kedwin*, and the like Judgment given the same Term between *Hacker and Whatten*, where the Writ of Error mentions Five, and the Loquela was between Seven, so two of them were not named.

4. If the Addition of the Mystery of one of the Parties be mistaken in the Writ of Error, by which it abates, the Record is not removed so as to have a Writ of Error Quod coram vobis residet; as if the Plaintiff in the first Action be named A. B. de London, Citizen and Sadler, and the Writ of Error is to * remove a Record in loquela inter A. B. de London, Citizen and Salter &c. the Record is not removed by this, but shall abate, and a new Writ of Error shall be awarded de novo. D. 1 El. 173. 16.

* Fol. 754.

5. If

Br. Error, pl. 5. cites S. C. —— Fitzh. Error, pl. 21. cites S. C.

5. If the Writ of Error abates for Mistake of the Name of either Party, there no Writ of Error Quod Coram &c. lies, for that the Record is not removed thereby. 9 H. 6. 4.

Br Error, pl 5. cites S C —— Fitzh Error, pl. 21. cites S. C.

6. As if F. recovers in Debt against the Executor of B. and the Executor brings a Writ of Error of a Record between the Executor and B the Testator, where it should be between the Executor and F. by which it abates, no Writ Quod Coram, &c. lies, for that the Record is not removed. 9 H. 6. 4.

7. If a Man 3 Jac. sues a Writ of Error to reverse a Judgment given in the time of Queen Eliz. and the Writ is Judicium redditum in Cur' nostra, by which is intended in the time of King James, (in whose Time the Writ of Error is brought) for which the Writ is abated, it seems that he cannot have a Writ Quod Coram vobis resident, but ought to have a new Writ of Error, for the Record is not removed, for there is not any such Court mentioned. M. 3 Ja. B. R. Dubitatur.

11 Rep. 41. b. Metcalf's Case, S. C. & S. P. unanimously resolved. —— Roll Rep. 33, 34. pl. 33. S. C. & S. P.

8 If Judgment be given in an Account quod computet, and before the second Judgment a Writ of Error is brought in B. R. where the Writ is abated, because it does not lie before the second Judgment, the Record is not removed by this; For the Writ commanded them to send the Record, Si Judicium inde redditum sit, but no Judgment was given here, upon which the Writ of Error lies thereupon. M. 12 Ja. B. R. between *Wood and Metcalf*, per Coke.

* Br. Error, pl 4. cites S C. —— Fitzh Record, pl. 16. cites S. C.

9. This Writ may be awarded by the Court, in which the Record is returned. 3 H. 6. 3. * 26.

Cro. J. 384 pl. 14 Sandelow v. Peverton, S C in the Exchequer-Chamber, and S P held accordingly. —— Roll Rep 294, pl. 9. S C. and S. P. held accordingly by Coke and Haughton. —— Hob. 72. pl. 85. Forest v. Sandland, S C. adjudged.

10. If Judgment be given against J. S. in B. R. and he and his Bail bring a Writ of Error in Camera Scaccarii, which is of a Record between J. S. and the Bail &c. this does not remove the Record, because the Bail are not parties to the Record. H. 13 Ja. B. R. between *Verton and Sir James Sandeloe.*

Cro C. 561. pl. 5 the Court doubted, and would advise, whether the Bail might have a Writ of Error, Quod coram vobis resident Mich. 15 Car B. R. Anon. —— Lev 137. Trin. 16 Car. B R. Atherton v. Hole, S. P. adjornatur; But Twisden J. cited Hill. 21 Car B R. Rot 217 that by Writ of Error brought by the Bail the Judgment against him only may be removed; but said, that in the principal Case, there being no Judgment against the Bail, nothing is removed, because Judgment against him is not yet given.

11 If the Bail bring a Writ of Error as well upon the principal Judgment as in the Judgment against them upon a Judgment in Banco, or in an inferior Court, and the Writ abates, because it does not lie upon the principal Judgment, it seems the principal Judgment is not removed by this, but it seems that the Judgment against the Bail is removed, so that the Bail may have a Writ of Error quod coram vobis resident. M. 15 Car. B. R. between *Williams and Worral*; a Doubt among the Justices.

Error in Boston to reverse a Judgment given there upon a Scire Facias grounded upon a Recognizance entered into by the Defendant, as Bail for one Townsend at the Suit of the Plaintiff; The Court of Boston do certify not only the Judgment upon the Scire Facias, but also the principal Judgment, and all Proceedings therein, and resolved good enough, because if they should certify only the Judgment in the Scire Facias it could not well be understood by this Court, because in inferior Jurisdictions there are not several Rolls to enter the Judgment for the Principal, and another for the Scire

Scire Facias, and another for the Bail, but all Proceedings, as well against Defendants as against the Bail, are entered (for the most part) in a Book, and never entered at large, unless when a Writ of Error is brought, and then they make up an intire Record, and not otherwise; and Judgment was affirmed. Raym. 431. Pasch. 33 Car. 2. B. R. Johnson v. Taylor.

12. If a Writ of Error be brought in B. R. to reverse a Judgment given in Banco, and in the Writ the Sum of the Damages in the first Action is mistaken, though a Mittitur be entered upon the Record upon the Receipt of the Writ of Error, yet the Record is not removed by it. H. 7 Ja. B. between *Stocker and Kemish*, per Curiam.

13. If the Judgment be given in Banco tempore of one King, and the Writ of Error brought tempore of another King, and the Writ of Error be to remove a Record in Loquela quæ fuit in Curia nostra; et coram Justiciariis nostris, et per breve nostrum, between the Parties, and thereupon the Record is certified in B. R. yet it is not removed de Banco, so that no Writ of Error lies in B. R. Quod Coram vobis residet. D. 1. 2. Ma. 106. 16.

Roll Rep. 200. pl. 2. Trin. 13 Jac. B. R. Lord v. Bethel, S. P. agreed per Curiam, that it is not good. —— Bridgm. 56 S. C. & S. P.

14. If the Writ of Error mentions the Judgment to be Coram the Constable and Bailiffs, and the Record is, that it was Coram the Deputy Constable and Suitors, and not the Bailiffs, the Record is not removed, but it ought to be abated, and a new Writ of Error to remove it. P. 1649. between *Worgan and Kedgwin* adjudged. Intratur M. 23 Car. B. R. Rot. 241.

See Sty. 131. Mich. 24 Car. Exception taken on the like Point, in the Case of Tomkins v. Jourden, Curia advisare vult.

15. If a Writ of Error be brought in B. R. in Hibernia, upon a Judgment * given in Banco there, and upon this the first Judgment is reversed, upon which a Writ of Error is brought in B. R. in England upon the Judgment given in Hibernia, and in this the Judgment given there reversed, and that the Judgment given in Banco in Hibernia shall stand in its Force; If there be Error in the Judgment given in Banco in Hibernia, Writ of Error may be brought in B. R. in Hibernia [Anglia] in Recordo quod Coram vobis residet, though the Record itself is not removed, but only the Transcript, for the Danger of the Miscarriage over the Sea. Tr. 5 Ja. B. R. between *Comyn and St. John*, agreed.

* Fol. 755.

Yelv. 117. Seint-john v. Comyn, S. C. the Court after much Debate granted that they should have a new Writ Quod coram vobis residet, de bene esse.

16. If a Writ of Error brought in Camera Scaccarii upon a Judgment given in B. R. by the Statute of 27 El. be abated by Death or otherwise, it seems that no Writ lies there quod coram vobis residet, for upon this Writ of Error the Record itself was not removed, but only the Transcript, and therefore he ought to have a new Writ of Error. Dubitatur H. 13 Jac. B. R. between *Verton and Sir James Sandeloe*. Mich. 19 Jac. in Scaccario, adjudged per Curiam.

Cro. J. 384. pl. 14 Sandelow v. Deverton, S. C. in the Exchequer-Chamber resolved accordingly. Roll Rep. 294. S. C. & S. P. per Coke and Haughton. —— Hob 72 pl. 81 Forest v. Sandland, S. C adjudged. —— Error Coram vobis lies on Affirmance of a Fine in B. R. 1 Salk 337 Winchurch v. Belwood.

18. If *Record* be *removed out of* this Court of *C. B. into B. R. by Writ of Error, and Scire Facias is brought against the Party, and after the Plaintiff in the Scire Facias is nonsuited, and the other brings Scire Facias to have Execution, and the other shews Writ of Error, Quod penes illos residet*

refidet and affigns Errors, yet the other ought to have Execution without Anfwering to the Errors. Br. Faux Judgment, pl. 9. cites 21 H. 6. 34.

19. *But if he will firft fue Writ of Error* and pray Scire Facias againft the Party, and after be nonfuited, there if the other fues Scire Facias to have Execution, the Party who was nonfuited fhall have Writ of Error Quod coram vobis refidet and affign his Error, *Contra in the Scire Facias.* Br. Faux Judgment, pl 9. cites 21 H. 6. 34.

20. *And* fo there feems *a Diverfity where he fues Scire Facias and is nonfuited*, and where he *prays Scire Facias and does not fue it out.* Br. Faux Judgment, pl. 9 cites 21 H. 6 34.

21. A Writ of Error is *brought* of a Judgment *in the Exchequer before the Chancellor, Ld. Treafurer, and two Chief Juftices*, and *afterwards another is brought, but not quod coram vobis refidet, becaufe the Record is not removed out of the Cuftody of him who had it before*, but the Record remains in the fame Cuftody after the Writ of Error purchafed as it was before 3 Rep. 11. b. 15. b. Mich. 26 & 27 Eliz. in Scacc. Sir William Herbert's Cafe.

22. If a Writ of Error be brought *to remove a Record before the Bifhop of Durham and eight others*, and thereupon *a Record before the Bifhop and nine others is removed*, the Record cannot be examined upon this Writ, but there *ought to be a new Writ* de Recordo quod coram vobis refidet; Cro. J. 224. pl. 14. Mich. 7 Jac. Odell v. Morton.

Yelv 211. S. P. adjudged and that the Record being brought in B R was well removed and remained there.——— 2 Ld. Raym. Rep 1200 cites S C that the Record was held to be well removed; For if the Parties are rightly named, any other Variance will not hurt.

23. But upon View of the Record it appeared the *Writ was directed to the Bifhop and eight others, and eight of them only certified, and not the ninth, and it appeared not that he was dead or removed*, and therefore alfo the Writ was held to be ill &c. per Curiam. Cro. J. 254. pl. 14. Mich. 7 Jac. Odell v. Morton.

Yelv. 212. S. C. & S. P. per Cur. for that the anfwer was not fo full as the Command of the Writ and therefore ill, and the Anfwer ought to be by all unlefs fome are dead after the Writ awarded, and if fo then it ought to appear by the Anfwer of thofe that are alive.

24. *A. brought* a Writ of *Error againft B. upon a Fine*, upon which *the Tranfcript of the Fine and Proclamations are removed* in Banco, and afterwards A. is nonfuited; Now another who has Caufe may have a Writ of Error Quod coram vobis refidet. 3 Le. 107. pl. 157. Trin. 26 Eliz. B. R. in the Cafe of Ragg v. Bowley.

25. The *Plaintiff recovered in B. R.* and the Defendant brought a Writ of *Error in the Exchequer-Chamber*, and after the Record was certified, the *Writ was difcontinued*, and *then the Defendant brought a Writ* of *Error Coram vobis refidet, in the Exchequer-Chamber*; and refolved by all that it did not lie, becaufe the Writ of Error is given by the Statute 27 Eliz. in a fpecial Manner, viz. either to affirm or reverfe the Judgment, and the Execution thereof is referred to B. R. and therefore no Coram vobis refidet lies; but upon a Difcontinuance or Mifcontinuance, the Tranfcript of the Record is remanded to B. R. Jo. 14. pl. 16. Mich. 18 Jac. Polhill v. Cate.

Cro. J. 620. pl 6. Cave v. Polewheel, S C. adjudged notwithftanding feveral Precedents were cited to the contrary, which the Court faid had paffed without Debate.

26. *If a Writ* of Error *does abate upon the Plea to the Writ and the Record be well removed*, the *Party may have a new Writ* of Error *Coram vobis refidet* &c. But if the Record be not well removed, then the Party fhall not have a new Writ of Error here; Per Doderidge. Godb. 375. pl. 463. Trin. 3 Car. B. R. Carlifle Dean and Chapter's Cafe.

27. Error

27. Error was brought in the Exchequer-Chamber of a *Judgment in a Sci. Fa. by an Executor to have Execution of a Debt recovered by Testator.* The Court doubted whether this Sci. Fa. being grounded on a *Judgment* in an Action of Debt, be not within the Equity of the Statute; Advisare vult. Cro. C. 286. pl. 32. Mich. 8 Car. B. R. Nevil v. South and Delabarre.

28 Where the Writ of Error *recites truly the Names of the Parties* to the Action, *the Action itself*, and the *Thing in Demand*, though the Writ of Error abates for other Defects, a new Writ of Error De Recordo Quod coram vobis residet well lies. Jenk. 306. pl. 81.

Yelv. 6. Trin. 44 Eliz. B. R. Cromwell v. Andrews S. P. but if there is any Mistaking in the said matters it is otherwise.

29. Error to reverse a Judgment in C. B. in an Action on the Case; Exception was taken that the Record was not removed, the *Judgment in C. B.* being *given Coram Petro Phesant*, and the *Writ of Error was to certify a Record Quod coram vobis residet*; And the Court abated the Writ of Error for this Exception. Sty. 183. Mich. 1649. Gilbert v. Marden.

30. *A Writ* of Error *quod coram vobis residet is*, when a Writ of Error is brought to reverse a Judgment given in C B. or other Court, where the Record was formerly removed into the Court of B. R. and by Reason of the Death of the Party, or for some other causes rests undetermined, by reason of the abatement of the former Writ of Error. Sty. 470. Mich 1655. Anon.

31. Where a Writ of *Error abates, or is discontinued in Cam. Scacc.* the Judgment is not again in B. R. till a *Remittitur* is entred; For without such Remittitur it cannot appeal to the Court of B. R. but that the Writ of Error is still pending in the Exchequer Chamber 1 Salk. 261. pl. 1. Trin. 4 W. & M. in B. R. Howard v. Pitt.

Show 402. S C accordingly.——Carth. 236. S C. and per Curiam, unless a Remittitur is entered the Plaintiff must sue a Scire Facias.

32. A Writ of Error coram vobis was brought, *reciting the former Writ to be returnable Coram Nobis, where it was in the Time of the late Queen as well as of the King*, and therefore was quashed. *But* Holt Ch. J. said, *if* the Writ of Error had been *granted in the Time of the King and Queen, and then the Queen had died*, and then the Record had been brought into B. R. this had been such a Record as the Coram Nobis residet describes. Ld. Raym. Rep. 151, 152. Hill. 8 & 9 W. 3 Walker v. Stokoe.

Carth. 367. S C. the Court held that this Writ was no Warrant for the Court to proceed upon, and quashed it. Carth. 370. S. P. in S. C.

33. And Holt took the Distinction in Yelv. 211. that *where the Suit is to defeat a Record*, then the Variance is fatal, *but where the suit goes to another Collateral matter*, and not to defeat the Record, there it is otherwise. Ld. Raym. Rep 152. in S. C.

34. It lies *on a Judgment in B. R. for any Error in the Record, As want of an Original &c.* or concerning *Matters of Fact, as Nonage, Death of the Party*; For Error in Fact is not the Fault of the Court, therefore it may be determined by the Judges when the Record is before them. 8 Mod. 317. Mich. 11 Geo. in a Note there at the Bottom of the Page.

35. Where a Writ of Error in this Court *abates by the Death of the Parties*, another Writ of Error will lie Quod coram vobis residet, but in no other Case. 2 Barnard. Rep. 253. Pasch. 6 Geo. 2. B. R. Herne v. Bushel.

(R) *Who may assign* Error in the Thing.

The *Vouchee.*

Br. Error, pl. 39 cites S. C. —— Fitzh. Error, pl 61. cites S. C. —— Jenk. 69 pl. 31. S P. and cites S. C and 9 H. 4. 1.

1. In a Writ of Error by the Vouchee he may assign Error which was between the Demandant and Tenant. 8 H. 4. 3. b. because the whole is upon one Original.

Jenk 69. pl. 31. cites 8 H. 4. 4. and 9 H. 4. 1. that the Tenant cannot. The Vouchee may have Prejudice by this Error, but the Tenant cannot, because he has recovered in Value; If the Tenant reverses the Judgment, the Vouchee shall have a Sci. Fac. to restore the Value; If the Vouchee prevails by Means of the Writ of Error brought by the Vouchee, the Tenant shall be restored. See (K) pl. 7 supra.

2. So the Tenant may assign Error between the Demandant and the Vouchee. Contra 22 E. 4. 32.

Br. Error, pl. 39. cites S. C. —— Fitzh. Error, pl. 61. cites S. C.

3. So the second Vouchee may assign Error between the Tenant and the first Vouchee. Contra 8 H. 4. 5.

Fitzh Error, pl. 61. cites S. C.

4. If the Heir of the Husband brings a Writ of Error upon a Judgment given against him, being Vouchee in a Writ of Dower, he may assign Error in the whole Process. 8 H. 4. 5.

5. The Vouchee may assign Error in the Judgment of the Value against himself. 18 E. 3. 38. b.

Cro E. 739. pl 13. Hill. 42 Eliz. B. R. Holland v Dauntzey, S. P. held accordingly per tot. Cur. —— Palm. 123. and 224. to 258. S. C. argued by Counsel and the Court, and Judgment accordingly. —— Brtdgm. 69. Holland v. Jackson & al' S. C. argued, but the Writ abated by Death of one of the Plaintiffs in Error —— Roll Rep. 301. to 309. S. C. Arg. sed adjornatur, and afterwards the Writ abated by the Death of one of the Plaintiffs. —— Mo. 622. pl. 850. S. C. but S P. does not appear. —— All. 75. S. C. cited by Hale, and that the intire Judgment was reversed. —— See Tit. Attorney (C) pl. 4 and the Notes there.

6. If Tenant in Tail within Age, being vouched in a Common Recovery, appears by Attorney where he ought to appear by Guardian, he in Remainder may assign it for Error, because he is privy to the Record in Regard of his Interest, and the Appearance of the Infant by Attorney was void. H. 13 Ja. B. R. between *Holland and Lee.*

7. If A. recovers against three in a Dum fuit infra Ætatem, and two of the Tenants are within Age, yet all may bring a Writ of Error, and assign the Nonage for Error. Dyer 1, 2. Ma. 104. 10. adjudged.

Cro C. 517. pl. 19. S. C. and for the Defendant in Error it was insisted, that for as much as there be two several Sci-

8. If A. recovers against B. Debt and Damages, and after B. dies, and upon the Return of the Death of B. upon a Testatum a Scire Facias is awarded to the Sheriff of Kent, and another Scire Facias to the Sheriff of Surry, against the Tertenants, and the Sheriff of Kent returns C. Tertenant of the Land there, which was the Land of B. at the Time of the Judgment; and the Sheriff of Surry returns D. Tertenant of the Land there; and upon this C. and D. appear, and C. pleads that J. S. a Stranger, is Tertenant of the Land, which

which was the Land of B. at the Time of the Judgment; to which A. the Plaintiff says, That J. S. is not Tertenant of any Land &c. upon which several Pleas several Issues are joined, and several Venire Facias's, and several Trials, one in Kent and the other in Surry; and the Issue is found against C. scilicet, that J. S. was not Tertenant; and the other Issue is found for D scilicet, that he is not Tertenant; upon which several Verdicts Judgment is given accordingly for the Plaintiff A. If C. brings a Writ of Error only upon this Judgment, (*) he cannot assign for Error that D. died before the Verdict was given for him, for he is a meer Stranger to the Proceedings between A. and D. for if A. had relinquished his Writ against D. C. could not prevent it; for he hath not pleaded that D. was also Tertenant, but hath put himself upon another Plea, and this being found against him he shall not have any Advantage of any Proceeding between D. and A. Mich. 14 Car. B. R. between *Angell and Cowper*, adjudged per Curiam in a Writ of Error upon a Judgment in B. and the first Judgment affirmed accordingly, notwithstanding this Error. Intratur.

re Facias's in several Counties, they be as several Suits, the one not depending upon the other, and

* Fol. 756.

The Proceedings are several; and although there be Death &c. alleged in the one, yet it is not material as to the other Suit; nor is there any Cause that the other, against whom the Verdict is found, should assign it for Erorr, and he cited for this Point 5 E. 4. 7. and of that Opinion was Brampston, Jones, and Croke; Whereupon Rule was given that the Judgment should be affirmed.

9 *If a Man be vouched, and enters into Warranty, and loses*, he may have a Writ of Error, and *assign the Errors* which happened *betwixt the Demandant and the Tenant*, or betwixt the *Demandant and the Vouchee*. F. N. B. 21. (C)

10. And *so he in the Reversion* who prays to be *received upon the Default of the Tenant for Life*, or *for his faint Pleading*, if he be received, and pleads, and loses, he shall have a Writ of Error, and *assign the Error betwixt the Demandant and the Tenant*, or between the *Demandant and him who prays to be received.* F. N. B. 21. (C)

11. Note also, The *Vouchee may assign Error between the Demandant and Tenant*, and so of Tenant per Resceit. 8 H. 8. 4. 5. 8 H. 4. 3. But the Tenant (himself) shall not have Error, because he is out of Court. Quære 17 E. 2. Recovery in Value 32. F. N. B. 21. (C) in the new Notes there (b)

12. Writ of Error *to reverse a Judgment* given *in an Assise against A. and 19 others* Hill. 43 Eliz. but nothing being done thereupon, a *Seire Facias was sued* Quare Executionem habere non debet, returnable quinque Pasch. *A. appeared*, and *the others exacti non venerunt*; and *A. only assigns the Errors*, and this Assignment was held to be null and void, *without suing a Summons and Severance of the others.* Cro. E. 891, 892. pl. 8. Trin. 44 Eliz. B. R. Cromwell v. Andrews.

Yelv. 3. S. C. for all ought to have assigned the Errors together, and by this the Writ of Error is discontinued; but he that appeared ought to have prayed Process ad sequend' simul, and upon this Judgment of Severance ought to have ensued, for before Appearance there cannot be any Judgment of Severance without Process, but otherwise it is after Appearance.

(S) Assignee.

In what Judgment Error may be assigned.

[By Default or false Surmise.]

This seems to be misprinted, and that it should be 19 Ass. pl. 8. —— A Judgment by Default is a Judgment, but if it be erroneous it cannot be affirmed. Sty 122. Trin. 24 Car. per Roll J. in Case of Crook v. Samm.

1. A Man may assign Error upon Law in a Judgment given against him by Default. 19 Ass. 10.

Br. Error, pl. 117. cites 19 Ass. 8. S. P. and Roll seems misprinted.

2. So a Man may assign Error in Fact upon a Judgment given against him by Default. 19 Ass. 10.

Br. Error, pl. 117 cites 19 Ass 8. S P. —[and Roll seems to be misprinted,] and Brooke says, Sic vide that upon Judgment upon Default Matter in Fact may be alleged for Error. — See (P. b) infra, pl. 17. S. C.

3. As in a Writ of Mesne against two Coparceners, if one dies pending the Writ, and after both are fore-judged, upon their Default, the Survivor and the Heir of him that is dead may assign for Error the Death at the Time of the Judgment of him that is dead. 19 Ass. 10. adjudged, though it be Matter in Fact.

Cro. C. 426. pl. 17. Tyffin's Case, S. C. and it was objected, that the Death of one of the Defendants ought to have been surmised before the Issue tried, and therefore Henden Serjeant very much urged it to be an Error; But it was resolved by all the Court, that such Surmise needs not to be in judicial Process to alter it, and therefore although a Venire Facias issued against a dead Person, yet one of the Defendants being alive is sufficient, and no Cause of Error; whereupon the Judgment was affirmed.

Error of a Judgment in C. B. in Trespass of Assault and Battery were assigned; That the Action was brought against H and J. S and J. S. died before the last Continuance; It was holden, that in regard the Judgment was only against H. that the Writ should abate as against J. S. and the Judgment stand good against H. Cro E. 145. pl. 4. Mich 31 & 32 Eliz. Hill v. Tempest.

In Trespass against divers, one dies pending the Action, and notwithstanding the Venire and Distringas mentions all, and the Verdict is against all, if this Matter be surmised before Judgment, so that the Judgment be against the Survivors, it is well enough. Vent. 249. Mich. 25 Car. 2. B. R. Anon.

Assumpsit was against two Men, mean betwixt the Verdict and the Judgment one of them died, and notwithstanding Judgment was given; the Judgment was reversed; for the Opinion of the Court was, that the Death of one of the Parties did abate the Writ. Cro. E. 105. pl. 19. Trin. 30 Eliz. B. R. Meggot v. Broughton. —— It was said, that the Case is not like the Case of an Action of Trespass, for every Trespass done by many is several by each of them, but every Assumpsit is joint and not several. 2 Le. 54 pl 77 Mich. 29 Eliz. B. R. Megot v. Broughton. See (Q. a) infra, pl. 1. S. C. —— See (I. c) infra, pl. 11.

4. In an Ejectione Firmæ against Two, if after Issue joined, and Venire Facias awarded, one of the Defendants dies, and after a Verdict is given at the Nisi Prius for the Plaintiff, and after, before Judgment, the Plaintiff surmises the Death of one, ut supra, and prays Judgment against the other, and Judgment is given accordingly, without any Answer to it by the Plaintiff [Defendant]; if it be not true that he died as is surmised it may be assigned for Error; for inasmuch as the Plaintiff had made this Surmise, this being a Matter of Fact, the Plaintiff [Defendant] cannot have any Answer thereto, (the use not being thereupon to enter that the Plaintiff [Defendant] did not deny it) the Plaintiff [Defendant] hath no other Remedy but to assign it for Error. Mich. 11 Car. B. R. between *Tiffin and Lentor*, per Curiam.

5. An Action of *Trover was brought by Five*, and *before Verdict one of them died*, and *yet they proceeded to Trial, and a Verdict* was given *for the Plaintiffs, and they suggested that one of them was dead, and Judgment was given for the rest*; this was Error, for every one ought to recover according to that Right only which he had at the bringing the Action; and this differs from the Case in Trespass where one Defendant dies. Upon a Writ of Error adjudged by three Judges, (the fourth, viz Dolbin doubting) and the Judgment reversed accordingly, and Spring's Case 2 Bulst. 262. disapproved, and said the Reason of the Judgment in that Case was mistaken. Raym. 463. Pasch. 34 Car. 2. Hedgewood & al' v. Bayly & al'.

Skinn 39. pl. 7. Wedgewood v. Baily, S. C. says, that all the Court, (Dolben and the others) were of Opinion, that the Judgment should be reversed mainly upon the Reason of Read and Redman's Case 10 Rep. 134. and 2 Bulst. 262. not allowed, but thought by Pemberton that Coke's Opinion was mistaken by the Reporter, and so it was reversed. —— 2 Show. 177. pl. 173. S. C. adjornatur —— S. C cited that the Judgment could not be entered 3 Mod. 249. Arg. —— See the Stat. 8 & 9 W. 3 cap 11 S. 7. at tit. Abatement (Q a).

(T) In what Judgment; And by *whom*.

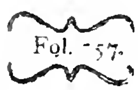
1. IN Debt the Plaintiff recovers by Judgment against B. who after dies, and upon a Scire Facias against the Tertenants, three are returned Tertenants, who appear and plead several Pleas, and thereupon there are several Judgments against them; and after one of them brings a Writ of Error, he cannot assign Error in the first Judgment given against B. as that the Judgment was not that B. sit in Misericordia, because he is not privy thereto. Tr. 9 Car. B. R. between *Hill and Witlach* adjudged, and upon such Writ of Error and Assignment the first Judgment affirmed.

2. If a Judgment be given against the Principal, and after another Judgment against the Bail in a Scire Facias, the Bail cannot in a Writ of Error assign Error in the first Judgment, because he is not privy thereto. Hill. 11 Car. B. R. between *Hardy and Brown* adjudged in a Writ of Error upon a Judgment in Rippon, but the Judgment given in the Scire Facias against the Bail was reversed.

S. P. by Roll J. Sty. 39. Trin. 23 Car. —— See (K) pl. 25. S. C.

3. If the *Defendant in the first Action dies before Ca. Sa. sued*, and *afterwards the Plaintiff obtains Judgment against the Bail in Sci. Fa.* Audita Querela lies and not Error. Ld. Raym. Rep. 27. Mich. 6 W. & M. Lampton v. Collingwood.

(U) *What Thing* may be *assigned* for Error.



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[Things contrary to the Certificate or Record, or Admittance of the Party.]

1. A Thing against the Certificate of the Justices of Record cannot be assigned. 1. M. 89. 3. Dyer 4. 5 Ma. 163. 56.

2. But otherwise where the Assignment stood with the Certificate &c. Dyer 1. Ma. 89. 3. as the Death of the Conusor before ingrossing and recording the King's Silver.

3. But

S. C. cited per Cur. Cro. J. 12. Pasch. 1 Jac. B. R. in pl. 15.

3. But if the Judge of the Nisi Prius dies before the Certificate of the Verdict and Day in Bank, and notwithstanding the Clerk of the Assise returns the Verdict, which is received and entered, he cannot after assign for Error the Death of the Justice aforesaid, because it is contrary to what the Court de Banco did as Judges. Dyer 4. 5 M. 163. 56.

4. In a Writ of Error to reverse a Fine, it cannot be assigned for Error, that the Conusor was dead before the Teste of the Dedimus Potestatem, for this is directly contrary to the Record of the Conusance taken by the Commissioners. Dyer. 1 Ma. 89.

Cro. E. 468, 469 (bis) pl. 27. S. C & S. P. agreed per Curiam. —— Ow. 21. S. C. but S. P. does not appear. —— Mo. 413. pl. 569. S. C. but not fully S. P.

5. In a Writ of Error to reverse a Fine, it cannot be assign'd for Error that the Conusor died between the Teste of the Writ of Covenant and the Return thereof, though the Conusance in this was taken by Dedimus Potestatem in the Country, although it was objected that this Assignment stood with the Record, inasmuch as the Dedimus Potestatem issued before the Writ of Covenant, and so it might be that he died after the Conusance, and between the Teste of the Writ of Covenant and the Return; for it seems it cannot be intended or averred, that the Dedimus issued before the Writ of Covenant, for by the Dedimus the Writ of Covenant is supposed to be pending, and so this Death ought to be before the Conusance taken, and so against the Certificate of the Commissioners. M. 38, 39 El. B. R. between *Wright and the Mayor of Wickam* adjudged per Curiam.

Cro. E. 468. (bis) pl. 27. S. C. held accordingly. ——2 Jo. 181 Mich. 33 Car. 2. B. R. Cockman v. Farrer, S. P. accordingly. —— Raym. 461. S. C. accordingly. —— 2 Sid. 94, 95. Trin. 1658. B. R. Row v. Evelyn, S. P. per Cur.

6. But it may be assigned for Error, that after the Conusance taken, and before the Certificate thereof the Conusor died, for this stands with the Record. M. 38, 39 El. B. R. in *Wright's Case*.

Cro. E. 677. pl. 7. S. C. the Court spake nothing to this Error, nor seemed much to regard it; Et adjornatur. —— Cro. J. 11, 12. pl. 15. Pasch. 1 Jac. B. R. the S. C. adjudged accordingly per tot. Cur. and the Fine was affirmed. —— Yelv. 33, 34 S. C. adjudged that this shall not be assigned for Error; For the Record is an Estoppel, and he might as well say, and for the same Reason, that there was no such Roger Manwood in Rerum Natura, which he cannot do, because it is against the Record. —— S. C. cited Arg. 3 Mod. 141.

7. In a Writ of Error to reverse a Fine it cannot be assigned for Error that the Dedimus Potestatem was directed to Sir Roger Manwood Knight, where there was not any such at the Time, but he was but an Esquire, and yet he certified it according to the Writ, for this is against the Record. Dubitatur 43, 44 El. B. R. between *Arundel and Arundel*.

8. If in *Assise of Fresh-Force*, which passed against the Defendant, the *Record* had *made mention that he had been attached and summoned*, and *he was not* attached and summoned, *he shall not assign this for Error*; For it is contrary to the Record, and then it seems that he is put to the Action against the Sheriff who returned it. Br. Error, pl. 116. cites 19 Ass. 7.

9. *Upon Judgment upon Default, Matter in Fact may be alledged for Error.* Br. Error, pl. 117. cites 19 Ass. 8.

10. *As two brought* Writ of *Error because Writ of Mesne* was brought *against the one and the Father of the other*, who were Forejudg'd by Judgment, where the Father was dead at the Time of the Judgment given, by which the *other Coparcener, and the Heir of him who was dead, brought Writ of Error, for they were Co-Heirs in Gavelkind*, and assigned for Error the Death of the Father before Judgment, by which the Judgment was reversed, and the Plaintiffs restored to their Mesnalty, and the

the Tenant to be attendant on them as before. Br. Error, pl. 117. cites 19 Aff. 8.

11 Error to reverse a Judgment in the Court of M. because the *Judgment was entred before the Mayor and J. S.* and J. D. Aldermannis &c. and at the same Time the *Plaintiff was made Mayor pending the Suit*; Sed non allocatur; For if he admits him to be his own Judge it is not Error. Cro. E. 320. pl. 8. Pasch. 36 Eliz. B. R. Walsh v. Collinger.

12. Another Error was, that the *Prescription is to hold Courts before the Mayor and two Aldermen*, and it is *alleged that at such a Court held before the Mayor and J. S. and J. D. Aldermen* &c. *and alleges in facto that the said J. S. was not then Alderman*; The Court held that to be a manifest Error, for that the Court cannot be holden unless there be two Aldermen at the least, and if J S. was not an Alderman there were not two Aldermen, and for that Cause the Judgment was reversed. Cro. E. 320. in S. C.

13. A *Statute-Merchant was by Mittimus removed out of the Chancery into C. B.* and *Execution awarded there super Tenorem Recordi*, Resolved, that in that Case the Conusor *cannot allege for* Error, *that the Statute wants one of the Seals* that ought to be to it, because he has admitted the same in C. B. Mo. 570. pl. 778. Trin. 41 Eliz. B. R. Worsley v. Charnock.

14. Error to reverse a Judgment in the Court of Abington, which *Court is mentioned to be held before the Mayor, secundum Consuetudinem Burgi a Tempore cujus* &c but it does not appear there was any such Custom there to hold Pleas; it was resolved the Assignment, being directly against the Record, is not receivable; And the Judgment was affirmed. Cro. J. 359. pl. 19. Mich. 12 Jac. B. R. Whistler v. Lee.

Roll Rep. 53 pl. 26. S. C. and the Writ of Error held not good; For the Writ admits it to be a Court of Record and therefore it cannot be assigned that there is no such Custom.——2 Bulst. 242. S. C. and Judgment affirmed accordingly.——Jenk. 327. pl. 47. S. C. the suit by the Writ of Error admits it to be a Court.

15. If the *Defendant appears by J. G. his Attorney*, it cannot be *assigned for Error, that the said J. G. was dead before the Day of Appearance*, because that it is against the Record; Adjudged upon a Writ of Error in the Exchequer-Chamber. Cro. C. 53. pl. 11. Mich. 2 Car. Morris v. Fletcher.

16. *Nothing* is assignable for Error *which proves the Writ abateable, but* that only *which proves it abated*; As where Error was brought of a Judgment in Ejectment, and it was assigned that after Verdict and before Judgment the Plaintiff entered, the Court held it not assignable, and affirmed the Judgment. Lev. 155. Hill. 16 & 17 Car. 2. B. R. Bois v. Norcliffe.

Sid 238. pl. 8. S. C. and the Court held it to be Error.

17. In a Writ of Error upon a *Judgment in an Inferior Court*, it may be assigned for *Error, that the Mayor, who was the Judge, had not received the Sacrament, and taken the Oaths according to the 25 Car. 2.* because his Office is made void, and so the Proceedings coram non judice; adjudged, and Judgment reversed accordingly. 2 Lev. 184. Mich. 27 Car. 2. Hipply v. Tuck.

2 Jo. Sr. Hippesley v. Tucke S C. adjudged by all, præter Wild, that the Error is well assignable, and though it cannot be alledged that he was not Judge, yet it may be that he was not Mayor, and without such Averment the Statute would be useless.——2 Mod. 193 Ipsley v. Tuck S C. and Judgment reversed.——3 Keb 721. pl. 6. S. C. and Judgment reversed——S. C. cited Arg 2 Ld. Raym. Rep. 885. Pasch. 2 Ann. but denied by Holt Ch. J. to be good Law.

Sid 94. pl 20. Mullens v. Weldy, S. C. & S. P. agreed per Cur. and that one cannot assign Error contrary to a Record out of an Inferior Court, any more than out of one of the Great Courts here. —— Lev. 311. cites S. C. and several other Cases to the same Purpose.

18. In a Writ of Error *upon a Judgment in the Palace-Court held coram Jacobo Duce Ormond*, it cannot be *assigned for Error, that the Duke was not there*, because that is contrary to the Record; Adjudged, *the Court* in Fact *being held before his Deputy according to the Patent.* 1. Lev. 76. Trin. 14 Car. 2. Molins v. Wheatley.

2 Jo 137. Deveney v. Norris, S. C. resolved e contra. —— 2 Ld Raym. Rep. 885. S. C. cited by Holt Ch J who says he was (and as Jones reports him to be) Counsel in the Cause, and argued that it was Error, but says the Court held there, that since the Defendant had admitted the Judge to be a Judge by pleading to the Action, he was estopped to say afterwards that he was not a Judge.

19. It is not *assignable* for Error *that the Person who tried the Cause was not Judge, by reason of his not having taken the Oaths, and subscribed the Declaration, according to the Statute* 13 *Car.* 2. Stat. 2 cap. 1. For this is contrary to the Record and Admittance of the Parties. 2 Lev. 242. Hill. 30 & 31 Car. 2. B. R. Denning v. Norris.

20. *Nothing* shall be assigned for Error *which the Party might have pleaded to the Action, and had a proper Time so do*; Arg. said it is a Rule; But because in the Principal Case the Plaintiff had no Time to plead the Matter; For *by the Death of* J. S. (*one of the Tertenants*) *before the Return of the* Writ of *Resummons all the Proceedings* on the Sci. Fa *were discontinued, and the Parties out of Court*, and so had no Time to plead any thing afterwards, and the Death of one Tertenant puts the whole without Day; and for that Holt Ch. J cited Keilw. 69. Fitzh. tit. Error, pl. 7. and Judgment was given for the Plaintiff in Error; and the Court said, that the Defendant must bring a New Sci. Fa. against the Tertenants, because the Old Writ was put without Day Causa qua supra. Carth. 200, 201. Mich. 3 W. & M. in B. R. Blake v. Gell.

1 Salk 262. pl. 3 S. C. held accordingly, and and quashed the Writ of Error, and said he must bring his Audita Querela —— Carth. 282. S. C. adjudged accordingly; And per Holt Ch. J. it will not lie, because the Fact assigned for Error is in the suggestion of the Writ itself, and not in any of the Proceedings in the Cause —— 4 Mod. 314. S. C. the Widow and Administratrix of one of the Defendants after two Nichils returned, and Judgment awarded against her by Default, brought a Writ of Error Coram vobis residen', and the Error in Fact assigned was, that she never was summoned, but the Writ was quashed. Afterwards she brought Audita Querela, suggesting the same, and that her Husband died in the Life of the other Debtor, and so his Estate was there by discharged of the Debt; And the Court held, upon the Authority of the Case of **Barcock v. Thompson**, that the Administratrix should have an Audita Querela, because now she has no other Remedy.

21. Error in Fact Coram Nobis upon a *Judgment in Scire Facias against the Bail*, the Scire Facias *suggested that Lampton survived, whereas in Fact the other survived*; But per Cur the Writ of Error lies not in this Case, for *the Merits of the Cause or Foundation of the Suit cannot be assigned for Error in Fact, but only mistakes in Fact pendente placito, which might hinder the Proceedings*, As where an Infant appears by Attorney, but this being the very Gist of the Action, the Party can be relieved only by Audita Querela. Comb. 325. Pasch. 7 W. 3. B. R. Lampton v. Collingwood.

22. It is not assignable for Error *that he who returned the Writ was not Sheriff.* 2 Ld. Raym. Rep. 884 Pasch. 2 Ann. Andrews v. Linton

23. *Debt* on a Bond; Non est Factum pleaded; *Verdict and Judgment for the Plaintiff* in C. B. *Error* on this Judgment *was assigned, that the Defendant died before the Day of Nisi Prius*; and held it was not assignable for Error, because *the Record mentioned that he appeared that Day*; Judgment was affirmed November 7. 1729. 2 Ld. Raym. Rep. 1415. in a Note of the Reporter, cites Mich. 3 Geo. 2. B. R. Plommer v. Webb.

(U. 2) Stile &c. of the King.

See Tit. Amendment, and Tit. Contra Pacem (A)

1. WRIT of Error was brought on a Judgment, reciting that it was *in Curia Noſtra, viz. Jac.* 2. whereas all the *Proceedings were in the Reign of Car.* 2. this was held a Fault incurable, and a Judgment in B. R. reverſed in the Exchequer Chamber, and thereupon the Plaintiff brought another Writ of Error. Carth. 158. Mich. 2 W. & M. in B. R. Dicken v. Greenvill.

2. *So* in a Writ of Error of a Judgment in C. B. the Writ recited the *Loquela* to be *Curia Noſtra*, viz. *Will.* 3. when it was a Loquela in the Time of *W. & M.* and the Court denied to alter or amend it by the Inſtructions to the Curſitor. Carth. 520. Paſch. 12 W. 3. B. R. Tonkyn v. Crocker.

(U. 3) Want of entering Pledges, Bail &c.

1. THE *Plaintiff an Attorney in C. B. ſued an Attachment of Privilege* againſt the Defendant, *and recovered* againſt him *by Non ſum informatus*, and upon a Writ of Error brought, this being certified, and *in Nullo eſt erratum pleaded*, and becauſe he did not find Pledges, the Judgment was reverſed. Cro. J. 329. pl. 7. Mich. 11 Jac. B. R. De la Hay v. Vaughan.

2. After a Verdict for the Plaintiff in an *Action of Aſſault* in B. R. the Error aſſigned was, That there were *no Bail in B. R.* Upon a Certiorari awarded, the *Ch. J. certified Bail there of John Hayes, but without any Addition, and with a Blank for the Place of his Habitation*; and thereupon the Judgment was reverſed, becauſe it did not appear that they were Bail for the Party who was ſued; and ſo he was never in the Cuſtody of the Marſhal, and if not, then he could not be ſued in B. R. Mo. 694. pl. 961. Bucknell v. Hayes.

3. Error to reverſe a Judgment in C. B. in which the Plaintiff *alleged Diminution for Want of an Original*, and upon a Certiorari to the *Cuſtos Brevium* he *certified no Original, and that there was not any Original between the ſaid Parties remaining with him, becauſe there were no Pledges that was aſſigned for Error*; and it was agreed that if no Pledges had been found it had been Error; but adjudged that *Pledges ſhall be intended to be on the Original*, (though it could not be found) becauſe *in C. B. they are always entered on the Original, and not on the Roll*; and where there is no Original, that is a Fault which is aided by the Statute, though a bad Original is not. Sid. 84. pl. 12. Trin. 14 Car. B. R. Wheeler v. Wilkinſon.

But ſee Tit. Amendment (P) (N. a) &c. And Tit. Pledges (B).

(X) A Thing *for his Advantage.*

[*Not against a Record.*]

* Br. Error, pl. 37 cites S. C.
† Br. Affise, pl 56 cites 11 H. 4. 44. that if in Præcipe quod reddat he loses his Land where the Attorney had no Warrant, and the Tenant is ousted, he shall have Assise; But Brooke says, that the contrary seems to be Law. ——— Fitzh. Judgment, pl 71 cites S. C. accordingly. —— But Ibid. Fitzherbert cites Hill. 35 H 6. that in Trespass Judgment was given notwithstanding such Allegation; and 13 R. 2. that Judgment was given for the Plaintiff notwithstanding the Defendant alleged such Matter in Detinue

1. A Man may assign the Want of the Warrant of Attorney of his own Attorney, which is for his Advantage. * 7 H. 4. 16. and his own Default. † 11 H. 4. 44. 88.

See (A) pl. 4 S. C and the Notes there.

2. In Scire Facias against the Bail after Judgment against the Principal it is no Plea for the Defendant to say, that the Principal died before Judgment, for this is against the Record, inasmuch as a Judgment ought not to have been given against a dead Person. Mich. 32, 33 El. B. R. between *Walter* Plaintiff, and *Perry and Spring* Defendants, per Curiam, præter Wray, who doubted, Quære, for by Intendment the Party was not present in Court at the Judgment, and this is Error in Fact.

Roll Rep. 51 pl. 21. S C & S. P ruled by Coke Ch. J accordingly.

3 In a Writ of Error upon a Judgment given at the great Sessions in Wales, by the Statute of 34 H. 8. the Justices there may make Deputies, who may give Judgment, and this Judgment was given by J. S. who is supposed by the Record to be a Deputy of the Justice, it cannot be * assigned for Error that the said J. S. was not Deputy to the said Justice, for this is against the Record. Tr. 12 Ja. B. R. between *Floyd and Best* adjudged in a Writ of Error.

* Fol. 758

Cro. C. 410. pl. 5. S. C. but S. P. does not appear. —— Ibid. 421. pl. 12. S. C. & S. P. the Defendant in Error pleaded that J. S. was made Sheriff before the Return of the Writ, prout patet de Recordo, and upon Nul tiel Record pleaded, at the Day he procured in Court the Letters Patents. The Judgment was affirmed. ——— Original return'd by one not Sheriff is not assignable for Error. 1 Salk. 265. pl. 9. Pasch. 2 Ann. B. R. Andrews v Linton.

4. In a Writ of Error to reverse a Judgment given in B. in a Formedon, it may [not] be assigned for Error, that whereas the Record is, that the Venire Facias to try the Issue, which was tried in that Cause, was returned by J. S. Sheriff of the County of D. that the said J. S. was not then Sheriff of the said County, for this is against the Admission of the Court, who know their Officers, and have recorded him to be their Officer of the Court. Mich. 11 Car. B. R. between *Smith and Smith*, such Matter was assigned for Error, and this certified by a Record under the Seal of the Exchequer, Scilicet, that he was Sheriff, upon which the Judgment was affirmed; But some then said this could not be assigned for Error against the Record of the Court de B. Intratur M. 10 Car. Rot. 192. Vide 12 H. 4. B. R. Return de bre 40.

5. If Error be assigned, that whereas by the Record the Defendant appears by *Francis Dennington* his Attorney, where his Name is *Henry Dennington*, and the Warrant of Attorney is certified, by which he is named Francis Dennington, the Judgment shall be affirmed; for this Averment is against the Record, and therefore it

it is not to be assigned for Error. P. 15 Car. B. R. between *Weblyn and Kirby* adjudged in a Writ of Error upon a Judgment in Banco. Intratur H. 14 Car. Rot. 1195.

6. In a Writ of Error upon a Judgment in Banco, the Plaintiff may assign for Error, that whereas the Record de Banco is, that the Defendant there appeared per J. Newton, his Attorney, and pleaded non sum Informatus, upon which Judgment was given for the Plaintiff, that J. Newton was not then any Attorney, but was forejudged usque and during all the Term in which he so appeared and pleaded; and upon a Writ directed de Banco it is certified accordingly; and per Curiam, this may be assigned for Error, because this is not the Act of the Court, as an Admittatur by Guardian is. H. 10 Car. B. R. between *Fawtrie and Herne* per Curiam, the Judgment given in Banco reversed accordingly. Intratur Tr. 9 Car. Rot. 207. contra Mich. 6 Ja. Rot. 435. and in another Action the same Term. Rot. 505. between *Lumley and Marwood* adjudged quia Contra Recordum.

2 Roll Rep. 53. Haydon v. Miller, S. C. but S. P. does not appear. — Jenk. 332. pl. 66. cites Cro. J. 521. 16 Jac. Heydon v. Mynn Where D. has appeared as an Attorney for A. in an Action brought by A. against B it cannot be assigned for Error that D was not an Attorney, or that there is no such Person in Rerum Natura; For it is against the Record; and the Admittance of him for an Attorney by the Court makes him an Attorney, if he was not an Attorney before this Admittance. In a Writ of Error brough in this Suit, and Error assigned ut supra, the Defendant in the Writ of Error in this Case pleads in Nullo est Erratum; this does not confess that he was not an Attorney; but this Plea est quasi a Demurrer, that this is not an Error at all. Judged and affirmed in Error.

7. In a Writ of Error upon a Judgment in an inferior Court, if the Stile of the Court be Curia tenta Coram J. S. Seneschallo Curiæ &c. a Tempore &c. an Error may be assigned that J. S. was not Steward at the Time of the Court held, for this is an Error in Fact. Hill. 9 Car. B. R. between *Hatch and Nichols*, per Curiam in a Writ of Error upon a Judgment in the Court of the Tower of London, but the Judgment was affirmed, because the Error was not well assign'd, for that it was assigned that J. S. had no Authority to hold Court, which was more general, and not Matter in Fact to be tried by the County, but may be a Matter in Law.

8. Upon an Issue tried, if *William Atkinson* de R. be return'd and sworn of the Principal & alii de Circumstantibus also sworn, among whom *William Atkinson* without Addition is returned and sworn, and a Verdict given for the Plaintiff, and Judgment in a Writ of Error, the Defendant cannot assign for Error that the said *William Atkinson* of the Principal, and of the Tales was one and the same Person, and so there were but 11 Jurors that tried the Cause, for this is against the Record, inasmuch as the Record is, that alii de Circumstantibus Jurati, of which *William Atkinson* is one, and therefore if the Record be true, this cannot be one and the same Person. P. 14 Car. B. R. between *Stevenson and Estoft* per Curiam adjudged, this being assigned for Error, and the first Judgment affirmed accordingly.

9. In an Action upon the Case upon a Promise in the Borough Court of Bewdly in Comitatu Worcestriæ, if the Plaintiff declares there that the Defendant at Bewdly within the Jurisdiction of the Court, in Consideration of 1 *l.* given to him by the Plaintiff, assumed to pay 5 *l* to the Plaintiff, if at any Time after he should sell at any Fair held within the Borough of Wallal, within the Jurisdiction of the said Court, any Woollen Cloth, and avers that the Defendant after sold at a Fair held at Wallal aforesaid, within the Jurisdiction of the Court, a Woollen Cloth, and therefore he had brought this Action, and the Defendant pleads that he did not sell the said Woollen Cloth at Wallal aforesaid, Modo & Forma, upon

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This Case is not Law. 2 Lutw. 1569 — Mod 81. Cox v St. Aubin, agreed that it is not assignable for Error.

upon which Issue is taken and tried at Bewdly by a Venire Facias de 12 de Burgo de Bewdley, and a Verdict and Judgment there given for the Plaintiff, the Defendant in a Writ of Error may assign it for Error, that Walsal is in Comitatu Staffordiæ, and out of the Liberty of the said Borough of Bewdly, for this is a Matter in Fact. Mich. 11 Car. B. R. between *Lea and Ceely* adjudged in a Writ of Error, and the first Judgment reversed, in which the Defendant in the Writ of Error being warned, made Default, which in Law was as much as if he had pleaded in nullo est erratum, which acknowledges the Matter in Fact assigned, to be true. Intratur Tr. 11 Car.

* See (K) pl. 18. S. C and the Notes there.
† See (K) pl. 18. S. C. and the Notes there.

10. If an Action upon the Case be brought against A. S. a Feme Covert, as a Feme Sole, and she appears and pleads there as a Feme Sole, and Judgment is given against her, and thereupon she and J. S. her Husband bring a Writ of Error, they may assign for Error that she was a Feme Covert at the Time of the Appearance and Pleading, &c. for otherwise the Wife might be taken in Execution without the Consent or Conusance of the Husband, and so he should be bereaved of the Society of his Wife, for he has no other Remedy to defeat it. Mich. 15 Car. B. R. per Curiam, between * *Edwards and Simpson*, in a Writ of Error upon such Judgment in the Court of Marshalsea. Intratur Mich. 15 Car. 18 E. 4. 4. per Curiam, accordingly. Tr. 1651. between † *Hayward and Williams*, adjudged in a Writ of Error, and the Judgment reversed accordingly. Intratur. H. 1649. Rot. 824.

11. It was argued if Judgment may be *reversed for the Damages and stand for the Land*; Brooke says it seems that No. Br. Error, pl. 12. cites 28 H. 6. 10.

12. In *Trespass* the Defendant pleaded Not Guilty, and the Judgment passed, and Error brought and assigned, because *after the Issue joined, and before Verdict, the Defendant's Attorney died* at D. and by the Opinion of the Court this is not Error; for the Writ shall not abate by the Death of the Attorney, nor the Issue by it is not waived nor discontinued; for he may appear by another Attorney, or in Person, and the Continuance is not entered between the Attornies, but between the Parties, and a Man cannot assign Error but in proper Person, and ought to sue Process immediately after Delay of the other Party; Per Trem. Br. Error, pl. 144. cites 5 H. 7. 3.

13. A Man cannot assign any Thing for Error which is for his Advantage, as to assign that he had Day, and *that the Day was given much longer then the Common Day*, or that he was *essoined* where he ought not, or *had Aid granted* to him where he ought not. 2 Saund. 46. cites F. N. B. 22. (F)

14. A Man shall not reverse a Judgment for Error, unless he can shew that the Error is to his Prejudice. 5 Rep. 39. b. per Cur. Trin. 34 Eliz. B. R. in Tey's Case ad finem, cites 8 H. 5. 2. b. and F. N. B. 11.

15. In the first Action the *Jury gave 4d. Costs, and the Court* gave *de Incremento* 23 s. *In the Judgment the 4d. was omitted*, and this was assigned for Error. The Court held that for that Cause the Judgment should be reversed, although it is for the Party's Advantage. 4 Le. 61. pl. 154. Hill. 31 Eliz. B. R. Bushy v. Milfield.

16. Error is brought by the Defendant upon a Judgment in a Court of Piepowders; the Error assigned is, *That the Defendant was not amerced*; this was allowed for Error; for *although it be for the Advantage of the Defendant, yet it concerns the King* and his Profit. Jenk. 211. pl. 48.

17. The

17. The Plaintiff in Error ought to assign nothing for Error but that which makes to his Disadvantage; and therefore he cannot assign for Error that a *Day over was given beyond the Time expressed* in the Writ. 2 Sid. 94, 95. Trin. 1658. Per Glyn Ch. J. in the Case of Row v. Evelyn.

18. *A. Tenant in Tail, Remainder to B. in Tail, Remainder to C. in Tail; A. and B. levy a Fine*, which proves erroneous. *C. may bring Error*, for the levying the Fine was for his Disadvantage; Per Cur. 2 Sid. 92. 95. Trin. 1658. Row v. Evelyn.

19. Where the Court awards a *Respondeas Ouster when the Judgment ought to be final*, it can do no Harm, because the Defendant cannot assign it for Error no more than he can the awarding an *Essoign* where it ought not to have been, being for his Advantage; Per Holt Ch. J. 12 Mod. 525. Trin. 13 W. 3. in Case of Slanney v. Slanney.

Ld. Raym. Rep. 594. S. P. by Holt Ch. J. and cites it is a Case in Hill. 12 W. 3. Rosier v. Sawkins. —— S. P. admitted by Holt Ch. J. 2 Ld. Raym. Rep. 1018. Hill. 2 Ann.

(Y) *Who may assign* the Error.

Where *he that hath Benefit* by the Error.

1. WHERE the Error is by the Default of the Court, though this be for the Advantage of one Party, yet the Party that hath the Benefit by it may assign it for Error, for the Course of the Court ought to be observed. Mich. 15 Ja. B. R. between *Holmes and Twiste* agreed per Curiam. Co. 8. *Beecher* 59. resolved.

A Man shall not reverse Judgment by Error unless he can shew that the Error is to his Disadvantage. 5 Rep. 39. b.

2. As if in an Action of Debt it be found, that the Defendant owes the Plaintiff 5 *l.* and the Jury assess Damages to 2 *d.* and Costs 2 *d.* and after Judgment is given, that the Plaintiff shall recover Debitum & Damna præd' to 2 *d.* and no Judgment is given for the Costs, though this is for the Advantage of the Defendant, yet he may assign it for Error, because this is the Error of the Court to alter the Manner of Judgments. Mich. 15 Ja. B. R. between *Holmes and Twiste*; adjudged and the Judgment reversed accordingly.

3. So the Plaintiff in a Suit retracts, by which Judgment is given against him, but he is not amerced as he ought, though this is for his own Advantage, yet for that the Amercement ought to be Parcel of the Judgment, and so the Judgment is not perfect without it, he may assign it for Error. Co. 8. *Beecher* 59. resolved.

Cro. J. 211. pl. 3. Beecher v. Shirley S. C. & S. P. held accordingly. —— Jenk.

4. So in every Case where a Judgment is given against a Man in which he ought to be amerced; if he be not amerced he may assign it * for Error though it be for his own Advantage. Co. 8. *Beecher* 59. resolved.

* Fol. 760.

283. pl. 12 S. C & S. P. for it concerns the King's Profit, and the Publick is concerned where the King is concerned —— S. C. cited 2 Saund. 47. at the End of pl. 4. —— But see Stat. 16 & 17 Car. 2. cap. 8. S. 1. at Tit. Amendment (P) that no Judgment shall be reversed for want of a Misericordia.

5. So if a Man be amerced by Judgment where he ought to be fined, though this be for his Advantage, yet he may assign it for Error, for that the Form of the Judgment, which is the Act of the Court, is altered by it. Co. 8. *Beecher* 59. adjudged.

6 [But] in a Writ of Annuity if the Issue be found for the Plaintiff, and no Damages found for him, and Judgment is given according to the Verdict, the Defendant cannot assign it for Error that no Damages were taxed against him, because this is for his Advantage, and here the Defect is not in the Judgment, as it is where there is a Capiatur for a Misericordia, but in the Verdict. Mich. 12 Ja. B. R. between *Bent and Marsh* per Curiam.

11 Rep. 56 a. Bentham's Case, alias, Marsh v. Bentham, S. C. and Judgment was affirmed, because the Plaintiff had released his Damages and Costs, which is for the Defendant's Benefit. —— Roll Rep. 288. pl. 40 S. C. & S. P. and Judgment affirmed; For the Defect here is in the Verdict, and not in the Judgment, and the Release has made it all clear. —— 2 Bulst. 279, 280. S. C. held accordingly, and Judgment affirmed. —— Jenk. 286. pl. 20. S. C. the Plaintiff shall have Judgment for the Reason abovementioned, and likewise the Release shall be understood to be before the Verdict; Adjudged and affirmed in Error. —— See (R. b) pl. 1 S. C. and pl. 7. S. C.

7. A Man cannot assign Error in Process or Delay which is for his own Advantage. Co. 8. *Beecher*. 59. resolved. Fitz. Nat. 21. F.

8. Upon an Issue between a Peer of the Realm and another if the Venire Facias be quod summoneat 12 Liberos & Legales homines, and does not say tam Milites quam alios as the Register is, though the Peer of the Realm may assign it for Error, yet the other cannot, because it does not concern him. P. 40 El. B. R. between the Earl of *Worcester* and *Trade*.

9. Error of Judgment *in Trespass of Assault and Battery*, because the *Judgment was Quod sit in Misericordia*, whereas it should be Quod Capiatur. Tanfield moved, that this is for the Plaintiff's Benefit, and is the Default of the Clerk, and so shall not be assigned for Error; but the Judgment for that Cause was reversed. Cro. E. 84. pl. 2. Hill. 30 Eliz. B. R. Crow's Case.

Cro E 107. pl 2. Mich. 30 & 31 Eliz. B. R. Bellscote v. Talboys. The Judgment was Capiatur where it ought to have been in Misericordia, and the Judgment was reversed.

10 The *Conusor shall not assign Error in the Grant and Render by which he himself takes the Estate*, any more than the Conusee shall do in the Conusance, for that would be to defeat the Estate given him by the Fine; *nor* shall the *Recoverer* bring Writ of Error *to defeat the Record in which himself recovered* the Judgment in Error, being to be restored to all that he lost by the Fine or Judgment, and not to avoid and lose what he gained by them. 3 Rep. 32. b. Trin. 34 Eliz. B. R. the third Resolution in Tey's Case.

If an Infant levies a Fine, and takes back an Estate for Life or in Tail by Render, he shall not after avoid the Fine by Error, but is without Remedy. Mo. 74. pl. 202. Trin. 6 Eliz. in the Star-Chamber by Catlyn.

11. If a *Plaintiff is not amerced where he ought to be* it is Error, yet he may assign it for Error though it be to his Advantage, for it *concerns the King's Profit*, and the Publick is concerned where the King is concerned. Jenk. 283. pl. 6.

12. In Error to reverse a *Judgment in Ejectment*, the Error assigned was, because the *Judgment is not Quod capiatur* as it ought to be, it being Vi & Armis; and it was reversed. Poph. 202. Mich. 2 Car. B. R. Rochester v. Rickhouse.

13. In

13. In a Writ of Error brought *by the Tenant* of a Judgment in the Grand Sessions in Wales, it cannot be *assigned* for Error, *that the Court awarded a Grand Cape, where they ought to have given Judgment for the Demandant to recover*, because the Award of the Grand Cape was only in Delay of the Demandant, and not to the Prejudice of the Tenant, and therefore not by him to be alleged for Error, because it is not Ad grave Damnum Querentis, as the Writ of Error supposes; Adjudged. 2 Saund. 45, 46. Pasch. 20 Car. 2. Williams v. Gwyn.

Vent. 60. S. C. states it that the Error assigned was, that the Court had awarded a Petit Cape where they should have given Judgment upon the Nient dedire; but the Court held that this was only the awarding of Process more than should be, and in Advantage of the Tenant, and therefore resolved they could not reverse it for Error. And Twisden said, that admitting it were erroneous they might then give Judgment in this Court.

14. The *giving Oyer where it ought not* to be allowed, is no Error, nor assignable by the Defendant, being in his Advantage; *but the Denial of it where it ought to be allowed, is Error*; quod Powell concessit. 2 Ld. Raym. Rep. 970. Trin. 2 Ann. in Case of Longueville v. Thistleworth Inhabitants.

(Z) Where the Error came *by the Default of him that assigns it.*

1. A Man may assign the Want of a Warrant of Attorney of his own Attorney, though it be his own Default. 11 H. 4. 44. 48.

See (X) pl. 1. S. C. and the Notes there.

(A. a) *In what Thing* it may be assigned.

1. It cannot be assigned in a Record which is not in the Court where the Writ of Error is brought. 11 H. 4. 47.

Fitzh Error pl. 63. cites 11 H. 4. 4. [which is the Commencement of the Case, and continued at Fol. 47 b. pl. 22.] —— Br. Error, pl. 46. cites S. C. but S. P. does not appear. —— See (H) supra Worseley v. Charnock.

2. If a Man recovers an Annuity and hath Judgment in a Scire Facias thereupon, if a Writ of Error be brought upon the Judgment in the Scire Facias only, he cannot assign Error in the first Judgment, for that was not come before them. 11 H. 4. 4. 47. adjudged.

Fitzh. Error pl. 63. cites S. C. —— Br. Error, pl. 46. cites S. C. & S. P.

3. In a Writ of Error upon a Judgment in Banco, if the Plaintiff assigns for Error that whereas a Venire Facias was returned by J. S. as Sheriff of the City of Exeter, he was not Sheriff of the City, this Error is not well assigned, because the Venire Facias is not certified upon which the Error is assigned, for this is upon Record in Banco, and this Court cannot take Notice of this Matter of Record by Averment without Certificate thereof; for he ought to have had this certified, and after Certificate thereof, then to aver that whereas it is mentioned by the Record to be returned by J. S. Sheriff, that he was not then Sheriff. Pasch. 1649. between *Barcroft and Richards* adjudged, not being well assigned, and the

Judgment affirmed accordingly. Intratur T. 23 Car. Rot. 1311 B. R.

4. Error may be assigned in every Part of the Record, 18 E. 4. 9.

5. The Plaintiff assigned for Error, *that where he* in the Exchequer *pleaded sufficient Plea in Bar* before the Barons, *upon which the other Party, then Plaintiff, demurred, and Barons awarded that he should recover where they ought to have awarded that he should be barred*; and per Cur. the now Plaintiff shall not be compelled to shew Cause why the Plea is not good; For by his Pretence the Plea is good, and *he shall not be compelled to shew Disability of his own Plea*; for he is to affirm the Plea. Br. Error, pl. 108. cites 39 H. 6. 52.

6. *But* he who is to prove the Plea ill, as where a Man assigns for Error *that the Court awarded a Plea good*, and barred the Plaintiff, *where the Plea was ill* and insufficient, there *he shall shew Cause of* the Insufficiency; quod fuit concessum. Ibid.

(B. a) *In what Thing* it may be assigned *upon the Writ.*

Cro. J. 324. pl. 4. S. C. but S. P. does not appear —— 2 Bulst. 119. 120. S. C. * Fol. 761. but S. P. does not appear. —— See (E. b) pl. 5. Tie v. Atkins. —— And see (M. c) pl. 9. S. C.

1. If a Feme recovers Land in a Writ of Error, and after the Sheriff returns Damages from the Writ purchased to the Delivery of Seisin, when it ought to be from the Writ purchased usque diem Judicii, and after the Tenant brings a Writ of Error in Redditione Judicii, he may upon this Writ assign Error in the Judgment given for the Damages, upon the Return of the Sheriff; for the last Judgment is not an Execution, but an Inquest (*) of Office by the Statute of Merton, and it is used always to bring but one Writ in such Case, and there is not any Writ Quia Judicia reddita sunt, but Judicium. Trin. 11 Ja. B. R. between *Porter and Ager* adjudged.

2. Error on a Judgment in a Sci. Fa. upon a Recognizance, the *Writ bore Teste Die Solis*, which is not dies juridicus; and it was reversed. Dyer 168. a. pl. 17. Trin. 1 Eliz. Barett v. Cleydon.

(C. a) *In what Thing* it may be assigned *upon the Writ.*

† Fitzh. Error, pl. 64. cites 11 H. 4. 6. and the Error was brought upon the Judgment of Redisseisin, as well as upon the Judgment of Outlawry —— Fitzh. Error, pl. 64. cites 11 H. 4. 6.

1. In a Writ of Error upon an Outlawry after a Judgment in a Redisseisin, an Error may be assigned in the Record of the Redisseisin (scilicet, the Caption out of the Land) and this is sufficient to reverse the Outlawry, though the Judgment of the Redisseisin continues, for the Outlawry cannot be good upon an erroneous Judgment. 11 H. 4. † b. 94. adjudged Co. 8. Altham ‡ 158. b.

4 6. [and so it should be in Roll, and this Case is continued in the Year-Book at fol. 94] and is as well upon the Redisseisin as upon the Outlawry. ——— Br. Error, pl. 45. cites 9 H. 4. 5. that upon Judgment given by the Sheriff in Writ of Redisseisin Writ of Error lies, and says see Judgment in this and the first Judgment reversed, and cites tit Redisseisin, pl. 1. [where the Case is taken more at Large]

‡ This is misprinted, and should be 152. b. where the Case in the Year-Book is cited and taken somewhat fully.

2. C. and A. recovered in a Writ of Account against R. Hill. 29 Eliz. R. assigned for Error *that the said Writ of Account was brought against him as Receiver of Monies for to render Account Quando ad hoc requisitus fuerit*, whereas it ought to have been more special; But the Court held the Writ good, and said that it was so held in one **Gomersal's Case**, viz. Quod reddat ei rationabilem Computum suum de Tempore quo fuit Receptor Denariorum ipsius A. 2 Le. 118. pl. 160. Hill. 30 Eliz. B. R. Collet v. Robston.

3 Le. 230. pl. 311. Trin. 31 Eliz. B. R. the S. C. in totidem Verbis. —— Cro. E 82. pl. 1. Robsert v. Andrews and Cockett, S. C. and Judgment was affirmed.

(D. a) *How* it may be *assigned.*

1. **If two** bring several Writs of Error and several Scire Facias's to reverse a Judgment in an Assise **against them, they may assign Errors jointly.** 11 H. 4. 92. b. **adjudged.**

Br. Error, pl. 50. cites S. C.

2. **In a Writ of Error it is** no good Assignment **of Error** quod in omnibus erratum est; **for the Court is not bound to inquire of the Errors, if the Party does not shew them to him.** 6 E. 4. 6.

Br. Attaint, pl. 86. cites S. C. — Br. Error, pl. 163. cites S. C. & S. P. by Suliard.

3. **In a** Dum fuit infra ætatem against three, **as Daughters and Heirs of J. S. if the Plaintiff recovers by Default, and the Defendants bring Error and assign their Nonage for Error, without alledging that their Ancestor died seised &c. [Quære if good or not] Dyer.** 2 **Mar.** 104. 10. **adjudged.**

4. Diverse Parties *upon diverse Writs of Error* may assign the Errors in Common or Severally. Br. Error, pl. 50. cites 11 H. 4. 52. 65. 92. Per Hulf. and Gasc.

5. The form to assign Errors is to put a Bill into the Court, and to say that *In hoc erratum est* &c. and to *shew in certain what Things, Et in hoc erratum est &c.* and *shew in certain another Thing*, Et *sic de singulis* in which he will assign the Errors; but to say In Omnibus erratum est is not good because of the Uncertainty. F. N. B. 20 (G) the second Part.

6. If a Writ of Error *upon a Judgment in an Assise be brought by four*, and *only one appears*, and the others make Default, *he cannot assign Errors alone till the others are summoned and severed*; Adjudged. Yelv. 3. 4. Pasch. 44 Eliz. Cromwell v. Andrews.

Cro. E. 891. pl. 8. Andrew v. Ld. Cromwel, S. C. & S. P. resolved accordingly.

7 If *two are outlawed in an appeal of Murder*, and they bring a Writ of Error to reverse it, and *one appears*, but the other does not, *he shall not assign Errors till the other appears*, because he has joined with him in

2 Keb. 141. pl. 11. S. C. and in a Nota there

195, that Both were brought to the Bar to assign the Error jointly, and one alone cannot do it without Summons and Severance.

in the Writ of Error; Adjudged. 1 Sid. 316. Hill. 18 and 19 Car. 2. The King v. Tothill & al'.

(E. a) A Man *cannot assign Error in Fact, and* also Error *in Law.*

[And how to take Advantage of such Assignment.] pl. 2.

[And what shall be said Error in Fact, and what Error in Law.] pl. 3, 4.

1. A Man cannot assign for Error that Judgment was given for the Plaintiff, where it should have been given for the Defendant and also an Error in Fact. Trin. 10 Car. Camera Scaccarii between *Davis and Selby* adjudged in a Writ of Error upon a Judgment in B. R. where the Error in Fact was, that the Plaintiff who brought the Action as Administratrix to her Husband, was a Feme Covert, and that her Husband was then in full Life.

One cannot assign an Error in Fact, and another Error in Law; For this is double, and may be demurred to; Per Roll J. Sty. 69 Mich. 23 Car. B. R ——— Where there is Error in Fact and Error in Law, it must be demurred to for the Doubleness, otherwise no Advantage shall be taken of it on a General Demurrer; Agreed per Cur. Lev. 76. Mich. 14 Car 2. B. R. Molins v. Wetby. —— Sid. 94. pl 20. Mullens v. Weldy, S. C. but S. P. does not appear.

2. But if a Man assigns for Error that the Judgment was given for the Plaintiff, where it ought to have been for the Defendant, and also that he being Defendant appeared there by Attorney, being then within Age, and the Defendant in the Writ of Error pleads in nullo est erratum he shall not have Advantage for the Doubleness, if he does not shew it specially in his Plea, but the Judgment shall be reversed, inasmuch as he acknowledges himself to be within Age, which is a Matter of Fact. Mich. 11 Car. B. R. between *Mayhew and Basnet* adjudged, and a Judgment given in an inferior Court reversed accordingly.

3. In a Writ of Error upon a Judgment in an inferior Court if the Stile of the Court be Curia tenta coram J. S. Seneschallo Curiæ &c. a tempore &c. an Error may be assigned that J. S. was not Steward at the Time of the Court held. Hill. 9. Car. B. R. between *Hatch and Nichols*; per Curiam, in a Writ of Error upon a Judgment in the Court of the Tower of London, for this is Error in Fact.

4. But in the said Case if the Error be assigned that J. S. had not any Authority to hold Court, this is not well assigned, for this is uncertain, and * Matter in Law peradventure, and more general, and not Matter of Fact to be tried by the Country. Hill. 9 Car. B. R. between *Hatch and Nichols* adjudged per Curiam, and the Judgment given in the Court of the Tower of London affirmed accordingly. Intratur. Trin. 9 Car. Rot. 425

* Fol. 762

5. In a Writ of Error upon a Judgment in B. R. he cannot assign for Error that there is not any Bail filed for the Defendant, for this is not material if he was in Custodia Mareschalli &c. for if he was in Custodia, the Proceedings might be against him without any Bail, but if he was not in Custodia, he ought to assign the Error, that he was not bailed nor in Custodia. Hobart's Reports, Case 341.

* Hob. 264 pl 343. Lancastell v. Sidley, S. C accordingly. † Hob 264, 265 pl. 344. S. C

* *Lancastel's*

* *Lancaster's Case*, and 342. between † *Willis and Woodhouse* adjudged, but Quære, whether he may assign it contrary to the Record, that he was not in Custodia Mareschalli when the Declaration supposes it, and the other so answers.

Error of a Judgment in Debt in B. R. was assigned, because the Bill was assigned 11 Feb and the Bail was filed 12 Feb, so as the Bill was before any Bail, and it did not appear that the Defendant was in Custodia Mareschalli, but because the very Day of filing the Bill is not material, for whenever it is filed it has relation to the first Day of the Term, this Error was disallowed. Cro J. 654 pl 13. Mich 13 Jac in Cam. Scacc. Plat v. Plummer. ——— Hob. 70. pl 82. S. C. accordingly. ——— Jenk 295. pl. 44. S. C. affirmed in Error; For Bail relates to the first Day of the Term.

Error assigned was, that there was not any Bail upon the File, and this was certified accordingly, and that he was not in Custodia Mareschalli; and it was held by all the Justices and Barons, that it could not be assigned for Error, for it is contrary to the Record; For the Declaration is against him as in Custodia Mareschalli, and he appears and pleads to the Issue as a Prisoner who was in Custodia Mareschalli, therefore he shall not be now received to say the contrary; wherefore the Judgment was affirmed. Cro. J. 568. pl 7. Pasch. 18 Jac. B. R. Webley v. Gilman.

9. A Man may assign *as many Errors in Law as he will*, but he can assign *only one Error en Fait*, because this Error en Fait is to be tried by the Country, and the Errors in the Record shall be tried by the Justices. F. N. B. 20 (E.)

7. In Replevin there are *two Avowants*, *one of them was an Infant*, *and appeared by Attorney* when he should appear by Guardian, and this was assigned for Error; but in the *Assignment* of it he *concluded Et hoc paratus est verificare* &c. and the Defendant pleaded In Nullo est Erratum; Per Cur. he *ought to have concluded to the Country*, because the Error which he assigned is an *Error in Fact*, and the Jurors only shall be Triers of it, and not the Judges, therefore it is as if there had been no Error assigned at all; For the Defendant by pleading In Nullo est Erratum has not confessed it to be Error, but only put himself on the Judgment of the Court, who cannot be Triers of it; And Judgment affirmed. Yelv. 58. Hill. 2 Jac. B. R. King v. Golpor.

Error was assigned that the Defendant was an Infant at the Time of the Judgment given against him, Et hoc paratus est verificare prout Curia vult, to which the other pleads, In Nullo est Erratum; this is a good Plea; For it lies not in the Breast of the Court to know whether he be within Age or not; but if he had concluded, Et hoc paratus est verificare only, without more, this had been good and traversable, and to be tried by the Country; And Judgment affirmed. Bulst. 37 Trin. 8 Jac. Barker's Case.

8. If one assigns Error in Fact, and also Error in Law, it is Double, and the other Party *may well demur upon it*; but it seems that the *Assignment of Error in Fact is no Waver of the Assignment of Error in Law*; Sic dictum fuit. Sid. 147. pl. 7. in a Nota, Trin. 15 Car. 2. B. R. Anon.

Lev. 105. Slaughter v. Tucker S P. and seems to be S. C and the Plaintiff waived the said Error, and assigned new Error.

9. Error upon a Judgment given in C. B. *in Case upon several Promises*, in which upon Non Assumpsit pleaded, *as to two of the Counts*, *Verdict and Judgment were given for the Plaintiff*, *and as to the rest for the Defendant*; And the *Error assigned was*, *that the Defendant was an Infant at the Time* of the Promise made, *and also appeared by Attorney*; To which Assignment the Defendant in Error demurred specially, because it contained Matter of Fact and of Law also; And therefore the Judgment was affirmed. 2 Ld. Raym. 883. Pasch. 2 Ann. Burdett v. Wheatley.

10. Error in Fact was assigned, viz. *that the Plaintiff was a Feme Covert at the Time of the Action brought*, Sed non allocatur; because it might have been pleaded in Abatement, and it is a *general Rule not to suffer that to be assigned for Error in Fact*, *which might have been* taken Advantage of, by being *pleaded in Abatement*. 10 Mod 196. Trin. 12. Ann. B. R. Grosvenor v. Stephens.

(F. a) *At what Time* it may be *assigned.*

[Or what may be assigned for Error after a Scire Facias.]

* Br. Error, pl. 188. cites S. C. —— Jenk. 140. pl. 86. cites S. C. —— After Errors assigned, and a Scire Facias against the Defendant upon that Assignment, he shall not assign an Error in Fact, as to say that the Plaintiff was dead at the Time of the Judgment, or before the Judgment &c. F. N. B. 20. (E).

After Award of Execution on a Scire Feci Defendant cannot have Advantage of Matter pleadable to that; otherwise after two Nihils. 1 Salk. 264. Wicket v. Creamer.

1. AFTER a Scire Facias awarded against the Defendant, he cannot assign any Error which is Matter of Fact. * 22 E. 4. 45. Fitz. Nat. 20 E. 8 H. 4. 23.

Br. Error, pl. 188. cites S. C.

2. As in Avoidance of an Outlawry, to say that he was in France, or other Place under such Captain in War, for this is Matter of Fact, for it shall be tried by Certificate of the Captain. 22 E. 4. 46.

Br. Error, pl. 188. cites S. C. — Jenk. 140. pl. 86. cites S. C. and it is repugnant to say that no Warrant of Attorney was entred, and to pray a Certificate to be made of it; And the Scire Facias admits the Record to be full.

3. Or in Avoidance of a Judgment given for the Plaintiff in a Writ of Dower, to say, that there is not any Warrant of Attorney for the Tenants certified, for this is Matter of Fact. 22 E. 4. 45. adjudged. But quære this, for it seems this is not Matter of Fact, but to be tried by the Record.

* Br. Error, pl. 188. cites S. C. —— Jenk. 140. pl. 86. cites S. C. For the Record is in Court, but the Warrant of Attorney is not so.

† Quære if this should not be pl. 7.

4. But after a Scire Facias awarded, the Plaintiff may assign Errors in the Record. * 22 E. 4. 45. 34 Ass. † 6.

Br. Error, pl. 188. cites S. C.

5. As to say there is not any Original. 22 E. 4. 45.

6. Or to say in avoidance of an Outlawry, that he was but quarto exactus, for this is to be tried by the Record of the Exigent, when it is certified. 22 E. 4. 46.

7. The Plaintiff *may assign other Errors in another Term apparent in the Record, but the Defendant cannot then allege Diminution*; Quod Nota. Br. Error, pl. 12. cites 28 H. 6. 10.

2 Le. 2. pl. 3. Werdman v. Yate, S. C. adjornatur.

8. Error; *After Errors examined* the *Plaintiff discontinued his Writ, and obtained a new Writ out of the Chancery, to remove the Residue of the Record*, which being sent in B. R. he *brings a new Writ* of Error *coram vobis residet*, and would assign Errors upon the new Part of the Record. It was said, It was not warranted by any Course; for this is to allege Diminution after In Nullo est Erratum pleaded. It was the Opinion of the Justices, that inasmuch as the first Writ is discontinued, and this is a new Writ sued, the *Plaintiff is not tied to the former Errors, but may assign other Errors at his Pleasure*, for it is now as if no Error were assigned before, and he may assign other Errors *in the Record*, or other Errors *out of the Record.* Cro. E. 155. pl. 38. and 281. pl. 2. Trin. 34. Eliz. B. R. Yates v. Windham.

9. A

9. A Writ of Error may *sleep seven Years or more*; For it is only a Commission, and the Parties have no Day in Court by it; *But* the Defendant in a Writ of Error may *by Motion force the Plaintiff in Error to assign Errors the same Term*, and bring a Sci. Fac. returnable the same Term, or the next Term. Jenk. 140. pl. 86.

Jenk. 25. pl. 48. S. P. the Parties have no Day in Court till the Plaintiff in Error sues a Sci Fac. ad audiendum Errores, or the Defendant in Error sues a Sci. Fac. Quare Executionem habere non debet.

10. The Court was moved that there was a Scire Facias issued out to certify Errors, and *Time was desired to assign them*; But the Court answered, that the bringing of the Writ of Error is delay enough, and therefore if you have *not assigned* the Errors *according to the Rules of the Court, they shall not be now accepted.* Sty. 208. Hill. 1649. Hudson's Case.

(G. a) At what *Time* it *ought to be* assigned.

1. THE Plaintiff in Error ought to assign some Error before he shall have any Scire Facias ad audiend' Errores. 24 E. 3. 31.

Fitzh. Error pl. 11. cites S. C.

2. If A. recovers against B. in Banco, and C. is Bail for B. and after a Scire Facias is awarded against C. the Bail, and after two Nihils returned a Judgment is given against C. and after he brings a Writ of Error in Banco Regis upon this Judgment, he cannot assign for Error that there was not any Capias returned against B. the Principal before the Scire Facias sued, for that if he had appeared and had not pleaded it, or had been returned summoned, and had not appeared and pleaded this Matter, he should not assign it for Error, because he might have pleaded it to the Scire Facias, and here the Return of two Nihils amounts to a Summons and is all one with it, and this is a Matter of Record and not a Matter of Fact, and there would be no End if he should be admitted to assign it after such Judgment, in which if he had appeared he might have been aided. Trin. 1651. between *Barcock and Tompson* adjudged, and the first Judgment affirmed. Intratur. M. 1650. Rot. 444.

Sty. 281. S C. adjornatur — Ibid. 288. S. C ruled to shew Cause why Judgment should not be affirmed, and take Liberty to bring an Audita Querela. — Ibid. 323, 324. Pasch. 1652. S. C. adjudg'd for the Plaintiff. — Scire Facias was brought against the Administratrix of one of the two Persons against whom Judgment was given, and after two Nihils return'd Judgment was awarded against her by Default; Afterwards she brought a Writ of Error Coram vobis residen' and the Error in Fact assign'd was, That she was never summoned. The Question was, Whether this Writ of Error would lie or not? Because the two Nichil's return'd amount to a Scire Feci; and so there being a Judgment by Default after two Nichils, it is two late now to bring a Writ of Error. And upon the Authority of the Case of Barcock v. Tompson reported by Style, and mention'd by Ld Roll, and agreed by him the Writ of Error was quash'd. 4 Mod 314. Mich. 6 W. & M. in B. R. Lampton v. Collingwood

3. Error *of a Judgment in Dower*; he assigned Error that the *Tenant in Writ of Dower appeared by Attorney who had no Warrant* here, and *prayed Writ to certify* if any Warrant be or not, and was Ousted of it; For when the Record is removed, if the Plaintiff will assign any Error in Fact, he ought to assign it before that Scire Facias issues against the Defendant; For *after this Scire Facias issues he shall not assign any Error in Fact*, and therefore he was deny'd the Certificate by Award. Br. Error, pl. 188. cites 22 E. 4. 45.

4. *And*

4. *And* where a Man *assigns that he was Ultra Mare at the Time of the Outlawry* &c. he shall do it before Scire Facias awarded against the Defendant. Ibid.

5. *And* per Hussey, a Man shall not assign *Diminution* after such Scire Facias. Ibid

6. *So* where *Original* is wanting, or *Capias or Exigent is wanting*. For *by the suing of the Scire Facias he affirms that the Record is full*; Per Hussey, quod non contradicitur. Ibid.

7. A Man outlawed of Felony, and brought to the Bar to say why he should not be put to Death, pleaded that he was *imprisoned* in the Castle of Oxon, at the Time of the Outlawry, and *did not say under whose Custody, nor in what County Oxon is, nor took Averment, et hoc* &c and by the Justices, he shall not assign Error before the Writ of Error by him purchased, and against the King does not lie a Writ of Scire Facias upon Errors assigned, because the King is always in Court a third Person present, therefore the *Prisoner must plead every Thing certain at first.* Br. Error, pl. 135. cites 1 H. 7. 13.

8. When the Record is removed, Errors must be assigned *before Sci. Fa ad audiend' Errores is* sued out. F. N. B 20 (E.)

9. And the Error *ought to be assigned the same Term*, and a Sci. Fa. ad audiend' Error' sued out returnable either that Term, or the Term ensuing, else all the Matter is discontinued. F. N. B. 20. (G.)

10. When the *Record comes into Court*, the Plaintiff shall assign his Errors and have a Sci. Fa. before the Record *shall be entered*, for that shall not be entred *until the Parties have a Day by Sci. Fa.* F. N. B. 22. (F.)

11. *In Civil Cases* the Errors neither are nor can be assigned *before the Writ of Error is allowed, and the Record removed*; But *in Cases of Outlawry of Felony or Attainder of Felony* the Error ought to be first assigned and allowed before a Writ of Error shall be granted. Jenk. 165, 166. in pl. 19.

12. The Plaintiff brought a Writ of Error upon a Judgment obtained against him; and afterwards the *Record was removed* into B. R. he for some Time *neglected to sue out a Scire Facias ad audiend' Errores*; whereupon the *Plaintiff in the original Action sued out a Scire Facias quare Executionem habere non* &c. and upon 2 Nihils returned had Judgment, and Execution executed. Carth. 40. Trin. 1. W. & M. in B. R. Moseley v. Cocks.

13 10 & 11 *W.* 3 *cap.* 14. *No Fine, Recovery or Judgment shall be reversed for Error, unless Writ of Error is brought within twenty Years after such Fine levied &c.*

14. In Ejectment Judgment is not compleat till Damages are found, and yet a Writ of Error lies of the Judgment *before any Damages are found*; Because by the Judgment that is given the Possession is touched immediately; And where a Judgment is final for any Part Writ of Error will lie 7 Mod. 100 Mich. 1 Ann. B. R. seems admitted in the Case of The Queen v. Darby.

15. If the *Plaintiff in Error lies still after a Writ of Error brought* this is no Discontinuance of the Writ, but that the *Defendant in Error* has no other way but to *bring a Scire Facias against him, to shew Cause Quare Executionem non haberet*, and it will be no Plea for the Plaintiff in Error to plead that there is a Writ of Error depending, but he *must assign his Errors forthwith* after such Scire Facias brought; And in this Case there is a Difference (viz.) if the Scire Facias is entered on the same Roll with the Writ of Error, then he may assign Errors without a Scire Facias ad audiendum Errores, otherwise not; Per Holt Ch. J. 3 Salk. 144. pl 1. Lynch v. Coot.

16. In

16. In a Writ of Error Quod Coram vobis resídet the Court on Motion made a Rule that Plaintiff should assign his Errors *within four Days.* Barnard. Rep. in B. R. 328. Pasch. 3 Geo. 2. Cowworth v. Throustout.

In a like Case the Court gave a Week only. Barnard. Rep. in B. R. Pasch. 4. Geo. 3. Goodright v. Jennings.

(G a. 2) Bar of Execution.

Where the bringing a Writ of Error will bar the Execution of the former Judgment.

1. WHERE a Writ of Error is brought *upon a Judgment in Annuity in C. B.* that Court cannot proceed upon a Sci. Fac. to execute this Judgment. Jenk. 74. pl. 40. cites 10 H. 6. 6. 17 E. 3. Fitzh. Quare incumbravit, and Dr. Drury's Case. 8 Rep. 42.

2. *But* where a Judgment is given *in Debt*, and the Record is removed by Error, yet *before Reversal an Original Writ of Debt lies upon this Record.* Jenk. 74. pl. 40 cites 4 H. 6. 31. and Dyer 32.

3. *In Trespass after Judgment by Default a Writ is awarded to enquire of Damages*, and before the Return thereof a Writ of Error is brought, yet this Writ to inquire of Damages shall be executed, though issued after the Writ of Error was brought; For in this Case the Writ of Error does not lie *before the Return of the Writ of Inquiry*, because till then *no perfect Judgment is given by which the Defendant may be damaged*; but it is *otherwise in Ejectione Firmæ, or Writ of Dower*, and a Writ of Inquiry of Damages awarded; *For the Land and Dower are recovered by the first Judgments.* Jenk. 74. pl. 40.

4. *Execution* was made *after Allowance of a Writ of Error in Parliament.* It was moved that the Writ of Execution was sealed before the Writ of Error taken out, and as Bail to it was not put in, it could not be a Supersedeas. The Court allowed, that *where Bail is afterwards put in, the Writ of Error is a Supersedeas by Relation from the very sealing of it*, but as Bail was not yet put in, the time of Service of the Execution was at present to be considered as Regular; But *where indeed no Bail is to be put in, the Writ of Error is a Supersedeas from the Sealing it.* Barnard. Rep. in B. R. 176. Trin. 2 Geo. 2. Gurnel. v. Fawl.

(G a. 3) By whom.

Where several Persons may have several Writs, or must all join.

1. A *Præcipe quod reddat* is brought against a *Tenant*; he *vouches*; *Judgment* is given for the Demandant *against the Tenant, and for the Tenant against the Vouchee*; They may have several Writs of Error upon this Judgment; the Vouchee may assign Error between the Demandant and the Tenant, but the Tenant cannot assign Error

between the Demandant and the Vouchee. The Vouchee may have Prejudice by this Error, but not so the Tenant, because he has recovered in Value; If the Tenant reverses the Judgment, the Vouchee shall have a Scire Facias to restore the Value; If the Vouchee prevails by Means of the Writ of Error brought by the Vouchee, the Tenant shall be restored. Jenk. 69. pl. 31.

2. *So* where an erroneous Recovery is had against *Tenant for Life, he in the Reversion, and the Tenant shall have several Writs* of Error, and Judgment for one of them, and Execution thereof shall revest their Estates. Jenk. 69 pl. 31.

Vent 165 Mich 23 Car. 2. B. R. Brell v. Richards S. C. resolved accordingly, and they all held that the Judgment ought to be reversed against.——2 Keb. 823. pl. 39. and 844. pl. 83. S. C. and the Judgment wholly reversed.

3. Error of a *Judgment in Ejectment against several* Defendants, and the *Writ concluded Ad damnum ipsorum*, which must be against all, when it appeared by the Record that the *Judgment was only against three, and that all the rest were acquitted*; Per Cur. yet the Writ of Error is well brought, for all must join in the Writ, which is only a Commission to examine Errors; *and ad damnum ipsorum may be intended only of those who were found Guilty*, viz. that they were damnified by this Judgment. 3 Salk. 146. pl. 8. Ball v. Richards.

4. If *one Executor appears upon the Capias, and another makes Default*, Judgment shall be against Both De Bonis Testatoris; And the Judgment being against Both, *one only ought not to bring the Writ of Error, but Both must join*; For the Judgment is ad grave Damnum of them all. 1 Salk. 312. pl. 17. Pasch. 1 Ann. B. R. Rouse v. Etherington.

Fol. 723

(H. a) Scire Facias *ad audiendum.*

In what Cases it shall be *sued.*

Fitzh Error, pl. 24 cites Trin. 18 H. 6 17. S. C.

1. **If these** Matters **which are** assigned **for Error,** appear **to the Court** to be no Error, nor Colour of Error, **it shall not grant any Scire Facias.** 18 **H.** 6. 18. 19. **Curia.**

Fitzh. Error, pl. 24 cites Trin. 18 H. 6. 17. S. C.

2. **If a** Matter of Fact **be** assigned **for Error, a Scire Facias shall be granted.** 18 **H.** 6. 19.

3. *In a False Judgment against an Abbot the Plaintiff was Nonsuit,* and the *Abbot had a Scire Facias* against the Plaintiff to shew why he should not have Execution, and to have the Judgment executed returnable at 15 Pasch. at which Day the *Plaintiff appeared, and assigned his Errors, and tendered Sureties to sue with Effect,* and prayed a Scire Facias against the Abbot to hear Errors. And the Opinion of the Court was, that he might assign the Errors against the Abbot, without suing any Scire Facias against him, because *they had Day by the Roll.* F. N. B. 18. (F)

4. *But if the false Judgment abate for Default in the Writ,* the Plaintiff shall not have a Sci. Fa. ad audiend' Errores upon the Record certified, and if the Plaintiff dies, if the false Judgment be given in a Writ

Writ of Droit Patent, the Heir shall have a Writ of Sci. Fa. ad audiend' Errores. F. N. B. 18. (G)

5. *Three Women and the Husband of one recovered Debt* in C. B. and Judgment affirmed in B. R. *The Husband died.* The Women sued out a Capias against the Party without first suing a Sci. Fa. But adjudged that a Sci. Fa. ought to have been first sued forth, because perhaps the Defendant might have a Release of the Husband who was dead to plead. Mo. 367. pl. 503. Mich. 36 & 37 Eliz. Isam's Case.

6. 17 *Car.* 2. *cap.* 2. *S.* 2. *Where any Judgment after a Verdict shall be had by any Executor or Administrator, an Administrator De Bonis Non may sue a Sci. Fa. and take Execution upon such Judgment.*

Made perpetual by 1 Jac. 2. cap. 17.

7. The *Exchequer-Chamber doth not award a Scire Facias ad audiend'* Errores, but Notice is given to the Parties concerned. Vent. 34. Trin. 21 Car. 2. B. R. Anon. in a Note.

8. A Scire Facias ad audiendum Errores went *against the Executors,* where the *Defendant in the Writ of Error died.* Vent. 34. Trin. 21 Car. 2. the Secondary informed the Court of this as the Case of Thyn v. Cory.

9. In an *Information qui tam* &c. upon 5 Eliz. *for using a Trade* contra Formam Statuti, and Judgment pro Quer', and Writ of Error brought; Per Cur. in the Case of Indictments, there needs no Scire Facias for the Party to assign his Errors, but a Rule is sufficient, because the Queen is always in Court by her Attorney-General; But a Rule in this Cause being moved for, the Court said they had order'd Precedents to be searched, but could find none, and therefore the Defendant in Error must proceed as he can by Law. Trin. 8 Ann. B. R. The Queen & al' v. Ford.

(I. a) [Scire Facias.]

Against whom it lies.

[*Tertenants.*]

1. If a Man condemned in an Assise be outlawed for the Fine of the King, and he brings a Writ of Error to reverse the Outlawry only, there shall not be any Scire Facias against the Recoveror, because the Outlawry is at the Suit of the King only. 7 H. 4. 40.

Fitzh. Error, pl. 62. cites 7 H. 4. 39. S. C.

2. But otherways it had been if the Writ of Error had been brought of the Judgment and the Outlawry only. 7 H. 4. 40.

Fitzh. Error, pl. 62. cites Pasch. 7 H. 4. 39. S. C.

3. If a Man be outlawed at the Suit of a Common Person, and he brings Error to reverse the Outlawry, he ought to sue a Scire Facias against the Party. * 7 H. 4. 40. 9 H. 4. 3. admitted. Contra 11 H. 4. 94.

* Fitzh. Error, pl. 62. cites 7 H. 4. 39. S. C.

4. But if a Man be outlawed upon Process at the Suit of A. who dies, and he brings Error to reverse the Outlawry, he shall not sue a Scire Facias against the Executor, because he cannot proceed upon

Br. Error, pl. 44 cites S. C. — Br. Utlaga-

ry pl. 9. cites S C. ——Fitzh. Utlagary, pl 9. cites S C.

on this Original, which is abated by the Death of the Testator. 9 H. 4 3.

Br. Error, pl. 42. cites 8 H 4. 18. S. C.——Fitzh. Error, pl. 60. cites S C.

5. Upon a Writ of Error against the Heir of him that recovers, a Scire Facias lies against the Heir and Tertenants. 8 H. 4 17.

A Writ of Error was brought to reverse a Recovery suffered in the Grand Sessions of Wales. The Question was, Whether there ought to be a Scire Facias against the Tertenants and the Heir? The Heir in this Case is an Infant, so that it was insisted that if he be admitted to be a Defendant, he ought not to appear during his Minority, and there is no Remedy till his full Age. Per Curiam, It is not necessary in Point of Law, but it seems to be the Course of the Court and that must be followed; and it is reasonable it should be so; because the Errors upon a Recovery should not be examined before all the Parties are in Court, and therefore there should be a Sci. Fa. against the Heir and the Tertenants. 3 Mod. 274. Hill. 1 W. & M. in B. R. Anon.

6. A Writ of Error was brought to reverse a Fine. Some of the Justices thought that it is the *best Way to award a Scire Facias against the Tertenant, before the Court proceeds* to Examination of the Errors, for *he may have something to plead in Bar, as Release &c.* and so save the Court the Trouble of examining the Errors; and tho' the Judgment ought to be reversed against the Party and Privy, yet the Plaintiff could not have Restitution till the Tertenant be made privy by a Scire Facias; for if he be otherwise ousted he may have Assise. Dy. 321. a. pl 21. Hill. 15 Eliz.

7. *Scire Facias* on a Judgment in Debt was brought *against the Bail.* It was assigned for Error that it *is not mentioned that Process was awarded against the Principal*; and Judgment was reversed. Cro. E. 177. pl. 6. Pasch. 32 Eliz. B. R. Herd v. Burstow.

8. Error assigned was that the *Bail was taken in Execution without any Scire Facias issued out against him*; This was held to be Error; and a Supersedeas was granted to deliver him out of Execution. 2 Bulst. 133. Mich. 11 Jac. Kirkby v. Ungle.

2 Bulst. 231. Huxley v. Harrison S. C & S P. by Man Secondary.

9. In Case of a Sci. Fa. *against an Administrator*, the Course is to grant it *sometimes Generally against Administrator, and sometimes against such a one Particularly as Administrator*; Per Mann, Clerk. Roll Rep. 23. pl. 32. Pasch. 12 Jac. B. R. in the Case of Harrison v. Hukesley.

10. *The Writ of Sci. Fa. anciently was Special, naming the Tertenants*, but of late such Course has been charged as appears by 8 H. 4. 18. and the Writ awarded generally, and *when the Writ is General, Non tenure is no Plea* in Abatement; Per Bridgman. Bridgm. 72. Hill. 13 Jac.

11. The Scire Facias *against the Tertenant* is not Ad audiendum Errores, but *Ad audiend' Processum & Recordum*, and therefore he cannot plead in Abatement of the Writ but only in Bar; Arg. to which Twisden and Windham inclined. Lev. 72. Mich. 14 Car. 2. B. R. in Case of Wynn v. Loyd.

Hardr. 164 Hill. 1659. cites 21 E. 4 and 21 H. 7. S. P.

12. *Appellees of Murder were outlawed*, and brought Error, and *apparent Errors were assigned*, but the Court notwithstanding would not reverse the Outlawry till a *Scire Facias returned against the Lords Mediate and Immediate.* Sid. 316. pl. 1. Hill. 18 & 19 Car. 2. B. R. The King v. Tothill & al'.

2 Show. 505. pl. 466. S. C. The Court upon this Motion was

13. If a Writ of Error is brought *to reverse a Common Recovery*, the Court before Reversal thereof *ought to award a Scire Facias against the Tertenants*, and this is not merely discretionary, but *Ex necessitate Juris*, for they may have a Matter to plead in Bar as a Release &c. Arg.

Arg. and held accordingly per Curiam; for it is not only a Cautionary Writ, but it is a legal Caution which in a Manner makes it necessary; Sed adjornatur. 3 Mod. 119. Hill. 2 & 3 Jac. 2. Kingston v. Herbert.

of Opinion that awarding it to the Tertenants was not Ex Necessitate Juris, but Discretionary.——— Comb. 42. S. C. and per Cur. The Reversal of the Recovery ought to be vacated; and it was ruled accordingly, Nisi &c. ——— S. P. in Error to reverse a Fine, and argued that it is in the Discretion of the Court to grant it, and that it lies as well after as before Judgment in the Writ of Error, and of this Opinion was Newdigate Ch. J. and cited 8 H. 6. and 43 E. 3. in Point, and that in D. 320, 321. no Scire Facias was awarded; Hill J. said, that it ought to have issued before, as in 21 E. 4. and 21 H. 7. in Error to reverse an Outlawry, a Sci Fa. to the Lords Mediate and Immediate, And Nicholas J. doubted; & adjornatur. Hardr. 163. Hill. 1659. B. R. Ford v. Bradsham.

(I. a 2) Examination of Errors. At what Time. After Execution Awarded.

1. A Man *recovered in* Writ of *Debt*, and the *Defendant brought Writ of Error*, and removed the Record in B. R. and there *did nothing*, *by which the Plaintiff prayed Execution*, and could not have it without Scire Facias, by which he *sued Scire Facias and Alias, and the Defendant was twice returned Nihil*, by which the *Plaintiff had Ca. Sa.* and after Exigent, because it was entered Quod Defendens exactus fuit et non comparuit, and *upon the Exigent he came and tendered the Money to the Court* as he ought, as it seems, and *pray'd Scire Facias ad Audiendum Errores, and Superfedeas, and had it, because the Exactus fuit et non comparuit was upon the Scire Facias of Execution, and not upon the Writ of Error*, and *so he is not nonsuited upon the Writ of Error*; And so see notwithstanding the Matter above, they shall proceed upon the Writ of Error, and the Advantage of it is not lost. Br. Error, pl. 6. cites 9 H. 6. 13.

Br. Nonsuit pl. 2 cites S. C.

2. If the *Defendant in Error sues out a Scire Facias quare Executionem habere non debet*, this is *merely collateral to the Record removed*, and yet by Matter ex post Facto may become a Record, As if the Plaintiff upon the Return of the Scire Facias appears and pleads a Release or other matter, as he well may, then this is a Record annexed to the first Record removed; But if upon the Return of the Scire Facias the *Plaintiff appears and assigns Errors*, or has a Day given him to assign them, and upon this Record assigns his Errors *insufficiently*, this *Scire Facias is but a Piece of Paper filed to the Record*, no Proceeding being thereupon. Yelv. 6, 7. Trin. 44 Eliz. B. R. Crumwell v. Andrews.

3. In *Scire Facias ad Audiendum* Errores, and Scire Facias *returned, et quod Præmonitus non venit*, the Court without pleading will examine the Errors. Keb. 662. pl. 53. Hill. 15 and 16 Car. 2. B. R. Molineux v. Nelson.

4 A Sci. Fac. does not lie on a Judgment *pending a Writ of Error* brought on that Judgment, but the Writ of Error pending is a good Plea to the Sci. Facias; and the whole Proceedings were set aside on Motion as irregular, without driving the Defendant to an Audita Querela. 2 Ld. Raym. Rep. 1295. Mich. 8 Ann. in Cam. Scacc. Ludlow v. Lennard.

(K. a) *How* it shall be *joyned in Demurrer or Rejoinder* to the Error assigned.

[*In Nullo est Erratum.*]

1. IF a Man outlawed brings a Writ of Error to reverse the Outlawry, and assigns his Errors, the King's Attorney shall not plead in Nullo est Erratum, and so a Demurrer, as they us'd to do between common Persons, but only upon the Assignment of the Error the Court shall give a Day to the King's Counsel to maintain the Outlawry, and it is entered Curia advisare vult till the Outlawry is reversed or affirmed. Mich. 14 Ja. B. R. per Curiam and Clerks in *Chapman's Case*.

2. If the Plaintiff in the Writ of Error assigns an Error in Fact, if the Defendant will put in Issue the Truth of the Fact, he ought to rejoyn by Denial of the Fact, and so join Issue thereupon, and shall not say * in nullo est Erratum, for by this he acknowledges the Fact alledged to be true. Dyer. 3 E. 6. † 7 E. 4. 16. and ‡ 9 E. 4. 32. it seems to be intended.

3. But when an Error in Fact is assigned, if the Defendant will acknowledge the Fact to be so as alledged, and yet that by the Law this is not Error he ought to rejoyn in Nullo est Erratum, for by this he acknowledges the Fact, and yet that by the Law that is not Error. Dyer, 3 E. 6. S. 7.

* Though In Nullo est Erratum be pleaded it is not any Confession, but Quasi a Demurrer, because it is not an Error assignable; Per Cur. Cro. J. 29. in pl. 5. Pasch. 2 Jac. B. R. —— In Nullo est Erratum is a Demurrer, but is not a Confession of Error in Fact not well assigned. Lev. 311. Hill. 22 & 23 Car. 2. B R. —— A Writ of Error assigned Nonage in two of the Defendants, where all appeared by Attorney, the Defendant pleaded In Nullo est Erratum; The Judgment was reversed in toto, because this Plea is a Confession of this Matter in Fact, it being a Demurrer, and no way left for the Demurrer to try it; but he ought to have pleaded to the Infancy, so that Issue might be taken upon it. Lev. 294. Trin 22 Car. 2 B. R. Grell v. Richards. —— A Demurrer in Law is never a Confession of a Thing against the Record, but of that only which may stand with the Record; For otherwise his Confession would be vain, and should not bind the Court; Per Popham. Cro. J. 12. pl. 15. Pasch. 1 Jac. B. R.

When Error in Fact is well assigned for Error, In nullo est Erratum amounts to a Confession of the Fact, As if Infancy be assigned, the Plaintiff cannot plead In nullo est Erratum, because by it he confesses the Infancy, but he ought to take Issue; But if the Party assign for Error that the Court did not sit, or that the Defendant did not appear, which Assignments are of Matters of Fact, but not well made, there In nullo est Erratum amounts to a Demurrer; Per Hale Ch. J. Raym 231. Mich. 25 Car. 2. B. R. Okeover v. Overbury.

† Br. Error, pl 165. cites S. C. —— Fitzh. Error, pl. 45. cites S. C.

‡ Br. Error, pl. 93. cites S. C. —— Fitzh Error, pl 45 cites S. C.

4. So if Error be alleged in the Body of the Record, in Nullo est Erratum is a good Rejoinder, for this shall put the Matter in the Judgment of the Court, the Record being agreed to be so. 9 E. 4. 32.

Br Error, pl. 93. cites S. C. —— Fitzh. Error, pl. 45. cites S. C. —— But otherwise it is of Error in the Record, As want of Capias, or the like, there he may say In nullo est Erratum, and there if the Defendant will confess the Error, the Court ought not to reverse the Judgment till they be ascertained of the Error. Br Error, pl. 165. cites 7 E. 4. 16.

5. So if Error be alledged in a Matter of Record which is not of the Body of the Record, but in a collateral Thing as quod non habetur aliquod Recordum of Resummons, in Nullo est Erratum is a good Rejoinder, for if the Plaintiff in the Writ of Error does not pray

* Br Error, pl 93 cites

pray a Diminution, and thereupon procure a Certificate from the inferior Court, that there is not any Re-summons before the Rejoinder entered, this Assignment is of no Effect, but void, inasmuch as this is to be tried by the Record itself; and no Diminution can be alledged after the Rejoinder entered. * 9 E. 4. 32. † 7 E. 4. 16. for if the Defendant will confess the Error yet the Court ought not to reverse the Judgment till they are ascertained of the Error by the Record itself.

S. C. —— Fitzh. Error, pl. 45. cites S. C. —— † Fitzh. Error, pl 43. cites S. C. —— Br Error, pl. 165. cites S. C.

6. In nullo est erratum cannot be pleaded *to an Error assigned en Fait*, but he ought to answer to the Error en Fait. Dy. 65. pl. 7. Mich. 3 E. 6. in Case of Ld. Arundell v. Ld. Windsor.

7. Error assigned was, that the *Defendant appeared per J. S. Attornatum suum*, and that *there was not any such Person as J. S. in rerum Natura*; The Defendant pleaded In nullo est erratum, which is a Confession, and yet the Court held it no Error, because *it is against the Record*, and the Party is estopped to say the contrary, but he might have assigned that J. S. had not any Warrant of Attorney; and Judgment affirmed. Cro. E. 665. pl. 18. Pasch. 41 Eliz. C. B. Crosse v. Tyrer.

8. The *Parties being at Issue, and an Habeas Corpora awarded* C. B. in which the Action depended, awarded a *Supersedeas quia improvide* &c. which *was delivered to the Sheriff, and yet he returned the Jury*, and *the Cause was tried* at the Assizes, and a *Verdict for the Plaintiff*; this Matter was assigned for Error; the Defendant in Error *pleaded in Nullo est Erratum*, and adjudged Error; For the Error assigned is a *Matter in Fact depending on a Matter of Record, and so* the Plea *is a Confession*, that such a Supersedeas was awarded, and delivered to the Sheriff before Trial, and consequently after the Supersedeas delivered the Hands of the Sheriff were bound. Yelv. 57. Mich. 2 Jac. B. R. King v. Andrews.

9. A *Double Error in Fact was assigned*; And per Holt Ch. J. The Way is to plead in Nullo est Erratum, and *shew the Duplicity for Cause to affirm the Judgment.* But if Apparent Error appears on the Record, notwithstanding the ill assigning of the Error in Fact by reason of the Duplicity, Judgment ought to be reversed for such Apparent Error; but no such Error appearing here on the Record, the Judgment was affirmed because of the Duplicity of the Error in Fact; Per Curiam. 12 Mod. 650, 651. Hill. 13 W. 3. Gibbs v. Walkley.

10. *Debt on a Bond*, and the Plaintiff having had a Verdict and Judgment in C. B. a Writ of Error was now brought by the Defendants; and it was assigned for Error, that *one of the Defendants died before the Day of Nisi Prius*; Strange for the Defendant in Error moved, that it *appears on the Record that both the Defendants joined in bringing this Writ of Error*; so that *the Error now assigned is contrary to the Record*, and consequently an Error which the Plaintiffs are estopped to assign; and therefore the Plea of in Nullo est Erratum is a Demurrer to it, and cites 1 Ro. Ab. 758. pl. 8. And the Court being of this Opinion, the Judgment was affirmed. Gibb. 109, 110. Mich. 3 Geo. 2. B. R. Webb v. Plumner & al'.

(L a) Diminution.

[Alleged; How. Not contrary to the Record.]

Diminution shall not be alleged in inferior Courts. Sid. 348. —— 1 Salk 266. pl. 11. Pasch 3 Ann. B. R. in Case of Hale v. Clare. S. P.

1. A Man cannot alledge Diminution contrary to the Record which is certified. Pasch. 41 El. B. R.

Sid 40. 364 Shall not be alleged when it appears there is want of Continuance.

2. As if in a Writ of Error it be certified that the Judgment was that Defendant sit in Misericordia, the Defendant in the Writ of Error cannot alledge Diminution, scilicet, that the Record is quod capiatur, because this is contrary to the Record certified. Pasch. 41 El. B. R.

Roll Rep. 200. pl. 2. S. C held accordingly

3. If upon a Writ of Error the Record be certified that a Challenge was to the Sheriff for Cousinage, and after thereupon a Venire Facias to the Coroner upon Diminution, it cannot be certified that the Challenge to the Cousinage was after the return of the Venire Facias, because this is contrary to the Record before certified, for nothing can be certified but that which stands with the first Record. Trin. 13 Ja. B. R. between *Floyd and Bethell.*

4 It cannot be alledged *upon a Bill of Exceptions*, As to say that a Minister, as Sheriff &c. was examined which is omitted. Br. Error, pl. 50. cites 11 H 4. 52. 65. 92. Per Huls.

5 Error in B. R. of *a Judgment given in Bristow*, inasmuch as *the Attachment was returned Tuesday was in Festo Sancti Edmundi*, where the *Feast was Wednesday*; The Defendant *alleged Diminution*, that the Record is *Tuesday the sixteenth Day of July*, *Anno* 5 E. 4. *in Festo Sancti Edmundi*, and so these Words *(Sancti Edmundi) void*, and the rest is the Day, and prayed Writ to certify it; And per Jenny and Laicon this Diminution is not good; For it is to Falsify the Record; For *Diminution cannot be alledged in that which is contrary to the Record.* But in that which may stand with &c But per Billing and Needham, this stands with it. Br Error, pl. 168 11 E. 4. 10

6 Assise was brought by A. against B. and others, and passed for A. and B. and the others brought Writ of Error, and assigned for Error the *Misnosmer of one of the Jurors, but not How*, and *also that the Disseisin was found with Force, by which the Justices should treble the Damages, where it was not found if* the Disseisin *was before the Statute of Forcible Entry or after*, and *to the first Error the Defendant prayed that it be amended*, and *to the other Error he pleaded* that in this, nor in any other Part of the Record, *In Nullo est Erratum*, and prayed that the Judgment be affirmed, and Day was given till the next Term, at which Day the *Plaintiff said that it appeared in the Record of Assise that they were at Issue upon two Matters out of the Point of Assise, and that the one was found, and the other not inquired*, and yet *Damages were given for all*, and therefore Error; to which the *Defendant alledged Diminution, and prayed Writ* to the Justices to certify it; to which the *Plaintiff said, that at another Time he brough Sci Fac. upon this Writ of Error against the Defendant, upon which he appeared, and the Plaintiff assigned the Errors, to which the Defendant had pleaded In Nullo est Erratum, and prayed that they proceed to the Examination of Errors*, and upon this Day is given to this Term; and therefore *Judgment if he may now allege* Dimi-

Diminution, and after the Judgment was reversed; And so see, that the alledging of Diminution shall not serve here; For per Danby and others, the *Defendant before he pleaded ought to have seen that he had the whole Record* except the Writ, Process, Warrant of Attorney, and the like; Quod Nota. And so see that the other *may assign other Errors in another Term apparent in the Record, but the Defendant cannot then allege Diminution*; Quod Nota; And there it was argued if Judgment may be *reversed for the Damages and stand for the Land*; and it seems that No; and that if Assise be *taken by Parcels* that it is Error; Quod Nota. Br. Error, pl. 12. cites 28 H. 6. 10. Lord Clinton v. Cliderowe.

7. Error assigned was, *for want of a Warrant of Attorney*; The *Plaintiff in Error prayed a Certiorari to the Ch. J. of C. B. and another to the Custos Brevium*, and they both *returned Non inveni aliquod Warrantum*; He who obtained the Judgment *died*. The Plaintiff brought *another Writ of Error by Journey's Accompts against his Son and Heir*, who appeared, and then the *Plaintiff alledged Diminution* in hoc, *that the Warrant of Attorney was not certified*, and *prayed a new Certiorari to the Ch. J. and another to the Custos Brevium*; It was objected, that it ought not to be granted twice in the same Action, especially when the first has been returned by one who is a Judge of Record, (viz.) by the Ch. J. who has certified, that Non inveni aliquod Warrantum, for which Reason Diminution cannot be alledged in this Warrant of Attorney, if another Certiorari should be granted; But on the other side it was said, that this Certiorari was only to inform the Court, and that if it was granted, and the Judge should certify, that Habetur aliquod Warrantum, that Certificate would not be contrary to the first, because that was Non inveni aliquod Warrantum, both which may be true and stand together; It seemed to Wray Ch. J. that it would be hard to grant a Certiorari, but if any Variance could be alledged, it should be otherwise, as was adjudged in **Lassel's Case**, where it was certified that there was no Warrant of Attorney, and afterwards, upon a Motion for a new Certiorari, as in this Case, and because the Original was between John Lassels Esq; Executorem Testamenti &c. where he was not named Executor in the first Certiorari, and upon that Matter a new Certiorari was granted. Le. 22. pl. 28. Trin. 26 Eliz. B. R. Dayrell v. Thinn.

Mo. 148. pl. 295. **Dorrell v. Thyn.** S. C. that the Ch. J. certified Non inveni aliquod Warrantum Attornat', and that the Custos Brevium certified Quod non habetur aliquod Warrantum Attornat', and thereupon Sci. Fac. issued against the Defendant who appeared and prayed Aid of the Queen, and had it, and then died; And a new Writ of Error was awarded against the Heir and Sci Fac after Errors assigned, upon which he appeared and pleaded, and alleged Diminution in not certifying the Warrant of Attorney; whereupon the Defendant demurred. And adjudged that he cannot allege Diminution, nor have new Writ contrary to the two first Certificates in the first Writ of Error.

8. In a Writ of Error, if they *alledge Diminution of the Postea & Habeas Corpora, and there is none to be found*, the Judgment is erroneous, because there is no Warrant to enter the Verdict on a Plea Roll. Gilb. Hist. of C. B. 138. cites Cro. E. 340. Long v. Mitchell.

Cro. E. 340. pl. 5. Mich. 36 & 37 Eliz. B. R the S. C. and the Court held it Error; Sed adjornatur.

9. Error of a Judgment in C. B. because there was *not any Warrant of Attorney for the Plaintiff* (the Judgment being for the Defendant.) Upon a Certiorari it was returned, there was not any Warrant of Attorney in that Term; It was the Opinion of the Court, that it is *not material in what Term it be entered, so it be entred at all*; and therefore it was commanded, that the Reversal of the Judgment should be stayed until it was certified; and thereupon the Parties compounded. Cro. J. 277. pl. 7. Pasch. 9 Jac. B. R. Smith v. Skipwith.

Bulst. 21. S. C. The Judges said to the Plaintiff in Error, that this was his Fault and Neglect, that the Judgment for the Reversal was not entred of Record; For if the same had been entred, then this Motion had been prevented, but for this Omission a Certiorari was granted by the Rule of Court.

10. In Error *upon Indictments* to reverse them, if the Error be *assigned in the Outlawry only*, Diminution may be alleged, there being only a Transcript of the Record; Per Fleming Ch. J. Bulst. 181. Pasch. 10 Jac. B. R. in Case of Baker v. Baker.

11. Error was brought of a Judgment in Assumpsit in C. B. After the Record certified, the Plaintiff in Error alledged Diminution *for want of an Original, which was certified and entred*, and then he assigned for Error a *Variance betwixt the Original and Declaration*, (as in Truth there was, for the Original was vicious) and he brought a Sci Fa. ad audiendum Errores; The *Defendant suggested, that there was another Original*, and that the Plaintiff in Error had procured an ill Original to be certified, and thereupon the *Defendant prayed a Certiorari to certify the other* Original, which was granted; for though one Person can have but one Certiorari, yet several Persons may have several Writs to certify. Cro. J. 597. pl. 20. Mich. 18 Jac. B. R. Johns v. Bowen.

12. *In the Venire Facias to the Sheriff of J.* the Word *Vicecomiti was omitted*, and yet the *Sheriff of S. returned the Panel, and his Name was endorsed*, this was held Error; but because on the Roll the Writ was awarded Vicecomiti S. and the Omission in the Venire Facias was the Default of the Clerk, it was agreed it should be amended; and Judgment affirmed, Nisi &c. Cro. C. 595. pl. 12. Mich. 16 Car. Sloper v. Child.

13. Error was assigned to reverse a Judgment in *Ejectment after Verdict*, that the *Demise was laid before the Plaintiff had any Title, as upon the Record appeared*, For the Demise was on the Essoin-Day, and the Declaration was of the same Term; But per Curiam, this being after a Verdict the Chief Justice said, that if the Plaintiff in Error would take Advantage of this Matter, he should have alledged Diminution, and procured the original Writ to be certified, and if that was returnable before the Plaintiff's Title it would be Error. Carth. 288. Mich. 5 W. & M. in B. R. Cook v. Darbison.

14. *In inferior Courts* no Diminution can be alleged. 12 Mod. 536 Trin. 13 W. 3. Lancaster v. Lovelace.

(M. a) Diminution.

Certiorari.

1. **AFTER** In Nullo est Erratum **pleaded, the** Court **to inform their Consciences** may award a Certiorari to amend the Record. **Pasch. 11 Ja. B. R. Co. 5.** *Bishop* 37. **b.**

S. C. cited Noy 83, 84. —— 2 Roll Rep. 471. Mich. 22 Jac. B. R. Anon S. P. though they cannot have it Ex Rigore Juris, because they have had Certiorari at the Suit of the Party, but they may have Certiorari ad informandam conscientiam ex Gratia Curiæ; And Ley Ch. J. would have amended the Record, and then it was said, that in the Exchequer Chamber they might move for a new Certiorari, and there they would certify it according to the Amendment; And one **Molineux's Case** was cited, where, upon Error in C. B. the Record was amended here in B. R. by the Record itself which was brought hither, and by a Clerk of C. B. which was done also by Advice of the Court of C. B. concurring with them. —— Lat. 152. Felton v. Weaver, S. C. accordingly.

2. So **after In Nullo est Erratum pleaded, the Court may award a Certiorari** to reverse the Judgment. **Pasch. 11 Ja. B. R. between** * *Hunsley and Osburn* **adjudged. Co. Lib. d'Entries, Fol.** 267, 268. *Boswell's Case.* **And Fol.** 242. *Dowmal's Case.* **Fol.** 266.

* 2 Bulst. 71. Pasch. 11 Jac. Hunley v. Alport, S. P.

Lancast

Lancast and Loa. Mich. 2 Car. between *Weaver and Felton* adjudged. Intratur Hil. 1 Car. Rot. 647. B. R.

and seems to be S. C. and a Certiorari was granted.

3. If after In Nullo est Erratum pleaded another Part of the Record is brought in by Certiorari, and made of Record, there the Court ought to reverse the Judgment, if the Matter so requires. Co. 5. *Bishop* 37. b. My Reports, 14 Ja. between the * Bishop of *Rochester and Young* adjudged, which Intratur Pasch. 33 El. Rot. 361.

* Roll Rep. 132. pl. 26. S. C. and Judgment was reversed. —— 3 Bulst. 224. Young v. the Bishop of Rochester, S. C. but S. P. does not appear.

4. After in Nullo est Erratum pleaded, if one Party allege upon Record a Diminution of the Record to reverse it, and prays a Certiorari to certify it, and thereupon a Writ of Certiorari is sued out, and the Record thereupon is certified, but before it is entered of Record the Court is informed of this Matter, this shall not be received, because it comes in by the Prayer of the Party after in Nullo est Erratum pleaded, which is not to be allowed, but upon Information to the Court the Court may grant it. Mich. 2 Car. * between *Weaver and Felton*, B. R. adjudged, and such Certificate disallowed, and a new Writ of Certiorari granted by the Court, which Intratur. Hill. 1 Car. Rot. 647. and then the Record of † the *Bishop's Case* was shewn to the Court where the Defendant did not plead in Nullo est Erratum, as the Book is Co. 5. But it passed against the Defendant by nil dicit, and after Diminution alleged, as it is in the Book.

Jo. 139, 140. pl. 5. S. C. resolved that the Certiorari was not well awarded; For after In nullo

*Fol. 765.

est Erratum pleaded, neither the Plaintiff nor Defendant can allege Diminution; For by the Joinder they allow the Record; and a Nota is there added, that Bishop's Case in Coke does not agree with the Record; For there the Defendant had not joined in Nullo est Erratum, but did not say any thing, Ideo remanet inde indefensus. —— Noy 83, 84. S. C. held accordingly, but yet the Court Ex Officio may award a Certiorari ad informand' conscientiam, and that which is certified shall be annexed to the Record, and is called a Rider-Roll, and says see 22 E. 4 46. a. 28 H. 6. 10. Dy. 32. b. 9 E. 4 32. b. And note in Chapman's Case the Difference is, if a Diminution be alleged in a Thing collateral, as Warranty of Attorney, or any mean Process that is not of the Body of the Record, so Diminution may be alleged after in nullo est Erratum; But otherwise if it be of the Substance and Part of the Record itself, As if returned in the Detinue only, where the first Action was in the Debet and Detinet, and says see 1 H 7 21. which reconciles many Differences. —— Lat. 152. Felton v. Weaver, S. C.

† The Word (the) should be omitted, and it should be only (Bishop's Case,) and is at 5 Rep. 37. a.

5. In Trespass in B. R. Judgment was given for the Plaintiff by Default, and a Writ of Error brought in Camera Scaccarii, and there assigned for Error, that there was not any Writ of Inquiry of Damages filed, and upon a Writ of Certiorari certified that there was not any such Writ, yet after another Certiorari granted, and upon this the Writ of Enquiry certified, and upon this the Judgment affirmed. Hill. 5 Car. between *Roror and Escourt*, adjudged.

6. [So] in a Writ of Right in B. R. after Judgment a Writ of Error is brought in Camera Scaccarii, and the want of Continuances assign'd for Error, and upon a Certiorari the want of Continuances certified; Yet after upon another Certiorari the Continuances were certified, and upon this the Judgment affirmed. Hill. 5 Car. between *Waterhouse and Coply* adjudged, and a like Case between *Travis and Scot*.

7. In an Action upon the Case in Banco, Hill. 6 Car. and Judgment after given for the Plaintiff upon Demurrer, and upon this a Writ of Error brought and assigned for Error, that there was not any Original in the Cause de H. [Hill.] 6 Car. and upon a Certiorari

Error of a Judgment in C. B in Covenant; The Plaintiff

it,

Error assigned for Error want of Original, and had a Certiorari, upon which it was certified, that there was no Original; Afterwards the Defendant applied to the Court of Chancery, and upon Affidavits that Instructions were given to the Cursitor for an Original, but they were lost, the Court of Chancery allowed that the Original should be supplied; upon which the Defendant in Error prayed another Certiorari, and an Original was certified of the same Term in which the Default of an Original was certified before; and now it was moved by Mr. Broderick, that this was irregular, for before the second Certiorari was returned, the Defendant ought to have given a Copy of the Original to the Attorney of the Plaintiff, and the Master informed the Court that the Course was so when the second Original certified was of another Term, but it being in this Case of another Term, the Motion was allowed. Comyns's Rep. 118. pl. 85. Pasch. 13 W. 3. B. R. Sir Richard Levin v. .....

It was certified accordingly; and upon this the Plaintiff says, That there was an Original in the said Cause de P. [Pasch.] 6 Car. and for the Non-appearance of the Defendant upon the Return of the Summons a Capias awarded returnable T. 6 Car. and an Alias returnable M. 6 Car. and a Pluries returnable H. 6 Car. upon which the Defendant appeared, and the Plaintiff declared, and the Defendant pleaded &c. and upon this prayed a Certiorari to certify the Original, which is certified accordingly, but none of the other Writs, nor any Continuance is certified between Pasch. 6 Car. and Hill. 6 Car. and so a Discontinuance of the Suit for what appears to the Court. Mich. 13 Car. B. R. between *Lowes and Coggan* adjudged, and the first Judgment reversed for this Cause.

Godb. 407. pl. 488. S. C. adjornatur. 2 Roll Rep. 352, 353. S. C. but no Judgment. — In a Writ of Error after the Record removed, Diminution of the Original was alleged, and there it was pretended that Judgment was given upon another Original, and one of the Originals was before, and the other after the Judgment, and there the Judgment was reversed, because it cannot appear to the contrary but that the Judgment was given upon the latter Original; Arg. Godb. 408. cites Pasch. 25 H. 8. Rot. 25. Plot & Ux' v. Coventry.

8. In a Writ of Error, if Error be assigned in the Original, and thereupon a Certiorari is granted and an Original is certified, which is erroneous; after the other Party prays a Certiorari for another Original; and thereupon another Original is certified, which is a good Original; and after in Nullo est Erratum is pleaded, the Court ought to intend that the Judgment was given upon the good Original, and not upon the erroneous Original, and so ought to affirm the Judgment; for they ought to intend more favourably for the Judgment, and to intend it to be well given. 21 Ja. between *Crouch and Hains.* B. R. adjudged in a Writ of Error.

In an Action upon the Case brought upon an Assumpsit, Error assigned was, because that no Place was limited where the Payment should be made; The Original was, that the Promise was in Consideration that the Plaintiff did lend to the Defendant so much, he at London did promise to pay the same to him again; There were two Originals which bore Date the same Day, Judgment was in that Case for the Plaintiff, and the Defendant brought a Writ of Error, and alleged Diminution of the Original, then the other Original was certified; The Defendant in the Writ of Error said, that the Original upon which the Recovery was grounded, was an Original which had a Place certain; The Judges did affirm the same to be the true Original which did maintain the Judgment, and agree with the Proceedings, otherwise great Mischief would follow: Arg. Godb. 408. cites Trin. 18 Jac. Rot. 1613. Bowen v. Jones —— 2 Roll Rep. 553. S. C. cited —— S. C. cited Godb. 306.

Sty. 176. Mich. 1649 Avery v. Kirton, S. C. and per Roll Ch. J. the Certiorari is general and not inter Partes prædict', but the Certificate is inter Parties prædict', and the Court may take the right Original that is certified, and the Judges are not bound

9. So in a Writ of Error, if Error be assigned in the Original, and upon a Certiorari granted, an erroneous Original is returned, and upon this in Nullo est Erratum is pleaded, and after the Court ad informandam conscientiam grant another Certiorari for another Original, and upon this a good Original is certified, the Court ought to intend that this is the Original upon which the Judgment was given, in favour of Judgments which ought to be intended to be good. Mich. 1649 between *Kerton and Avery*, and the Judgment in Banco affirmed accordingly. Intratur Mich. 23 Car. Rot. 239.

bound by the Plea in nullo est Erratum that is pleaded, but may grant a new original Writ of Error, but the Party cannot require it, for he is concluded by his own Plea, and if he discontinue his Original he may have a new one, but not if he plead, and the Certiorari is good and well certified, and therefore Judgment ought to be affirmed; Per Roll Ch. J. and Jerman, Nicholas and Ask to the same Effect, and so Judgment was affirmed.

10. Where *Two take the Tenancy severally, and plead in Bar*, if the Assise *inquire of the Bar before that they inquire of the Tenancy*, this is Error, and as to the Point of the Tenancy not inquired, the Defendant of this alleged Diminution, and prayed that it be certified, alleging that it was enquired; and had it &c. Br. Error, pl. 52. cites 11 H. 4. 67. 68.

Br. Assise, pl. 57. cites S. C.

11. If the Defendant pleads *in Nullo est Erratum*, there he *cannot allege Diminution*; For *by the Issue they are agreed that there is the whole Record.* Br. Error, pl. 166. cites 7 E. 4. 25.

12. *If the Justices* of C. B. or other Justices upon the Writ of Error *will not certify* all the Record, then the Party who sues the Writ of Error *may alledge Diminution* of the Record, *and pray a Writ* unto the Justices who certified the Record before, *to certify all the Record.* F. N. B. 25. (A).

13. If a Writ of *Error* is *brought in C. B. of a Judgment in an Inferior Court*, and the *Judgment is there affirmed*, and then a Writ of Error is *brought in B. R. on the Judgment so affirmed*; In that Case no Diminution can be alleged of the Record in the Inferior Court; for now the Judgment in C. B. is only in Question; So Resolved Pasch. 20 Jac. B. R. Bannister v. Kennedy F. N. B. 25. (A) in the new Notes there (a).

14. If in a Writ of Error *upon a Fine*, an Error be *assigned in the Proclamations*, *upon* which *a Certiorari* goes *to the Custos Brevium*, and upon his Certificate *it appears that two of the Proclamations were made in one Day*, *but it appears in the Chirograph Office*, *that all the Proclamations were duly made*, Wray Ch. J. held that the Defendant ought to have his Prayer; For the Chirographer makes the Proclamations, and is the principal Officer as to them, and the Custos Brevium, having only an Abstract thereof, upon the Prayer of the Defendant, a new Certiorari was directed to the Chirographer, who having certified the Proclamations duly made, and upon Examination of the Clerks of C. B. by the Justices in B. R. who answered according to what was said by Wray Ch. J. they awarded, that the Proclamations with the Custos Brevium should be amended according to those in the Custody of the Chirographer. 3 Le. 106, 107. pl. 157. Trin. 26 Eliz. Rag v. Bowly.

15. In Error the *Plaintiff prayed a Certiorari to the Custos Brevium to certify an Original Writ upon which a Common Recovery was had*, and it was granted him, and the Custos Brevium *certified that there was no Original*, and afterwards the *Defendant prayed another Certiorari, and had it.* Le. 22. in pl. 28. Trin. 26 Eliz. B. R. Arg. cites it as the Case of Ld. Norris v. Braybrook.

A Writ of Certiorari de Novo was granted after the Plaintiff had pleaded in Nullo est erratum; For this Plea of in Nullo est erratum goes only to that which is contained in the Body of the Record, and not to any Collateral Matter, as Warrant of Attorneys. Le 176 in pl 246. Hill. 31 Eliz. B. R. Wray Ch. J cites it as a Case greatly debated between Norris and Braybrooke. —— Mo. 95. pl. 235 Pasch 12 Eliz Brabrooke's Case, S. C. but S. P. does not appear. —— Ibid. 125. pl. 271. S. C. but S. P. does not appear.

16. After Assignment of the Errors, and in Nullo est Erratum pleaded, it was moved that there was a *manifest Error in the awarding the Venire Fac.* and prayed a *Certiorari* to certify it. Popham held it not grantable; For though sometimes *in Affirmance of a Judgment*, it is used in such Case to award a Certiorari to inform their Consciences, because they would not reverse a Judgment if it could be helped, yet never was it grantable *to avoid a Judgment*; For it is the Folly of the Party

[illegible] that he did not procure it to be removed before the Errors assigned; [illegible] the other Justices held e contra, that it is grantable as well in [illegible] as the other; and awarded accordingly. Cro. E. 836, 837. pl. 9. Trin. [illegible] Eliz. B. R. Winchcomb v. Goddard.

17. Error *upon a Judgment in Trover against Husband and Wife*, of a Trover and Conversion by the Wife, and several Errors assigned, which were all over-ruled; afterwards, upon a *Suggestion that there was not any Bail entered for the Wife*, the *Court was moved for a Certiorari*; it was *objected* against the granting it, *that the Plaintiff in Error had assigned several Errors, but not this for one and that the Defendant had pleaded in Nullo est Erratum*, and the Record is examined, it is now too late, especially as it is to reverse a Record, but peradventure upon such a Suggestion, to help a Record in Affirmance of a Judgment, they may award a Certiorari Ex Officio. But the Court held, that though the Plaintiff in Error cannot assign this for an Error after in Nullo est Erratum pleaded, yet *the Court for their own Information may Ex Officio award such a Certiorari upon such a Suggestion after that Plea pleaded*; and a Certiorari was granted. Cro. J. 5. pl. 6. Pasch. 1 Jac. in Cam. Scacc. Cox. v. Cropwell.

18. A *Venire Facias* was *returned in the Time of Queen Elizabeth*, and the *Hab. Corpora Juratorum was summoned in Curia Nostra, whereas it ought to have been in Curia nuper Reginæ*; For there was not any Summons in the King's Court which was moved to be a manifest Error, as was resolved in the Case of **Knowls v. Beckingshaw** in Cam. Scacc. wherefore it was *prayed that Certiorari might be awarded to certify it*, which was granted, (Popham absente.) But afterwards it being moved for Stay thereof, (Popham being in Court) because it was in the Discretion of the Court to award it or not, it being after in Nullo est Erratum pleaded, and *in Disaffirmance of a Judgment*; therefore all agreed that no Certiorari should be awarded, but that a Supersedeas should be made for Stay of that which issued before; and Judgment was affirmed. Cro. J. 138. 141. pl. 16. Mich. 4 Jac B. R. Read v. Potter.

Error of a Judgment by Nil dicit in an Action of *Debt on a Bond*, and the Error assigned was in the *Adjournment of the Continuances*; the Defendant *pleaded in Nullo est erratum*, and thereupon a *Motion was made for a Certiorari* to certify them; the Court doubted at first whether they should grant it after in Nullo est erratum pleaded, because it was in order to reverse, and not to affirm a Judgment; but at last it was adjudged, that it might be *granted to inform the Truth as well for the Reversal as in Affirmance of the Judgment*; and awarded accordingly Cro J. 445. pl. 24. Mich. 15 Jac. B. R. Anon

19. *After in Nullo est Erratum* is pleaded the Defendant cannot allege Diminution, because there *is a perfect Issue before*; Per Cur. Godb. 267. pl. 368 Hill. 13 Jac. B. R. in Case of Brook v. Gregory.

20. A Man *cannot* allege Diminution *of any Thing which appears in the Record to be true*; Per Cur. Godb. 267. pl. 368. Hill 13 Jac. B. R. in Case of Brook v. Gregory.

21. If a Writ of Error be brought *upon a Judgment in B. R. in Ireland* in a Writ of false Judgment *upon a Judgment in the Toulsil*, (which is the Court of the Mayor and Aldermen of Dublin) and it is assigned for *Error that there was no Plaint entered in the Toulsil, and that* these Words, *Per quod Actio accrevit were omitted in the Conclusion of the Declaration*; If the Defendant alleges Diminution, yet *he shall not have a Certiorari to the Ch. J. of B. R. in Ireland to certify* the *Residue* of the Record &c. *and that if any Part* of the Record *be not before him, that he should write to the Mayor and Aldermen to certify it, and that he should certify it to this Court*; for by his Plea of in Nullo est Erratum in B. R. in Ireland he has admitted the Record well certified by the Mayor and Aldermen, and this Court has no Authority to require the Court of B. R. in Ireland to write to the Mayor &c. and the Judgment of B. R. in Ireland is only here in Question. Such Writ being issued a Supersedeas was granted to the Whole, though it was prayed that the

the Superſedeas ſhould be as to the Inferior Court only F... Day it being moved, that there might be a Certiorari as ... *Per Quod* &c. it was granted. 3 Danv. 17. pl 11. cite... Paſch. 20 Jac. B. R. Baniſter v. Kennedy.

22. In a Writ of Error in the Exchequer-Chamber ... ment in B. R. it was aſſigned for Error that *in the B...* *declared on a Leaſe for three Years*, but *in the Plea R...*, u... which the Iſſue was joined, and the Record of Niſi Prius, *it was upon a Leaſe for five Years*, ſo that the Bill and Declaration vary, and Dimi... being alleged by the Plaintiff, *a Bill was certified*, in wh... it was *only for five Years*; upon which the *Defendant had a ...ther Certiorari, and thereupon a Bill was certified*, wherein he declared of a Leaſe *for five Years*, which warranted the Declaration upon the Roll and the Niſi Prius. It was held by all the Juſtices and Barons, that the ſecond Certificate upon Diminution alleged by the Defendant ſhould be received; for that warranting the Roll and the Record of Niſi Prius, ſhall be intended the true Bill, and the other a fictitious one. Cro. C. 91. Trin. 1 Car. Howell v. Thomas.

23. Diminution does not lie *after in Nullo eſt Erratum is pleaded*, for it is *repugnant* to the Plea, which goes to the Whole; for this Plea implies and refers to the Errors aſſigned by the Plaintiff, which being the Iſſue between them, no other can be aſſigned; and after Iſſue joined, ſuch new Matter is not to be alleged. But if the Original be returned, upon a Writ of Diminution, after In Nullo erratum pleaded; the Court will not reject it. Jenk. 164. pl. 13.

24. In a Writ of Error *upon a Bill of Exceptions*, the Plaintiff can allege no Diminution; For he muſt hold himſelf to the Matter of the Bill ſealed, and if it be not there it was his Folly to omit it. 2 Inſt. 427.

25. Error of a Judgment in C. B. in *Ejectment* upon Non ſum Informatus, and the Error aſſigned was, that *it appeared by the Record that the Declaration was before the Plaintiff had any Cauſe of Action*; it was ſaid it doth not appear ſo, but that if that was true, then there was a wrong Original certified; whereupon a Certiorari was prayed and granted to certify the true one, it being in Affirmance of a Judgment which ought to be favoured. Style 352. Mich. 1652. B. R. Jennings v. Downs.

26. Writ of Error was brought *upon a Judgment given by Juſtices of Oyer and Terminer*; The Error aſſigned was *becauſe there was no Adjournment*. And upon great Debate, it was ruled that Writ ſhall be directed to the Juſtices to ſupply this Diminution. Sid. 40. pl. 3. Paſch. 13 Car. 2. cited by Windham J. as adjudged in Sampſon's Caſe.

27. Diminution cannot be alleged upon a Writ of Error brought upon *a Judgment in any Inferior Court*; Per Cur. Sid. 40. pl. 3. Paſch. 13 Car. 2. B. R. Redding's Caſe.

28. *After in Nullo eſt erratum pleaded*, none may have a Certiorari to diſaffirm the Judgment, but contra to affirm it; though when it comes in Advantage it may be taken of Errors, and though the Plaintiff may have it before without Motion, yet not after ſuch Plea pleaded. Keb. 225. pl. 41. Hill. 13 Car 2. B. R. Furnage v. Norton.

29. Diminution may be alleged *in Wales*, and out of the *Courts in Counties Palatine*, but not in Ely, for that is only a Royal Franchiſe. Sid. 147. pl. 5. Trin. 15 Car. 2. B. R. Smith v. Smith.

Lev. 105. S. C.

30. In *Dower* in Nullo eſt erratum was pleaded. It was aſſigned for Error that it was *againſt an Infant who appeared by Attorney*, when he ſhould have appeared by Guardian. Per Cur. though it be after in Nullo eſt erratum pleaded, yet we may grant a Certiorari ad informand' Conſcientias; and a Dowager is a Kind of a Purchaſor. 7 Mod. 104. Mich. 1 Ann. B. R. Wood v. Branford.

31. Where

31. Where the *Defendant has joined in Execution* no Certiorari is necessary; neither is it, unless the Party, when he assigns Errors, prays it for *for want of Original* &c. Keb. 735. pl. 17 Trin. 16 Car. 2. B. R. Swain v. Shin.

32. A *Certiorari to Ireland after in Nullo est erratum pleaded*, was held grantable at the Prayer of the Defendant in Error, ad Informandum Curiam, and when returned, it will appear if the same Record or not. Show. 214. Pasch. 3 W. & M. Price v. Hartong.

33. No Diminution can be alleged *of a Record of an Inferior Court*. 7 Mod. 103. Mich. 1 Ann. B. R. Le Noyer's Case.

34 Upon a Writ of Error in B. R. the *Want of an Original* was assigned for Error, and the *Defendant, before the Return of the Certiorari, came in gratis, and pleaded a Release in Bar*. The Plaintiff in Error demurred, and the Defendant joined in Demurrer; this Release was agreed to be mispleaded for *Want of a Venue*; then the Question was, *Whether the Court Ex Officio, might award a Certiorari*, that it might appear whether there was an Original or not; Holt Ch. J. held they could not, because the Defendant, by pleading a Release, had admitted the Want of an Original; besides, the Question was not, Whether Error or not, but whether barred by the Release or not, and therefore the Court cannot depart from the Point referred to their Judgment; for if they do, then they give Judgment on the Certiorari, and depart from the Plea and Demurrer, and joined in Demurrer. But the other Judges were of a contrary Opinion, viz. that the Act of the Parties might foreclose themselves, but not the Court; for they are to give Judgment upon the whole Record, and may award a Certiorari ad informand' conscientiam. 1 Salk. 268. pl. 15. Trin 3 Ann. B. R. Carlton v. Mortagh.

6 Mod. 113. S. C. adjornatur. —— Ibid. 206. S. C. with the Arguments of the Judges, and held accordingly by three Justices, contra Holt. —— 2 Ld. Raym. Rep. 1005. S. C. adjudged the Plea naught for Want of a Venue, and then it amounted to a Confession of the Error. But as to the granting a Certiorari a Rule was made for hearing Counsel. —— 3 Salk. 399 pl. 3. S. C. and in arguing the Demurrer it was admitted that the Plaintiff could not pray a Certiorari to certify whether there was an Original or not, because the Defendant had confessed by his Plea that there was none, the Fault being cured by the Release of Errors, and therefore doubted whether the Court could award a Certiorari, and without it they could not reverse the Judgment. —— S. C. cited 1 Salk 270.

35. Error was brought on a Judgment in C. B. and *Want of an Original assigned*; The Defendant in Error came in Gratis, and *alleged Diminution*, and prayed a Certiorari, and thereupon *a variant Original was certified*; Upon this he came again at the Day given, and *suggested another Original of such a Term, and prayed another Certiorari*. This appearing on the Master's Report, the Question was, Whether it was regular? And per Holt Ch. J. *If a Record below be of Easter Term, and a Want of Original be assigned* for Error, the *Defendant may allege Diminution*, and then a *Certiorari goes* to the Custos Brevium *only to certify an Original of Easter Term*, that being the Term of which the Placita is; If then the *Custos Brevium certifies a wrong* Original, *or that there is no Original*, then the *Defendant may* come and *suggest, before in Nullo est erratum pleaded, that there is an Original of another Term, viz. Hill. or Mich.* and then *there must go a Certiorari to the Custos Brevium to certify that, and another to the Ch. J. of C. B. to certify the Continuances*. Also if the Custos Brevium *certify a wrong Original of the same Term the Placita is of*, it has been held, the Defendant may suggest there is a right Original even of that very Term; and when both are before the Court, the Court will apply the Record to that which is a good Original. 1 Salk. 266. pl. 13. Trin 3 Ann. B R. Burnaby v. Saunderson.

36. Error

36. Error of a Judgment in C. B. After Verdict the Plaintiff in Error assigned the *Want of an Original, but did not take out a Certiorari, as the Course is*; The Defendant in Error *pleaded in Nullo est erratum*; And per Holt Ch. J. If Want of an Original be assigned for Error, and the Plaintiff in Error does not sue out a Certiorari, the Course is for the Defendant in Error to go to the Master of the Office and get a Rule for the Plaintiff in Error to return his Certiorari; And in Case he does not get it done accordingly, the Assignment of Error signifies nothing; but if the Defendant in Error will come gratis and confess the Error, there need be no Certiorari returned; And as to the Objection, that there may be a bad Original in this Case, that is another Kind of Error; For when Want of an Original is assigned for Error, the Court will never intend a bad Original; The Judgment was affirmed. 1 Salk. 267. pl. 14. Smith v. Stoneard.

Want of an Original and Warrant of Attorney was assigned for Error. The Defendant came in gratis without any Process, and pleaded Instanter in Nullo est erratum; It was moved that this was a Confession of the Errors, because the Defendant has thereby prevented the Plaintiff from taking out a Certiorari to verify them. The Court reversed the Judgment. Barnard. Rep. in B. R. Mich. 5 Geo. 2. Addey v. Hutchinson.

37. Error in B. R. of a Judgment in C. B. the *Declaration was, Trin. 1 Annæ*, and *Want of an Original was assigned* for Error; and upon a Certiorari the Original was returned with the Continuances, by which it appeared, that *the Declaration was Hill. 13 Will. 3. with Imparlances to Trin. 1 Annæ, and the Original of that Term, so that the Suit was depending in the Reign of King William before any Original*; Sed non allocatur. For per Holt Ch. J. The Certiorari as to the Continuances was impertinent, and so is the Matter returned; and as to the Rest the Return is impossible and contrary to the Record, and therefore *the Imparlances shall be intended to be in another Cause*; and Judgment affirmed. 1 Salk. 269. pl. 16. Hill. 3 Ann. B. R. Tyson v. Hilliard.

38. In a Writ of Error out of C. B. the Defendant pleads in Nullo est erratum; it was *in a Scire Facias against Bail*, and the Plaintiff assigned for Error *the Want of a Scire Facias on the Roll.* Resolved by Holt Ch. J. that this Error might be assigned, as well as the Want of an Original Bill; and that by pleading *in Nullo est erratum*, the Plaintiff *has confessed the Error*; But the whole Court, viz. Holt Ch. J. Powell, Powis and Gould agreed, That a *Certiorari ad informandam Conscientiam* Curiæ might be *awarded*, which was done accordingly. 11 Mod. 143. pl. 15. Mich. 6 Ann. B. R. Lawn v. Sawbridge.

39. The Plaintiff had a Judgment in Ejectment, *the General Errors were assigned, and in Nullo est erratum pleaded.* It appeared on arguing the Case, that the *Declaration set forth a Demise &c. and did not shew that the Plaintiff entered or was possessed*; and the Truth was, that *the Declaration was right, but the Line in which those Words are, was omitted in the Transcript*, and the Court held this Defect to be fatal; thereupon the *Plaintiff moved for a Certiorari* ad informandam Conscientiam; which was opposed, because by in Nullo est erratum pleaded the Defendant affirmed the Record to be perfect, and therefore he is now foreclosed to say, that there is Error by Reason of such a Defect, for that is directly against his former Supposal; but yet *the Court is not foreclosed by this Admission of the Party*; for the Writ of Error being a Commission to them to examine the Record, the Parties cannot restrain them from looking into it; and that wherever by inspecting the Court may affirm the Judgment, they ought to award a Certiorari, and a Rule was made accordingly for a Certiorari upon these Reasons together with an Affidavit that the Record was right below. 1 Salk. 270. pl. 18. Pasch. 13 Ann. B. R. Meredith v. Davis.

(N. a) What Pleas a *Party* or *Privy*, and what Pleas a *Tertenant* shall plead.

Pleader.

Cro. J. 332. pl. 15. Bartholomew v. Belfield, S. C. resolved per Curiam upon solemn Argument.—— 2 Bulst. 244. S. C. adjudged.—— Roll Rep. 36. pl. 5 S. C. adjudged accordingly.—— S. C. cited Ibid. 308.—— S. C. cited 2 Jo. 183. Mich. 33 Car. 2. per Cur.

1. IN a Writ of Error against him that recovers the Defendant may plead, that after a Recovery he levied a Fine of the Land recovered to B. and that five Years are passed without Claim by the Plaintiff, for this Fine bars the Right by the Statute of 4 H. 7. and the Defendant may plead in bar of the Right, though he be not Tenant of the Land. Tr. 12 Ja. B. R. between *Benfield and Batlamew.*

Br. Error, pl. 9. cites 9 H. 6. 46. S. C. —— Fitzh. Error, pl. 20 cites S. C.

2. If a Writ of Error be brought against the Heir of him that recovers, though he hath nothing in the Land, yet he may plead the Release of the Demandant of the Error. 9 H. 6. 46. b. 48. per Curiam.

Br. Error, pl. 9. cites 9 H. 6 46. S. C. —— Fitzh Error, pl. 20. cites S. C.

3. So he may plead that the Demandant is a Bastard, where it is material. 9 H. 6. 46. b. 49. Curia.

And it is a good Plea for the Tertenant also Br. Error, pl 9 cites 9 H. 6. 46. S. C. per Radford, so that the Tertenant was Tertenant at the Time of making the Release, but otherwise not; For then it cannot enure.—— Fitzh. Error, pl. 20. cites S. C.—— And a Release of his Right in the Land after Recovery is a good Bar to a Writ of Error, because he cannot be restored to the Land. Co. Litt. 289. a. in Principio.

4. So he may plead a Release of the Right in the Land, though he hath nothing in the Land. 9 H. 6. 49.

Br. Error, pl. 9. cites 9 H 6. 46. S. C. & S. P. per Radford —— Fitzh Error, pl. 20. cites S. C.

5. In a Scire Facias against a Tertenant, he may plead a Release of the Error, though he be not privy to the Judgment. 9 H. 6. 48. Curia.

Br. Error, pl. 9 cites 9 H. 6. 46. S. C. & S. P. per Hals. —— Fitzh. Error, pl. 20 cites S. C.

6. In a Writ of Error against him that is privy, if the Judgment be reversed; yet in a Scire Facias against the Tertenant he may plead a Release in Bar, or that the Demandant is a Bastard. 9 H. 6. 47.

Br. Error, pl. 2. cites 9 H. 6. 46. per Martin.

6. Where a *Judgment is given in a Real Action*, a *Release of all Actions Real* is a good Bar in a Writ of Error brought thereupon. Co. Litt. 288. b. ad finem.

7. The Tertenant may plead *that the Ancestor was outlawed of Felony*, or that he *is not Son and Heir*. Br. Error, pl. 9. cites 9 H. 6. 46. Per Hals.

8. Error

8. Error was brought *by the Heir of him who lost* the Land, *against the Heir of him who recover'd*, and had Scire Facias against the Heir, who *pleaded Jointenancy with B.* And per Brian, this is no Plea; For the *Scire Facias is brought for the Privity, and not against the Heir as Tertenant*; For it does not suppose Quod Terram illam tenet. Per Catesby Scire Facias brought against him who recovered, or his Heir, upon Writ of Error, *shall not say Qui Terram illam tenet*; but *otherwise it is against a strange Tenant*; And therefore now the Judgment shall bind without Scire Facias after, and therefore Jointenancy is a good Plea. But Bill. Contra; For this Scire Facias *is only Ad audiendum Errores*, and the other shall be to have Execution of the Land. Nevertheless Yelverton agreed with Catesby. Br. Error, pl. 167. cites 10 E. 4. 12, 13.

9. The *Tertenant cannot plead in Abatement of a Writ of Error but only in Bar*, as a *Release* &c. in Maintenance of his Title; For the *Scire Facias against him is not Ad audiendum Errores*, but Ad audiendum *Processum & Recordum*, Arg. and to this Twisden and Windham inclined. Lev. 72. Mich. 14 Car. 2. B. R. in Case of Winn v. Loid.

The Tertenants, have thing to do with the Errors, but only with the Process and Record; Per Twisden. Keb. 352. in S. C.

(O. a) At what Time.

1. In a Writ of Error against the Heir of the Recoveror within Age, and a Scire Facias against the Tertenant, if the Parol demurs for the Heir, and the Judgment is reversed against the Tertenant, yet at full Age the Heir may plead the Release of the Demandant of the Right, or of the Errors, and bar him. 9 H. 6. 48. Curia.

Br. Error, pl. 9. cites 9 H. 6. 46. S. C. & S. P. per Hals. — Fitzh. Error, pl. 20. cites S. C.

2. In a Writ of Error against the Heir of the Recoverer, if a Scire Facias be awarded against the Heir and Tertenants.

This in Roll is left imperfect as here.]

(P. a) *What* Thing shall be Error *in Verdicts, or* in *Proceedings after the Jury returned and before Verdict.*

See (M. c)

1. If a Man be indicted for speaking scandalous Words &c. and upon Not Guilty pleaded it is entered that the Jury upon the Return of them appeared, & super hoc Juratores præd' electi triati & ad veritatem de & super Premissis jurati dicunt super Sacramentum suum quod &c. and so give a Verdict, yet this is Error, because it is not said, that they were jurati ad veritatem dicendam, according to the usual Course, for they may be sworn ad veritatem; yet inasmuch as they are not sworn to give their Verdict according to the Truth, there is not any Command to give their Verdict according to Truth, and a Verdict is so called a Veredicto. Hill. 1650. *Williams's* Case, adjudged, and the Judgment given at the Sessions at Newgate, reversed accordingly for this Error; and then another Judgment was given accordingly, in an Inditment of Perjury shewed in a Case.

Sty. 244. S. C. adjudged.

Fol. 767.

(Q. a) *What* Thing shall be *Error in Verdicts.*

* Cro. Car. 426. pl. 17. Tyffin's Case, S. C. and Judgment affirmed. —— Jo. 367. pl. pl. 7. Tippen v. Fenton, S. C. and Judgment was affirmed according to the Book of 4 H. 7. 6. and 7. a and 2 Eliz. Sir Cha. Howard's Case, but if Judgment had been given against Both, it had been Error. —— Ld. Raym. Rep. 601. Trin. 12 W. 3 Arg. cites same Cases, and says it seems to be a settled Point, that where Trespass is brought against several, and they plead Not Guilty, and then one of them dies, and a Venire and Distringas issue to try the Issue between the Plaintiff and the two Defendants, and a Verdict for the Plaintiff against both, the Plaintiff may surmise the Death of one of the Defendants, and shall have Judgment for the whole against the other, and good; and of this Opinion the whole Court seemed to be as to the dead Man.

1. IF A. brings an Ejectione Firmæ against B. and C. and after Issue joyned B. dies; and after upon a Habeas Corpora which mentions the Issue to be between A. of the one Part, and the said B. and C. a Verdict is given against B. and C that they are guilty, and Damages are given against them, but a Surmise thereof is made before Judgment, and so Judgment given only against C. this is not Erroneous, though the Verdict was against both, inasmuch as the Judgment was against him only that is living. Mich. 11 Car. B. R. between * *Tyffin and Lenton*, adjudged in a Writ of Error upon a Judgment in B. and the first Judgment affirmed. Intratur Hill. 10 Car. Rot. 501. † 4. H. 7. 7. 3 H. 7. 6.

† Fitzh. Brief, pl. 185. cites S. C. —— See (S) supra, pl. 4. S. C. and the Notes.

See tit. Damages (Q) per totum.

2. In an Action upon the Case for several Words spoke at several Times, and upon Not Guilty pleaded the Jury find for the Plaintiff, and give intire Damages; upon which a Verdict is given, if the Words spoke at one Day will bear an Action, and the Words spoke on another Day will not bear an Action, this is erroneous; for it shall be intended the Damages were given for the Words spoke at both Times. Mich. 13 Car. B. R. between *Alcock and Pargrave*, per Curiam adjudged in arrest of Judgment.

See tit. Damages (Q) per totum.

3. But in an Action upon the Case for Words spoke at one Time, though Part of the Words are actionable and Part not, and the Jury find him guilty and tax Damages generally, this is a good Verdict, for it shall be intended that they gave the Damages for those Words only which are actionable; this is the Common Practice. Co. 10. *Osborn's Case.*

The Declaration was, De placito debiti, and then shews the Sale of such and such Things at such a Price, and concludes, that they attingunt to such a Sum, and so demands the Sum, whereas in Truth the Sums were miscast; It was insisted that this was erroneous; But the Court held it to be only the Misprision of the Clerk, and no Error. The Reporter adds a Quære, if the Verdict had found, and the Jury had given Damages for the intire Sum miscast, it seems that it would be Error. 2 Roll Rep. 45. Trin. 16 Jac. B. R. Hill v. Whittingham —— Cro. J. 494. pl. 15. Whittingham v. Hill, S. C. but S. P. does not appear. —— See tit. Miscasting (A) per totum.

4. In an Action upon the Case upon a Promise, if the Plaintiff declares that the Defendant was indebted to him for Wares sold, scilicet, for such Wares so much, for such Wares so much, &c. in toto so much &c. and miscasts the total Sum, (putting more than the total Sum in Truth) and thereupon assumed &c. and the Defendant pleads the general Issue, and it is found for the Plaintiff, and Damages given, and Judgment, this is Error, because by Intendment the Jury gave Damages according to the total Sum put, and not according to the Particulars. Mich. 14 Car. B. R. between *Milborne and Shaftoe* adjudged, and Judgment given in Newcastle reversed accordingly. Intratur P. 14 Car. Rot. 325. and so adjudged. Pasch. 13 Car. B. R. between *Kellet and Ashe* in Arrest of Judgment.

5. But

5. But if the Miscasting be in a small Sum as three Farthings more than is declar'd for in a great Sum, and this not certain, this shall not be so minced as to make Error. *Hobart's* Reports, *Lastlow and Tomlinson.*

Hob. 88. pl. 115. Hill. 11 Jac. S. C. —— For De minimis non curat Lex.

——Jenk. 287. pl. 22. S. C.

6. In Trover and Conversion for divers several Goods, if the Jury find him guilty for other Goods than those in the Declaration, and give Damages for all, and Judgment is given accordingly, this is Error. Pasch. 14 Car. B. R. between *Griffith and Clark*, adjudged in a Writ of Error upon a Judgment in Ireland, and this reversed accordingly. Intratur Mich. 13 Car. Rot. 205.

In Trespass, the Plaintiff declared of the taking of one Parcel of Cloth, containing 18 Yards, and of another containing 20 Yards, and of two other Parcels The Jury found him Guilty as to five Parcels; And Judgment given in C B. but was reversed; because it shall not be intended, one of the first Pieces containing several Yards contained diverse Parcels, and then the Jury found him guilty of five Parcels, whereas the Plaintiff declared of four only. 2 Roll Rep. 415. Mich. 21 Jac. B. R. King v. Hoskins.

7. In Debt upon an Obligation, if the Defendant pleads non est Factum, which is found for the Plaintiff, and the Jury assess Damages occasione infrascripta, this is good, without saying occasione detentionis debiti, for this is tantamount. Pasch. 8 Ja. B. *Alcock's Case*, adjudged in Camera Scaccarii in a Writ of Error.

See (B. b) infra, pl. 29 S. C.

8. In an Action upon the Case, if the Plaintiff declares for Slander of his Title to certain Lands, and also for speaking scandalous Words of his Person, and the Action is not well alleged as to the Slander of Title to the Land, but well as to the Slander of the Person, and Not Guilty is pleaded, and it is found for the Plaintiff, and intire Damages given, this is Error; for it shall be intended that the Jury gave the Damages as well for Slander of the Title of Land, as to the Person. Trin. 15 Car. B. R. between *Nevill and Nevill* per Curiam; this being moved in arrest of Judgment.

Fol. 768.

9. *Assise by two against one*, who *pleaded that the one of the Plaintiffs was not seised so that he might be Disseised*, and if &c. Nul Tort; *and against the other Feoffment of his Ancestor whose Heir &c. with Warranty; Judgment if contrary to the Warranty* &c. And the *Jury gave Verdict, that the one was not seised so that he might be disseised, and found the Bar against the other*; And the Justices adjudged that the Plaintiffs should prejudice nothing by their Writ; And the Plaintiffs brought Writ of *Error because the Jury found the Plea to the Writ, and also inquired of the Bar*, and yet the Court adjudged that they should take nothing by their Writ. And per Cur. this Judgment was well given, by which the Court was in Opinion to have given Judgment to affirm the first Judgment; Nota. Br. Assise, pl. 5. cites 28 H. 6. 9.

10. In *Trespass* &c. the Plaintiff had a Verdict, and upon a Writ of Error brought by the Defendant he assigned for Error, that the Plaintiff had *declared to his Damage of* 40 *l.* aud that the *Damages assessed by the Jury were* 35 *l. and Costs encreased by the Court were* 6 *l. in all* 41 *l.* so that he had *recovered more than that whereof he declared*, for that was but for 40 l. but adjudged, that the Damages assessed by the Jury being less than he counted for, though the Costs amount to more, it is not material. Cro. Eliz. 866. pl. 47. Mich. 43 & 44 Eliz. in Cam. Scacc. Comb v. Carew.

11. Judgment in *Assumpsit*, Error assigned was, for that the *Plaintiff had declared Ad Damnum* 10 *l.* and the *Jury gave him* 10 *l. Damages, and* 13 *s.* 4 *d. for Costs, which is more than what he had declared for*; Sed non allocatur; For though the Entry is of Damages and Costs by the Name of Damna, yet they are distinct, and though the Jury had

Yelv. 70. Vale v Egles S C. held accordingly.

7 E found

found more Damages than the Plaintiff had declared, and Judgment had been given, it had been Erroneous; but if they had found more Costs than the Damages had amounted to, it had not been Error; for it may be, that *the Costs of Suit by long depending might exceed the Debt.* Cro. J 69 pl. 11. Pasch. 3 Jac. B. R. Egles v. Vale.

Noy 126. Brownlowe v. Littleton. S. C. resolved upon search of Precedents that a Scire Facias does not lie against the Executor for the Damages

12. In *Dower* there was a *Judgment by Default*, and a Writ of Seisin to the Sheriff &c. and also a *Writ of Inquiry, whether the Husband died seised, and of what Estate, whether in Fee, or in Tail*; the *Jury found, that the Husband died seised, but whether in Fee or in Tail ignorant*, and they found the Value of the Lands &c. and quantum Temporis elabitur &c. where upon Judgment was given that she recover &c. and her Damages to 60 l. A Writ of Error was brought, and after the Record removed the Widow died, whereupon the Plaintiff in Error brought a Sci. Fa. against her Executor Ad audiend, Errores, and upon 2 Nihils returned he assigned Error, (viz.) that there ought to be no *Judgment to recover Damages, because the Jury had not found any dying seised of any Estate of Inheritance* in the Husband, as the Writ supposed, for if he did not die seised of such an Estate, the Widow shall not be endowed; and this was adjudged Error. Yelv. 112. Mich. 5 Jac. B. R. Bromley v. Littleton.

13. In Trespass the *Entry* in the Record *was, Ad quem Diem A. B. and C. D. &c. of the principal Panel veniunt & jurati existunt, and because the rest did not appear, W. N. and J. N. de novo apponuntur qui ad veritatem de infra content' electi, triati & jurati dicunt* super Sacram' suum, *omitting these usual Words, (Simul cum aliis juratoribus prius impanellat')* so that this was the Verdict of the Tales only, and not by those with whom they were Sworn; And all the Judges and Barons being of this Opinion the Judgment was reversed. Cro. J. 207. pl 3. Pasch. 6 Jac. in Cam. Scacc. Kempton v. Bartell.

14. In *Detinue*, the Plaintiff *declared to his Damage of* 100 *l.* and the Jury *found the Damages to* 150 *l.* and Judgment for so much; But upon Error brought the Judgment was reversed; For where the Plaintiff counts of a certain Damage, he is to recover no more than he has counted for. 1 Bulst. 49. Mich. 8 Jac. Hoblins v. Kimble.

15. Error assigned was, because *two several Assumpsits* were laid, *whereof the one was void and the other good*, and *Verdict* was *for the Plaintiff, and intire Damages* given by the Jury. The Court agreed this to be clear Error and reversed the Judgment. 3 Bulst. 235. Mich. 14 Jac. Porter v. Chapman.

16. The *Original* in C. B. *concluded Ad Damnum* 40 *l.* and the *Declaration was Ad Damnum* 100 *l.* Upon Not Guilty pleaded, the *Jury gave* 12. *d. Damages*; and upon a Writ of Error brought, this Variance between the Writ and Declaration was assigned for Error; Adjudged, this had been a good Objection in the original Action upon a Demurrer to the Declaration, but it is not so after a Verdict, especially after the Jury had found 12 d. Damages; but if the Verdict had found more Damages than what was mentioned in the Writ, and less than in the Declaration, yet it had been ill, because there was no Writ to warrant such Damages; But when the Damages are less than they are in the Writ or Count it is otherwise, and therefore held by all the Justices to be well enough. Cro. J. 629. pl. 2. Hill. 19 Jac. B. R. Eardley v. Turnock.

17. Error upon a Judgment in B. R. in Ireland, where the *Jury gave* 10 *l.* 6 *d. for Damages and Costs*, and *the Judgment entred was, Quod recuperet Dampna sua per Juratores Assessa ad Valorem* 10 *l.* and *no Notice was taken of the* 6 *d. nor was that Part released*; and it was held naught, because Damages and Costs are all Dampna, and both included by that

Word

Word in the Judgment; and Judgment was reversed Nisi; Arg. 2 Show. 56. pl. 42. cites Mich. 30 Car. 2. B. R. Osborn v. Exton.

18. In Debt on an Obligation, the *Jury in assessing Damages say*, pro *Mis' & Castag'*, *omitting the Words*, *Circa sectam expenditis*, and so it doth not appear for what the Costs and Damages were assessed; the Judgment was ordered to be reversed, Nisi. Sty. 164. Mich. 1649. Crible v. Orchard.

19. In Trespass the *Issue was*, *De injuria sua propria absque tali causa*, and the Jury *found the Defendant Not Guilty generally*; Per Roll Ch. J. this is not good, because it was not a direct finding the Issue, but only Argumentatively; and Judgment was reversed, Nisi &c. Sty. 167. Mich. 1649. Hobbs v. Blanchard.

20. Error was brought upon a *Judgment by Default in Case* in C. B. and the Error assigned here was, that the *Jurors upon the Writ of Inquiry had assessed more Damages than were laid in the Declaration*, and the *Judgment being Quod recuperet Dampna sua prædict' per Juratores prædict' assess'* &c. naught; And for this Error the Judgment was accordingly reversed. Arg. 2 Show. 56, 57. cites Mich. 29 Car. 2. Webb v. Webb.

Ibid. The Reporter says Nota, that in this Case the *Plaintiff might between the Verdict and Judgment have released the Surplusage of the Damages* here meant, and such Release being entred upon the Record would have rendred the Judgment well enough.

21. Error on a *Judgment* in B. R. in Ireland which was *by Default*, and Writ of Inquiry; and the *Jury Assess* 100 *l. and* 6 *d. Costs*, and the *Judgment is quod prædict' querens recuperet Dampna sua prædict ad cent' libras per Inquisition' prædict' compert' & pro increment'* 7 *l.* &c. Agreed, That *if ad cent' had been left out*, it had been doubtless good; argued therefore, that the rest should be Surplusage, or else Miscounting, which will not vitiate the Judgment. However the Rule was quod reversetur Jud' nisi &c. 2 Show. 88. 89. pl. 82. 31 & 32 Car. 2. Anger v. Brookhen.

But the Reporter says, Quære; for Dampna being a general Word for the Costs and Damages it seems to be a compleat Judgment in that Quod recuperet Dampna sua prædict', and the rest coming after was Surplusage, for if they had said no more than this, Quod recuperet Dampna sua prædict' & de Incremento &c. ad Requisition &c. it would doubtless have been well enough. Ibid.

(A. b) *In Judgments.*

What Act or Thing shall be said Error.

No Letter in Roll between (Q a) and (A. b)

1. **If the** Husband seised in Right of his Wife makes an Ejectment Lease, **and the** Lessee brings an Action thereupon, and hath a Verdict, and Judgment, **it is not Error to** allege the Death of the Feme before Judgment, **by which the Interest of the Baron and Lease by him made to the Plaintiff determined, because the** Feme nor her Husband are not Parties to the Action, **and this depends upon the Title of the Land, for the Plaintiff may say the Baron was seised in his own Right. Hobart's Reports, 8. between** *Wilks and Jordan* **adjudged.**

Hob. 5 pl. 10. S. C. — Cro J. 332. pl. 14. Jordan v. Wikes, S. C. but there it is that the Husband died after the Lease made, and before the Action brought; But the Court held, that in Regard the Feme had not entered after the Death of her Husband the Lease is not determined nor void after her Husband's Death, but voidable only. —— Jenk. 293. pl. 39. S. C. says the Writ does not abate; and the Plaintiff may have Judgment and a Writ of Execution.

Poph. 192. the Earl of Shrewsbury's Case seems to be S. C. resolv'd that no Writ of Error should be allowed, nor any Supersedeas granted.

2. If a Man brings an Ejectione Firmæ in B. R. and there hath a Verdict for him upon a Trial at Bar, and after before Judgment he dies, and after Judgment is given for him the same Term, this is not Error, because the Judgment relates to the Verdict. Mich. 15 Ja. between *Hide and Marker*, which concerned the Earl of *Shrewsbury*, per Curiam.

Roll Rep. 51. pl. 20. Jordan's Case, S C. and per tot. Cur. the Judgment was reversed, and it cannot relate to the Nisi Prius. ——— Sid. 143 pl. 22. Pasch. 15 Car. 2. B R. Anon. in a Nota says, the Death of one of the Parties between the Nisi Prius and the Day in Bank is Error, because the Writ is thereby abated, though it cannot be pleaded. ——— *But by the Stat. 17 Car. 2 cap. 8. S. 1. made perpetual by 1 Jac. 2 cap. 17. in all Actions Personal, Real, or Mixt, the Death of either Party, between the Verdict and the Judgment, shall not be alleged for Error, so as such Judgment be entered within two Terms after such Verdict.* ——— Though the Judgment be not entered on the Roll till after two Terms, yet if it be signed within two Terms it has been held within the Act, whence it appears that the Judgment is compleated; and ruled that Judgment be entered in the Roll, and the Execution to stand. Sid. 385. pl. 17. Mich. 20 Car. 2. B. R. Helie v. Baker.

3. If a Verdict passes against the Plaintiff at Nisi Prius, and after, before the Day in Bank he dies, and after Judgment is given against him, this is Error, inasmuch as Judgment was given against a dead Person. Tr. 12 Ja. B. R. *Jurdan's Case* adjudged.

Br. Error, pl 123. cites S. C.

4. If the Tenant in a real Action dies, pending the Writ, and after Judgment is given against him, this is Error, because it is given against a dead Person. 28 Ass. 17. adjudged.

Fitzh Judgment, pl. 193. cites Mich 27 E. 3. 88. S P. [This is 27 E. 3. fol. 12. b. pl. 55. S. P.]

5 In an Action against Baron and Feme if the Feme be received and traverses the Action, and this is found against her by Nisi Prius, and after the Baron dies before the Day in Bank, at which Day the Judgment is given, this is Error, because the Judgment is given against a dead Person. 27 E. 3. 89.

4 Le 15. pl. 55 Blaby v. Eltwick, S. C. the Court cannot take Notice of such Death judicially on the Allegation, nor hath any of the Parties Day in Court to plead it, but may have a Writ of Error. ——— Cro. E. 202. pl. 32. S. C. accordingly.

‡ Roll Rep 14. pl 18 Lee v Rowkeley, S. C in Ejectment the Court advised the Plaintiff to relinquish this Action, and only to enter the Verdict for Evidence, because the giving Judgment against Both will be erroneous; Per Doderidge, and Mann Prothonotary; But it is there added, that Mich. 12 Jac. Coke said, that the Plaintiff may make Allegation that the one is dead, and shall have Judgment against the other; and that so is the 44 E. 3. ——— Cro. J. 356 pl. 12. Rigley v. Lee & Ux' S. C. and because the Action, which was an Ejectment, is in Nature of an Action of Trespass, and the Feme is charged for her own Fact, it was adjudged that the Action continues against the Feme, and that Judgment should be entered against her alone, because the Baron was dead ——— But if Judgment was given against the Survivor only upon a Surmise of the Death of the other, it had not been Error. Jo. 367. Tippen v. Fenton. ——— Cro. C. 426. pl. 17. Tyffin's Case, S. C ——— See (S) pl. 4. and the Notes there.

6. In an Assumpsit against two, after a Verdict against them at the Assises by Nisi Prius, if one of the Defendants dies before the Day in Bank, and after Judgment is given against both according to the Verdict, this is erroneous, though the Day of Nisi Prius and Day in Bank are one Day as to some Purposes, for the Judgment was given against a dead Person. Pasch. 32 El. B. R. dubitatur between * *Blady and Eastwigg*. Pasch. 12 Jac. B. R. between ‡ *Lee and Rowkely* per Curiam.

7. If a Judgment be given against three Executors, where one was dead before the Judgment, yet this is not Error. Hill. 41 El. B. R. adjudged in a Writ of Error.

8. A

8. A *Verdict* was *against Husband and Wife in Ejectione Firmæ, after Trial by Nisi Prius, and before the Day in Bank the Husband died*; Adjudged the Action continued against the Wife, and Judgment was entred against her; For it is in the Nature of an Action of Trespass, and she is charged for her own Act. Cro. J. 356. pl. 12. Mich. 12 Jac. B. R. Rigley v. Lee.

Roll Rep. 14. pl. 18. Pasch 12. Jac. B. R. Lee v Rowkeley S. C. the Court advised the Plaintiff to relinquish the Action, and only to enter the Verdict for Evidence; For if Judgment be given against both, and one is dead at the time of the Judgment given, it will be erroneous; Per Dodderidge and Man Prothonotary But Mich 12 Jac. Coke Ch J. said, that the Plaintiff might allege that the Baron is dead and have Judgment against the Feme, and that so is 44 E. 3.

9. If a *Verdict* be *given at Nisi Prius*, and the *Plaintiff or Defendant dies after the Beginning of the Term*, yet Judgment shall be entred, for that relates to the first Day of the Term; Agreed per Cur. Het. 157. Mich. 5 Car. C. B. Springall v. Tuttersbury.

10. Judgment was given against the Defendant, and he brings a Writ of Error, and assigns for *Error, that the Plaintiff was dead at the Time of the Judgment given.* The Plaintiff's Entry is, That the aforesaid Plaintiff by A. B. his Attorney venit & dicit, that he is in Life, and Issue thereupon, and found for the Plaintiff in the Writ of Error that he was Dead; and Serjeant Maynard moved that the Judgment might be reversed. Allen contra, because there ought to have a Scire Facias against the Executors of the Party dead. It was adjourned. Raym. 59. Mich. 14 Car. 2. B. R. Dove v. Darkin.

Lev. 80. Darkin v. Done S. C. and by the Opinion of three Justices the Judgment was reversed, but Forster Ch. J. e contra, because though it appears by the Verdict that the Plaintiff was dead yet it does not appear legally, the Verdict itself not being lawfully obtained. And it was argued that the Attorney who pleaded that he was living did it without authority; For he could not be Attorney to a dead Man.——Sid 93. pl 17. S. C resolved accordingly; and said that if the Executors in this Case are at any prejudice they may have Action on the Case against the Attorney if he appeared without Warrant And Windham J. said that his Brothers at Serjeant's Inn said this was good, but that the sure Way had been for the Attorney to have pleaded, Quod venit pro Magistro suo D and not that D venit per Attornatum.——Keb. 413. pl. 119 S. C. and Judgment reversed.

11. The *taking of Baron between the Nisi Prius and the Day in Bank* seems not to be Error, it being *only a Plea in Abatement.* Sid. 143. pl. 22. in a Nota. Pasch. 15 Car. 2. B R. Anon.

12. 17. *Car* 2. *cap.* 8. *S.* 1. *In all Actions personal, real or mixt, the Death of either Party between the Verdict and the Judgment shall not be alleged for Error, so as such Judgment be entred within two Terms after such Verdict.*

12. The Signing of the Judgment within two Terms is an entring of the Judgment so that by the Statute 17 Car. 2. cap. 8. it may be *entered on the Roll after the Death of the Party.* Sid. 385. pl. 17. Mich. 20 Car. 2. B. R. Helie v. Baker.

13. In Writ of Covenant Verdict was for the Plaintiff, but it being objected that it was a Mistrial, for that the Venire Fac. was misawarded, it being to an adjoining County; But after Argument the *Court ruled the Venire well awarded; But the Case having remained two or three Terms since the Postea was returned, and no Continuances entered, one of the Plaintiffs died*, and it was doubted whether Judgment could be now entred; And the Secondary said, that they did enter up Judgments two Terms after the Day in Bank, without any Continuances; And of this Matter the Court would be advised. Vent. 58, 59. Hill. 21 & 22 Car. 2. in B. R. Crispe and Jackson v. Berwick Mayor and Commonalty.

Vent. 92. Trin. 22 Car. 2 in B R. S. C. And it was prayed notwithstanding that Judgment might be entred, there being no Default in the Plaintiff, but a Delay which came by the Act of the Court, and that it was within the Statute of this King, that the Death of the Party between Verdict and Judgment should not abate the Action, and that it was in the Discretion of the Court, whether they would take notice of the Death in this Case; for the Defendant has no Day in Court to plead, there being no Continuances entred after the Return of the Postea, and cites Leon. 187. Isley's Case, Latch's Rep 92. [Farnel v. Tupper] And the

the Court were of Opinion, that Judgment ought to be entred, and there being no Continuances, it may be entred as if immediately upon the Return of the Postea.——Lev. 252 Mich 20 Car. 2. B R. S C. adjornatur, but the Reporter says he heard that Judgment was afterwards given for the Plaintiff.——Mod. 36. pl. 88. S C. but adjornatur, to hear Counsel.——Raym. 173. S. C. but S. P. does not appear.——Sid. 462. pl. 5. S. C. & S. P. and that Judgment was entred as in the Life of the Party, and that such Entry is well Warranted both by the Common Law and by Statutes And that Twisden J said, that if the *Party had died in the Term before the Judgment entred*, and the same had been suggested to the Court, yet they would take no Notice of it, but should proceed to Judgment, and as to the principal Case it was said, there is no Reason that the Laches of the Court should prejudice the Plaintiff

14. The *Plaintiff after Verdict for him at the Assises died*; It was moved, that notwithstanding the Statute 17 Car 2. cap. 8 which enacts that the Death of either Party after Verdict, and before Judgment, shall not be alledged for Error, that the Defendant coming now before Judgment was entred, was out of the Statute; Sed Curia contra; For if it shall not be alledged after Judgment for Error by the Statute it was certainly *never intended that it should be admitted a sufficient Cause to stay Judgment.* Freem. Rep. 79. pl. Pasch. 1673. C. B. Bellamy v. Player.

15. Writ of Error upon a Judgment in C. B *in Trover against six, where after Verdict one of the Plaintiffs* comes and *suggests that his Fellow is dead, and prays that he as Survivor may have Judgment*, and had it there; but the Court here, viz. Pemberton Ch. J. Jones, Raymond, and Dolbin, were of Opinion that the Judgment should be reversed mainly upon the Reason in **Read and Redman's Case** 10 Rep. 134. Skinn. 39. pl. 7. Pasch 34 Car. 2. B. R. Wedgewood v. Bayly.

Freem. Rep. 532 pl. 716. S. C. adjudged in C. B for the Plaintiff——2 Show. 177. pl. 173. S C. in B. R. Sed adjornatur——Raym. 463 S. C in B. R. and Judgment was agreed to be reversed by the Opinion of three Justices against Dolben, who desired Time to consider.——3 Mod 249. Arg. cites S. C. that the Judgment could not be entred; but says it is true, that where so many are Defendants and one dies, the Action is not abated, but then it must be suggested on the Roll.——8 & 9 *W.* 3. *cap* 11. *S.* 7. *Provides, that if there are two or more Plaintiffs or Defendants, and one dies, if the Cause of Action survives to or against the surviving Plaintiff or Defendant, the Writ or Action shall not abate, but such Death being suggested on the Record shall proceed.*

16. *Error in Fact* assigned, *that the Plaintiff died before the Judgment*, but the Judgment was affirmed Nisi &c. And Holt said, he was not well satisfied with the Case of **Dove v. Darcen** Sid. 93. for there should be a Scire Facias against the Executors or Administrators, and the Truth will appear upon the Sheriff's Return. Comb 320. Pasch. 7 W. 3. B. R. Proberts v. Edmunds.

17. 8 & 9 *W.* 3. *cap.* 11. *S.* 2. *If after Judgment for the Defendant, the Plaintiff or Demandant shall sue a Writ of Error, and the Judgment shall be affirmed, or the Writ of Error discontinued, or the Plaintiff nonsuit therein, the Defendant or Tenant shall have Judgment to recover his Costs, and have Execution for the same by Capias ad Satisfaciendum, Fieri Facias, or Elegit.*

18. The *Husband joined in a Writ of Error*, yet it was ruled that *by his Death the Writ abated*; otherwise it is where the *Defendant in Error dies after in nullo est Erratum pleaded*, for there the *Court may proceed* to examine the Errors. Comb. 263. Trin 6 W. & M. in B. R. Fitzgerald v. Clanrickard Countess.

Show. 76. S. C. but not S. P.

(B. b)

(B. b) In Judgments.

Fol. 769.

What Things shall be Errors in Judgments.

1. IN an Indictment for not repairing a Common Highway, if the Defendants are found guilty, and a Fine imposed & quod sint in Misericordia without a Capiatur, this is Error. Hill. 10 Car. B. R. between *the Inhabitants of Somersham, in Comitatu Huntington, and the King* adjudged; and the first Judgment reversed accordingly.

Upon every Conviction upon an Indictment the Judgment is, Quod capiatur, and the Omission thereof is to the King's Prejudice, and for this Omission a Judgment for the King upon an Indictment for Recusancy was reversed Cro. C. 524 pl. 6. Trin. 14 Car. B. R. the Marquis of Winchester's Case. ——— Jo. 407 pl. 5. The King v. Ld. St. John, S. C. accordingly.

2 If the Judgment be quod the Plaintiff or Defendant capiatur where it should not be, this is Error, for it is a false Judgment, and in Prejudice of the Party. Tr. 15 Ja. between *Wheateley and Stone*, per totam Curiam in a Writ of Error at Serjeant's Inn agreed. Dyer, 14 El. 315. 99. admit.

Hob. 180. pl. 215. S. C.

3. So if the Plaintiff or Defendant be amerced by the Judgment where he ought not, this is Error. Dyer, 44 El. 315. 99. admitted. 6 E. 6. 75. 22.

4 So if the Judgment be not Quod capiatur where it ought to be so, it is erroneous. Mich. 16 Car. B. R. *Frideau's Case*, who was indicted for poisoning J. S. but he did not die, and found guilty; and Judgment to pay so much for a Fine, and no Capiatur quousque &c. and for this Cause reversed per Curiam; contra 29 E. 3. 30. b. adjudged.

5. So if the Judgment be not quod sit in Misericordia, where it ought to be so, it is erroneous. Co. 8 *Beecher's Case* 49. resolved, because the Judgment is not perfect without it. Dyer, 14 El. 315. 99. admitted. 6 E. 6. 75. 22.

Cro. J. 211. pl 3. Beecher v. Shirley, S. C. adjudged.

6. In an Ejectione Firmæ, if Judgment be given upon a Demurrer, or by Default, or upon a Non sum informatus for the Plaintiff to recover the Term, but awarded that there shall be a Writ of Inquiry of Damages, without saying quod capiatur this is erroneous; for it may be that he will never inquire of the Damages, or make Re- thereof, and then the Fine due upon the Capiatur will be lost. Tr. 1651. between in a Writ of Error upon a Judgment in Banco; and the Judgment reversed accordingly.

Stv. 283. Giles v Timberley, S P. and seems to be S. C.

7. If the Judgment be quod capiatur where it ought to be quod sit in Misericordia, this is erroneous, for by this the Judgment is altered, and this is in Prejudice of the Party. Tr. 15 Ja. between *Whetely and Stone*, in a Writ of Error at Serjeant's Inn agreed per totam Curiam.

Hob. 180. pl. 215. S. C ——— Cro. E. 107. pl. 2. Mich. 30 & 31 Eliz. B. R. Bellicote v. Taylboys, S. P. adjudged, and the former Judgment reversed.

8. So if the Judgment be quod sit in Misericordia where it ought to be quod capiatur, this is erroneous for the Cause aforesaid. Co. 8. *Beecher* 59. P. 3 Ja. B. R. between *Rivers and Guynn* adjudged, and the first Judgment reversed. P. 43 El. B. R. Tr. 14 Car. B. R.

Cro J 211. pl. 3. Beecher v. Shirley S. C. and Judgment

reversed accordingly — Cro. E. 84. pl. 2. Hill. 30 Eliz. B. R. Crow's Case, S. P. and the first Judgment reversed. — Freem. Rep. 281. pl. (320. c) S. P. and Judgment reversed, cites Trin 1673 B. R. Underwood v. Burlacy. — Cro. J. 538. pl. 5. Trin. 17 Jac. B. R. Miller v. The King S. P. assigned for Error on a Judgment on a Penal Statute, and Judgment was reversed.

B. R between *Margatrode and Beverly*, adjudged in a Writ of Error. Intratur P. 14. Rot. 168.

9. If the Judgment be quod sit in Misericordia & quod capiatur, where it ought to be only in Misericordia, this is Error. Mich. 8 Car. B. R. Intratur. Tr. 8 Car. Rot. 477. between *Kent and Fowkes* resolved, and such Judgment given in Lincoln reversed.

10. And in these Cases the Error is in the whole Judgment, and the Whole shall be reversed for it, as well the Judgment of the Party as for the King. Co. 8. *Beecher* 59. resolved. Tr. 15 Ja. between *Whetely and Stone*, in a Writ of Error at Serjeant's Inn agreed per totam Curiam. Quære Dyer, 14 El. 315.

11. In an Information against an Ingrosser, upon the Statute of 5 Ed. 6. if the Judgment be against the Ingrosser quod capiatur &c. without expressing in certain that he shall be imprisoned for the Time limited in the Statute, scilicet, per two Months; yet this is not Error in the Judgment, for this is the Common (*) Course of such Judgments where a certain Time is limited for the Imprisonment, for the Word &c. supplies all. Tr. 16 Ja. between *The King and Curtis*. H. 15 Ja. B. R. between *Brown and Marshal* adjudged; and it was said by the Clerks, that this is the Common Course.

* Fol. 700.

12. In Debt upon an Obligation, if upon Non est Factum pleaded, it is found his Deed, upon which Judgment is given quod Defendant sit in Misericordia & quod capiatur; this double Judgment is erroneous, and this makes the whole Judgment erroneous. P. 3 Ja. B. R. between *Banks and Pembleton* adjudged in a Writ of Error. Mich. 8 Car. B. R. between *Kent and Fowkes* adjudged, and a Judgment given in Lincoln in an Action upon the Case, where the Judgment should be quod capiatur reversed accordingly. Intratur Tr. 8. Rot. 477.

Palm. 509. Gaver v. Goter, S. C. and Judgment affirmed Nisi &c. Jo 171. pl. 4 Gofer v. Gregory, S. P. and seems to be S. C and the first Judgment was affirmed

13. In an Action upon the Case upon a Promise, if Judgment be given for the Plaintiff upon Demurrer, and a Writ of Damages awarded, and thereupon Damages taxed to 35 l. and upon this Judgment is given quod querens recuperet damna præd' ad 37 l per Juratores præd' assessa, yet this Judgment is not erroneous, because the Judgment is perfect by the first Words, quod recuperet damna prædicta, without more, and therefore the summing thereof afterwards is but Surplus; and therefore this being mistaken it does not vitiate the Judgment. H. 3 Car. B. R. between *Guer and Goter* adjudged in a Writ of Error upon a Judgment in the City of Pool in Southampton; which Intratur M. 2 Car. Rot. 247.

14. In an Action of Debt if the Defendant pleads Nil debet, and the Jury find it for the Plaintiff, and tax Damages to 12 d. and for Costs 12 d. and thereupon Judgment is given quod querens recuperet debitum suum præd' & debita sua præd' (instead of damna) this is erroneous, for the Word debita does not include damna. Mich. 11 Car. B. R. between *Morgan and Bayly* adjudged per Curiam, and such Judgment given in Southwark reversed accordingly in a Writ of Error. Intratur Tr. 9 Car. Rot. 895.

15. In Debt, if Judgment be given for the Plaintiff by Default of the Defendant, and the Judgment is quod recuperet debitum & damna occasione detentionis debiti ad 13 s. 4 d. ex assensu suo per Curiam de incremento adjudicat', this is a good Judgment, though no Mention of the Costs; for Damages include Costs. Mich. 11 Car. B. R. between *Pierce and Brown* adjudged in a Writ of Error to reverse a Judgment given in the Hundred Court of Slaughter. Intratur P. 10 Car. Rot. 1335. but it was said also in this Case that the Defendant shall not assign for Error the not giving of Costs, because it was for his Advantage.

16 In an Action upon the Case upon a Promise, if the Defendant pleads Non Assumpsit, and the Jury find for the Plaintiff, and tax Damages and Costs, and upon this Judgment is given quod querens recuperet Damna & Custagia per Juratores præd' assessa & 40 s. de incremento per Curiam, and does not say whether for Damages or Costs, yet this is good, for it shall be intended for Costs, because the Court could not increase the Damages. Tr. 11 Car. B. R. between *Cooling and Lawrence* adjudged in a Writ of Error upon Judgment in the Court of Coventry. Intratur Tr. 10 Car. Rot. 1328. Co. Entries 22. *Snag's Case.*

17. In an Action of Debt, if upon Nil debet pleaded it be found that the Defendant owes the Plaintiff 5 l. Debt, and the Jury assess the Damages to 2 d. and the Costs 2 d. and the Judgment is entered, that the Plaintiff shall recover debitum & Damna præd' to 2 d. and says nothing of the Costs, the Judgment is erroneous, though the Damna generally comprehends as well Costs as Damages; for in this Case it is limited but to 2 d. and so no Judgment for the other 2 d. Mich. 15 Ja. B. R. between *Homes and Twiste* adjudged in a Writ of Error, and the Judgment reversed.

18. In a Trover and Conversion of Goods, if the Defendant be found guilty of Part, and for Part not guilty, but no Judgment is given for those of which he is found not guilty, scilicet, Quod eat inde sine die, as it ought to be, this is erroneous. Hill. 13 Jac. B. R. between *Wood and Dr. Sutcliff* per Curiam.

Cro J. 439 440. pl. 2. Wood v. Suckling, S C. and Judgment reversed. —— Roll Rep 293. pl. 8. S. C. adjudged. —— 3 Bulst. 150, 151. S. C. but S. P. does not appear.

19. If a Man recovers Debt or Damages upon a Verdict, and Judgment is given thereof, and 2 s. de incremento generally, without saying in the Record as the Use is ex requisitione querentis, or ex assensu partium, this Judgment is erroneous. Pasch. 15 Jac. B. R. *Hardye and Mayhew*; the Judgment reversed for this. Mich. 15 Jac. B. R. between *Far and Loggins* per Curiam; the Judgment reversed; which Intratur Mich. 12 Car. Rot. 259. Mich. 18 Jac. B. R. between * *Sarke and Yeomans* adjudged in a Writ of Error, and so the same Term adjudged between † *Concellor and Aier*, and no Diversity where the Judgment is upon Nil dicit, and where upon Verdict. Hi. 2 Car. B. R. between ‡ *Lawrence and Gad* adjudged an erroneous Judgment, which was Ideo ad petitionem querentis Consideratum est quod querens recuperet &c. & Damna de incremento, so much because the Petition was not in the right Place.

* Cro. J. 587 pl. 10. Sache v. Yeoman, S. C. and the first Judgment reversed.

† Cro. J. 587. in pl. 10 cites a like Judgment reversed for this Cause, in Case of Cowslaw v. Eyre, S. C. ——Palm. 148. Conslade v. Ayres, S. C. and the first Judgment was reversed.

‡ Poph. 211, 212. Good's Case, S P. and seems to be S. C. adjudged accordingly. —— Lat. 177. Good v. Lawrence, S. C. and the first Judgment reversed.

See pl 18. S. C. and the Notes there.

20. In a Trover and Conversion, if the Defendant be found guilty of Part, and not guilty of the Rest, upon which Judgment is given for that for which he is found guilty, and no Judgment is given quod eat inde sine die for the Residue, it is erroneous. M. 15 Jac. B. R. between *Wood and Sutcliffe*, this was moved for an Error, but not resolved, but the Judgment reversed for other Error.

* Cro. J. 278 pl. 53. S C adjornatur —— Ibid. 386 pl 17. Robins v Sanders, S C and to make good this Entry divers Precedents were cited in the Precedents of Ld Coke; but it was answered, that it was a Misprision of the Printer. —— 3 Bulst. 92 S C and the Judgment agreed to be erroneous.

21. If a Man recovers in an Action upon the Case, and the Judgment is entered Ideo concessum est quod querens recuperet, where the usual Word is Ideo consideratum est &c. this is erroneous, though concessum be equivalent to the Word consideratum, because the usual Form ought to be observed. Mich. 13 Jac. B. R. 42. between * *Robins and Sanders*. Dubitatur Hill. 11 Car. B. R. between ‡ *Delamore and Heskins* adjudged in a Writ of Error, and the Judgment given at Bath reversed accordingly. Intratur Tr. 11 Car. Rot. 900.

‡ Cro C 442. pl. 13 Slocomb's Case, S. P. ruled accordingly, and seems to be S C. —— Lat. 76 in a Nota, S. P. and Judgment was reversed. —— Ibid. 83. Hill. 22 Jac Hern v. Warden, S. P and Judgment reversed. —— Noy 77 Heene v Warden, S. C. accordingly. —— Ibid 188 Mich 2 Car. Cook v Williams, S. P. and Judgment reversed. —— Noy 77 cites Cooper v. Williams, S. C. and Judgment reversed accordingly. —— S. P. Bulst 125, 126. Pasch. 9 Jac. B. R. Fuller v. Righteous, in a Judgment given at Lynne, and the whole Court were of Opinion, that Concessum est is not good, and as to the Judgment in 1 Rep. 83 in Corbet's Case, and 119. in Chudleigh's Case, being Ideo concessum est quod &c. Cur. these Judgments are false printed, and Mann Secondary informed the Court that the Roll was right, viz. Ideo consideratum est; Quod Nota. —— But see tit Amendment (P) —— But see Hob. 17 pl. 28. at the End of the Case of Read v. Hawke. And Ibid 19. pl. 34 Fitzhughes's Case. And ibid 194 pl 245 at the End of the Case of Winchcomb v. Pulleston, in which Cases is the Word Concessum.

* Lat. 177 Good v. Lawrence, S C. and ruled to be Error; and said, if they were not tied up to Form there never would be an End of new and senseless Words, and perhaps at last it would be necessary to have one Judgment to expound another —— Poph. 211, 212. Good's Case, S C. and the first Judgment was reversed.

22. If the Judgment be Ideo consideratum, concessum & adjudicatum est quod querens recuperet &c. though the Words concessum & adjudicatum are more and more than necessary, yet this makes the Judgment erroneous, because the Term of Judgments ought to be observed, which is consideratum only. Hill. 2 Car. B. R. between * *Laurence and Gad* adjudged in a Writ of Error. Pasch. 8 Car. B. R. Rot. *Bauntsey's Case*, a Judgment in an Indictment of Barretry reversed, because the Judgment was Ideo concessum est quod &c.

Lat. 211. Strand v. Blunden, S C. and Judgment reversed.

23. If the Judgment be Ideo consideratum est quod querens recuperaret, for recuperet, this is erroneous. Trin. 3 Car. between *Strowd and Blundell* adjudged in B. R. in a Writ of Error upon a Judgment given in Basingstoke in Hampshire. Mich. 14 Car. between *Pickell and Rotherford* adjudged in a Writ upon a Judgment in Newcastle. Intratur Hill. 13. Rot. 1093.

Sty. 183. Mich 1659. Spry v. Mill, S.P. and Roll Ch. J. said it was a good Exception for the Uncertainty of the Words. —— Comb. 479. Pasch. 10 W. 3. B. R. Hall v. Jackson, S. P. and held to be fatal.

24. If a Judgment be Ideo consideratum fuit for consideratum est, it is erroneous. Trin. 3 Car. B. R. between adjudged in a Writ of Error upon a Judgment given in Lincoln.

Roll Rep. 44. pl 11. S. C. and the Judgment was affirmed.

25. If an Action of Debt be brought against Two by one Original with several Præcipes upon one Obligation in which they are obliged jointly and severally, and several Declarations are made against them, and several Judgments given, but these Words are not put in the Judg-

Judgment, as the Use is, scilicet, (Unica tantum fiat Executio) yet the Judgment is not erroneous, because these Words are used to be entered for the Direction of the (*) Clerks, and are of Form only, for though the Words are not entered, yet he shall have but one Execution. Trin. 12 Jac. B. R. between *Banks and Chamberlain* adjudged.

* Fol. 772.

26. In an Ejectione Firmæ, if the Judgment be found Guilty for Part and for Part Not Guilty, the Judgment is Quod Defendens sit quietus, this is erroneous, for it ought to be Quod eat inde sine die. Trin. 12 Jac. between *William Morris and Cadwallader*, dubitatur.

Roll Rep. 51. pl. 22. S. C. Coke, Crooke, and Dodderidge, seemed to incline that the Judgment was erroneous, but Haughton e contra; but the Court ordered Precedents to be searched.

27. In a Quare Impedit against the Ordinary, Metropolitan and others, if the Ordinary and Metropolitan plead that they plead nothing but as Ordinary, upon which the Plaintiff prays Judgment against them, and Judgment is entered that he shall recover against them, but it is not also entered quod cesset Executio, till the Plea of the others is determined as the usual Course is, yet if no Execution be awarded till the Plea of the others is determined, it is not erroneous. Pasch. 14 Jac. B. R. Trin. 14 Jac. B. R. between *Grange and Denny* adjudged in a Writ of Error.

Roll Rep. 363. pl. 17. S. C. & S. P. held accordingly by Coke Ch. J. but he said, that if Execution had been sued before the last Judgment it should be Error —— Ibid. 397. pl. 24. S. C. & S. P. by Coke Ch. J. and the Judgment was affirmed. —— 3 Bulst. 174. S. C. & S. P. held accordingly by Coke Ch. J. and notwithstanding this and other Exceptions the Judgment was affirmed. —— Jenk. 323. pl. 56. S. C. the said Omission was not erroneous, because it was after Judgment, and if it be Error, it is Error in Executione Judicii, and in this Case no Writ of Execution was sued out against them.

28. In an Action of Debt in Banco, if Judgment be Quod querens recuperet debitum, and so much pro damnis occasione detentionis, though it be not Nec non pro Misis & Custagiis, as the Use in Banco Regis, yet it is good, for this is the Use in Banco. Mich. 22 Jac. B. R. between *Broad and Nurse* adjudged in a Writ of Error.

2 Roll Rep. 470. S. C. but a Difference was taken where the Plaintiff has a Verdict for him, there the Judgment is Quod recuperet debitum & damna, and Costs assessed by the Jury, and farther de incremento per Curiam; but where the Judgment is upon Non sum Informatus, Demurrer or Nil dicit, the Judgment is Quod recuperet debitum & damna, which includes Costs, but in the last Case in B. R. the Entry is more special, viz. Tam occasione detentionis &c. quam pro misis & custagiis; and Judgment was affirmed.

29. In Debt upon an Obligation the Defendant pleads Non est Factum, which is found for the Plaintiff, and the Jury assess Damages occasione infrascripta, this is good, without saying occasione detentionis debiti, for this is tantamount. Pasch. 8 Jac. B. R. *Alcock's Case* adjudged in Camera Scaccarii in a Writ of Error.

30. In Ejectione Firmæ, if upon Non sum informatus pleaded, Judgment be given Quod def. remaneat indefensus, without saying against Plaintiff, it is good. Pasch. 12 Jac. B. R. between *Friget and Mallory* per Curiam.

31. In an Action if the Defendant pleads in Bar, upon which there is a Demurrer, and Judgment is entered in this Manner, Quia videtur to the said A. and B. scilicet, the Mayor and Recorder (who were the Judges of the Court) Justiciaris Dom' Regis that the Plea is not good, Ideo consideratum est &c. this is good, because the naming them Justices is but Surplus. Hill. 8 Car. B. R. between *Greenhill*

Greenhill and King adjudged in a Writ of Error upon a Judgment in Linn. Intratur Trin. 7 Rot. 1572.

32. If the Judgment be entered in an Inferior Court held before the Steward, Ideo consideratum est per Seneschallum quod querens recuperet, this is good, for this is all one as if it had been said Ideo consideratum est per Curiam. Trin. 14 Car. B. R. between *Stretch and Parker* adjudged in a Writ of Error. Intratur Mich. 13 Car. Rot. 21. in a Writ of Error out of Alcester Court. Trin. 13 Car. B. R. between *Mill and Maurice* adjudged good in a Writ of Error upon a Judgment in Exeter, where it was Ideo consideratum est * ad eandem Curiam by the Mayor and Bayliffs (who were the Judges) quod querens recuperet, and did not say per Curiam. Mich. 15 Car. B. R. between *Hipowder and Lippingcot* it was adjudged in a Writ of Error there. Intratur Pasch. 15 Car. 95. Mich. 23 Car. B. R. between *Robinson and Barns* adjudged upon a Judgment in Exeter.

Ideo consideratum est, without saying per Cur. is no Error in any of the *Great Courts* as the Courts here, the Courts of Wales, the Courts of Counties Palatine, tho' otherwise in Inferior Courts. Sid. 147. pl. 5. Trin. 15 Car. 2 B R Smith v. Smith ——— Lev. 105. S. C. adjudged ——— Ibid. 145. pl. 21. Pasch. 15 Car. 2. B. R. Anon S P. ——— Saund. 74 Pasch. 19 Car. 2. S P.

* Sty. 182, 183. Mich. 1649. in Case of Spry v. Mill, S P. assigned for Error, and that it should have been Per eandem Curiam, but nothing as to this Exception said by the Court. ——— Ibid. 194. Hill. 1649. Peise v. Mabley, S. P. and upon this and another Exception Judgment was reversed.

33. But if it be Ideo consideratum est, and it is not said per Cur. nec per Seneschallum, this is erroneous in other Judgments. Mich. 14 Car. B. R. between *Brown and Clay* adjudged in a Writ of Error, and the Judgment given in the new Court of Marshalsea reversed accordingly. Intratur Pasch. 14 Car. Rot. 325. Trin. 15 Car. B. R. between * *Moon and Axe* adjudged in a Writ of Error upon a Judgment in Exeter. Intratur Mich. 14 Car. Rot. 213. Trin. 14 Car. B. R. (†) between *Cook and Lewis* adjudged in a Writ of Error upon a Judgment in Wenlock Court, and this reversed accordingly. Intratur Trin. 13 Car. Rot. 542. Mich. 14 Car. B. R. between *Guy and Cannon* adjudged in a Writ of Error upon a Judgment in the Marshalsea, and this reversed accordingly. Intratur Hill. 13 Rot. 824.

* Mar. 15. 16. pl. 37. Meade v. Axe, seems to be S. C. but does not mention in what Court the Action was, nor say any Thing of Per Seneschallum; bus the Court was clear that the Judgment should be reversed. ——— S P. by Roll Ch. J. Sty. 430. Hill. 1654. in Case of the Protector v. Richardson.

(†) Fol. 773.

34. In an Action upon the Case upon a Promise and Verdict for the Plaintiffs, and Damages and Costs given, and the Judgment is quod querens recuperet Damna sua ad 6 l. per Juratores prædictos in Forma prædicta assessa, and the Damages and Costs are mistaken, not amounting to so much; yet this is not erroneous, for this is only a miscasting, and Damna præd' intends only those which were assessed, and so the Judgment is not for more. Trin. 15 Car. B. R. between *Moorecock and Hooles* per Curiam adjudged good, and the first Judgment affirmed accordingly in a Writ of Error. Intratur Pasch. 15 Car. Rot. 416.

S. C. cited by Name of Motlock v. Cowle by Pemberton J. 2 Show. Rep. 89. Hill. 31 & 32 Car 2. B. R. and that (attingent') is all one with (ad) and (ad) with (attingent') and whether the (ad) do hit the Sum right or no is but miscounting, for if more or less it were good. Scrogs said, The Jury here give Particulars, and the Judgment is but for one of those particular Sums. Jones said, Dampna prædict' is enough, and all the rest naught and surplusage; and is as much as attingent' for its Meaning else has no Sense; it will be hard to make the Word (ad) restringent, when the Court ought to give Judgment for the Whole; Ad is the usual Word in all Judgments, and reaches the Whole, and it was the Intent of the Court to give all; where they intend but Part, they say Quoad; in C. B. they say, Dampna sua prædict' ad then comes the Increment', and after that the Quæ quidem &c.

35. If

35. If a Judgment be given in Banco, Ideo consideratum est quod querens or defendens recuperet &c. and it is not consideratum est per Curiam, yet this is good, for this is the use de Banco & de B. R. Mich. 14 Car. B. R. between *Elvyn and Prince* adjudged in a Writ of Error. Intratur Pasch. 14 Rot. 134.

36. If a Judgment in Banco be Ob quod consideratum est, where it should be Ideo consideratum est by the usual Course, yet this is good in Banco, for this is all one in Effect. Mich. 15 Car. B. R. between *Drury and Young* adjudged in a Writ of Error. Intratur Trin. 15 Car. Rot. 46.

37. In an Action upon the Case upon a Promise, if the Defendant Nihil dicit, per quod the Judgment is to be given by Nihil dicit, and the Judgment is entered quod querens recuperet Damna sua, sed quia nescitur quæ Damna &c. a Writ of Inquiry is awarded where the usual Course of Entry is quod querens recuperare debeat Damna &c. and not recuperet, yet this is good in Banco, for it is all one in Effect. Mich. 15 Car. B. R. between *Drury and Young* adjudged in a Writ of Error. Intratur Trin. 15 Car. Rot. 46.

38. In *Trespass for taking away Goods* &c. the Jury found the Defendant *Guilty as to the taking Part* of the Goods, *and as to the rest Not Guilty*; and the *Judgment was, that the Plaintiff should recover his Damages for Part, Et quod defendens capiatur, and that yet the Plaintiff sit in misericordia pro falso clamore suo* against the Defendant *pro residuo transgressionis*, and this was assigned for Error; for the Judgment ought to have been Quod querens nihil capiat per Billam pro residuo transgressionis; Sed non allocatur; and the Judgment was affirmed. Mo. 692. pl. 956. in Cam. Scacc. Palmer v. Sherwood.

39. Error on a *Judgment in Debt against Husband and Wife, upon a Bond made by the Wife dum sola fuit*; The *Judgment was, that the Husband be in Misericordia, and that the Wife capiatur.* This was held Error, and the Judgment was reversed; for it should be, that the Husband and Wife Capiantur. Mo. 704. pl. 982. Hill. 37 Eliz. in Cam. Scacc. Burdolph v. Perry & Ux'.

40. *Judgment* was given *in Debt* in C. B. *upon a Non sum Informatus*, and Error was brought and moved for Error; 1st, Because there is *no Imparlance.* 2dly, Because the *Entry was Quod defendit vim et injuriam*, when it is not usual that such a Judgment shall be given upon a Non sum Informatus; Yet notwithstanding that Judgment was affirmed. Noy. 36. Mich. 42 & 43 Eliz. B. R. Loyd v. Twyford.

41. In *Debt upon an Obligation* the Defendant *pleaded Non est Factum, and after Relicta Verificati ne confessed the Action* The Judgment was, Quod sit in *Misericordia*, and this was assigned for Error, for that it ought to be *Quod capiatur.* But the Court held it no Error, because *a Fine is not due*, but where the Party denies his Deed which is found against him; and then it is due for his false Plea, and for the troubling the Jury and the Court; and Judgment affirmed. Cro. J. 64. pl. 2. Pasch. 2 Jac. B. R. Davis v. Clerk.

Noy. 4 vage v. Bz- Clark, S. C. held accordingly, and that the same Rule is so used in B. R and C B though Dyer 67. is contrary, and cites 33 H. 6. 54. 34 H. 6. 20. 41 E. 3. 42. and 45 E. 3. 10.

42. Error of a *Judgment in Debt* was assigned, because it *was in the Disjunctive*, As Quod Querens *recuperet Dolium Ferri vel Valorem* ejusdem ad Damna &c. whereas it should be, Quod recuperet Dolium Ferri, & si non, Valorem inde; Adjudged Error. Yelv. 71. Trin. 3. Jac. B R. Paler v Hardyman.

Brownl. 87. S C. seems only a Translation of Yelv.

43. The *Judgment* was, *Quod querens & plegii sui sint in Misericordia pro falso clamore*, whereas it ought to have been *Quia non prosecuti sunt*; for it ought not to be Pro falso clamore but where the Judgment is af-

ter Verdict, or upon Demurrer, and for this Matter it was held manifest Error, and the Judgment was reversed. Cro. J. 213. pl. 7. Mich 6 Jac. B. R. Anon.

44. Judgment given *against an Infant* was *Quod capiatur*. Error was brought, and the whole Court agreed that it is a clear Error, and therefore Judgment was reversed. Bulst. 171. Trin. 9 Jac. Daby v. Holbrook.

45. Error of a Judgment in C. B. upon an *Information for buying Cattle, and selling them again in the same Market Contra Forman Statuti*, the Judgment was entred, Quod sit *in Misericordia*, when it ought to be *Quod capiatur*, being upon an Information; For it is a Contempt, and punishable by Imprisonment; And per tot. Cur. Judgment was reversed. Godb 349. pl. 443. Trin 21 Jac. B. R. Pye v. Bonner.

46. Error of a Judgment in Debt, because Judgment was given for the Defendant, *Quod querens nihil capiat per breve* It was assigned, that the *Action* was brought there by an Attorney, by *Bill of Privilege*, and not by *original Writ*; so the Judgment ought to be *nihil capiat per Billam*, and not *per breve*; But the Court doubted of it, because it was in the Judgment which was by the Court, and would advise of it. Cro. C. 580. pl. 5. Pasch. 16. Car. B. R. Raymond v. Burbridge.

47. T. and three others were *convicted of a Riot upon View* of two Justices of Peace and the Sheriff of the County, contra Formam Statuti 13 H. 4. cap 7. and they were fined by the Justices; and upon a Writ of Error brought the Errors assigned were, 1st, It does not appear that the Defendants were convicted by View of the Justices, 2dly, That the Sheriff did not join in setting the Fine, whereas the Statute says, that the Sheriff shall be joined with the Justices in the whole Proceedings; and for these Errors the Jndgment was reversed. Raym. 316. Trin. 32 Car. 2. B. R. The King v. Tempest & al'.

48. *Judgment* was awarded *in an Inferior Court by the Mayor and Bailiffs, without saying per Cur.* and this assigned for Error; But because *it was said in eadem Curia*, the Court held it well enough and over-ruled the Exception. Comb. 5. Mich. 1 Jac. 2. B. R. Salter v. Bellamy.

49. Writ of Error of a Judgment in a *Recognizance* upon a Sci. Fa. was, *Quia in adjudicatione executionis super Judicium præd'*, instead of super *recognitionem præd'*, and was for that quashed. 12 Mod. 371. Pasch. 12 W. 3.

50. In Debt, if the *Original* be *recited* to be *Attachiat'*, *instead of Summonit'*, yet we cannot reverse the Judgment because it is only a Recital; Per Holt Ch. J. 12 Mod. 513. Pasch. 13. W. 2. Anon.

See tit. Amendment and Jeofails (K) &c. the several Statutes with the Notes. And tit. Amercement.

(C. b) Judgment.

What Judgment ſhall be *given upon* the *Reverſal.*

See Falſe Judgment (F)

1. If the Defendant pleads abatement of the Writ, and this is awarded a good Plea, by which the Writ abates, if the Judgment is reverſed, becauſe this was not a good Plea, the Plaintiff ſhall be reſtored to his Original, and ſhall not be enforced to a new Original. 9 H. 6. 38. b.

Br. Error, pl. 7. cites S. C.

2. So if an erroneous Judgment be given upon a Proceſs againſt the Demandant, and it is after reverſed for Error in the Proceſs, the Demandant ſhall be reſtored to his Original, and the Tenant ſhall anſwer to it. 21 Aſſ. Placito 17.

If Formedon abates by Judgment, and Writ of Error thereof brought in B. R. and Judgment reverſed, immediately upon this Writ the Tenant ſhall plead de Novo, and ſhall anſwer upon the Declaration there. Br. Error, pl. 132 cites 1 H. 7. 12. and ſays that it is affirmed accordingly i. the next Caſe there, that the Writ is revived, and that the Tenant ſhall anſwer.

3. But if an inſufficient Plea in Bar be adjudged a good Plea, and the Judgment after reverſed for this Cauſe by Writ of Error the Demandant ſhall not be reſtored to the ſame Original. 9 H. * 9. 38. b.

Br. Error, pl. 7. cites 9 H. 6. 38. S. C.

* This is miſprinted for (6)——In Debt the Defendant pleaded in Bar, to which the Plaintiff demurred. The Plea was adjudged good; But upon Error brought the Bar was adjudged inſufficient. The Court at firſt doubted what Judgment ſhould be given; but at laſt it was awarded that the Plaintiff ſhould recover his Debt and Damages. Le 33. pl 41. Hill. 28 Eliz. B. R. Taylor v. Moore.

4. But in this Caſe he ſhall be reſtored to his Action. 9 H. 6. 38. b.

Br. Error, pl. 7. cites S. C.

5. In an Aſſiſe by an Infant, if the Tenant pleads in Bar upon which the Aſſiſe is awarded at large to inquire of the Circumſtance, becauſe the Plaintiff is an Infant, and the Inqueſt find for the Plaintiff without inquiring of the Matters alleged in Bar, by which the Plaintiff hath Judgment, and it is reverſed in a Writ of Error; the Plaintiff at his Election ſhall be reſtored to his Original, and ſo attach the Tenant thereupon. 31 Aſſ. 22. adjudged.

Br. Error, pl. 126. cites 31 Aſſ. pl. 18. 22. S. C.

6. And the Judgment ſhall be, that he ſhall have a new Original at his Election. 31 Aſſ. 22. adjudged.

Br. Error, pl. 36. cites 31 Aſſ. pl. 18. 22. S. C.

7. If the Tenant in an Action makes Default and an Eſſoin is caſt for him, which does not lie, and notwithſtanding upon Challenge thereof by the Demandant, and Prayer by him of Seiſin of the Land upon the Default, Judgment is given againſt the Demandant for not counting that he ſhall take nothing by his Writ, if he brings a Writ of Error and it is reverſed for this Cauſe, the Judgment ſhall be, that he ſhall recover Seiſin of the Land upon the Default, becauſe the inferior Court ought to have given this Judgment. 21 E. 3. 46. 62. 21 Aſſ. Placito 17. adjudged.

Fol. 774

8. *Such Judgment* ſhall be given in Writ of Error *as ought to have been given in the firſt Court* which err'd, quod nota. Br. Error pl. 64. cites 21 E. 3. 45.

See Tit Judgment (U)

(D. b) *How Judgment* shall be given *upon* the *Reversal of the first* Judgment.

Cro C. 442. pl. 13. Slocomb's Case. S. P. and seems to be S. C. adjudg'd accordingly — S. C. cited Vent. 28.

1. IN an Action upon the Case, if the Plaintiff being *Delamore*, declares, that whereas there was a Suit in Bath between the Defendant and S. and Issue thereupon was joined, and at the Trial thereof in Aula there the Plaintiff was sworn as a Witness, and shewed his Oath, and after the Defendant having Communication with the Wife of S. of the said Trial and Oath, said these Words of the Plaintiff, Your Brother Delamore (innuendo the Plaintiff existentem fratrem of the said Wife) took a False Oath against me in the Hall, (innuendo &c.) I would not take such an Oath for all the World; After Not Guilty pleaded, and a Verdict for the Plaintiff, yet Judgment being there given against the Plaintiff quod nihil capiat &c. because the Declaration is not good, because it is not averred that the Plaintiff was Brother to the Wife of S. to whom the said Words were spoken, but only in the Innuendo which is not sufficient; Though this Judgment given there be reversed in Banco Regis in a Writ of Error for the Insufficiency in the Judgment, this being ideo Concessum est for consideratum est, yet the Court de B. R. ought to give the same Judgment which ought to have been given at Bath, scilicet, quod querens nil capiat per Billam. Hill. 11 Car. B. R. between *Delamore and Heskins* adjudged. Intratur Trin. 10 Car. Rot. 900.

Cro C. 509. pl. 2. Ceely v Hopkins. S. C. the first Judgment was reversed, and Plaintiff recovered.

2. In an Action upon the Case for Words, if Judgment be given against the Plaintiff, that the Words are not actionable, upon which the Plaintiff brings a Writ of Error, and thereupon the first Judgment is reversed because the Words are actionable; the Court after Reversal of the first Judgment, ought to give Judgment that the Plaintiff shall recover, for this Court ought to give the same Judgment that the first Court might have done. Mich. 14 Car. B. R. between *Hekins and Cheele* adjudged. Intratur Hill. 13 Car. Rot. 696.

Cro. C. 511, 512 pl 6. Mulcarry v. Eyres S. C. resolv'd that there should be a Writ directed to the Chief Justice in Ireland to reverse the Judgment, and commanding him to award Execution —— S. C. cited per Curiam. 2 Saund. 256, 257. Mich. 22 Car. 2. in Case of Green v. Cole. —— Ibid. 319 S. P. and cites Roll's Abr. 774

3. In an Ejectione Firmæ, upon Not Guilty pleaded, Issue is join'd and a Special Verdict is found, and upon this Verdict Judgment given against the Plaintiff; and after the Plaintiff brings a Writ of Error, and in this the Judgment is reversed, the Plaintiff shall have Judgment and recover his Term, his Declaration being good, and the Law being for him upon the Special Verdict; for the Court that reverses the first Judgment ought to give the same Judgment which ought to have been given in the first Suit. Mich. 14 Car. B. R. between *Omulcnrie and Ayres*, adjudged in a Writ of Error upon a Judgment in Ireland. Intratur Mich. 13 Car. R. 332.

Cro. J. 206 Pasch 6 Jac. Faldoe v Rudge, S. C. adjudged,

4. F. brought *Trespass* against R. in B. R. And *upon Demurrer* upon Plea of the Defendant it was *adjudged for the Defendant*. F. brought Error in Cam. Scacc. and there the *Judgment in B. R. was reversed, but no Writ of Inquiry of Damages could be awarded out of the Exchequer Chamber*,

Chamber by the Stat. 27 *Eliz. cap.* 8. And now F. *sues a Writ of Inquiry out of B. R.* and well; For the first Judgment being reversed is not a Bar. Noy 129. Falder v. Ridge.

and that the Plaintiff should recover the Damages found; For though the Stat. 27 Eliz. mentions only the Returning the Record, yet it must be intended, that all shall be done that is necessary in order thereto.——Yelv 74. 76. S. C. adjudged.

5. Where the Plaintiff *brings Error* and the Court reverse, they give a *new Judgment*; otherwise where the Defendant brings Error. 1 Salk. 262. pl. 2. Mich. 4. W. & M. in B. R. Parker v. Harris.

6. In *Replevin, if the Judgment for the Plaintiff be reversed*, such *new Judgment* must be given as the Court should have given before, which cannot be for the Avowant, unless upon the Merits of the Avowry, and if that be naught, it *must only be Nil cap. per billam.* Comb 398. Mich. 8 W. 3. B. R. Bret v. Bagill.

7. If in Error a Release is pleaded and found for the Plaintiff, yet if there is no Error, the Court cannot reverse the Judgment, and if the *Release* were *found for the Defendant*, a Different Judgment must be given according as the Error assigned is sufficient or not; For if *it is a good Error* the *Judgment must be, that the Plaintiff be barred* of his Writ of Error, and not that the Judgment be affirmed; if it be not a a good Error, the Judgment be that the first Judgment be affirmed; Per Curiam. 2 Ld. Raym. Rep. 1005, 1006. Hill. 2 Ann. B. R. in Case of Carleton v. Mortagh.

(E. b) In what Cases *the whole* Judgment shall *be reversed, or only Part.*

See tit. Fines (L. b) and Judgment (X)

1. IN a Formedon de uno Crofto de Messuagio &c. if the Demandant recovers, and in a Writ of Error it is adjudged that a Formedon does not lie of a Croft, the Judgment for the Residue shall be reversed also, because the Writ is not good, inasmuch as there cannot be a good Judgment upon a bad Writ. Pasch. 12 Jac. B. R. adjudged.

Fol. 775.

Roll Rep. 2. pl. 2. Anon. S. C. adjudged.——2 Bulst. 214 Ellis v. Wallis S. C. adjudged.——S. C. cited All. 74.

2. In an Action of Trespass against three, if one dies pending the Writ, and yet Judgment is given against all three, in a Writ of Error upon this Judgment the whole Judgment shall be reversed, because it is intire, though the Writ by the Death abates but against one. Trin. 14 Car. B. R. between *Scudamore and Scriven.* Per Curiam, such Judgment reversed. Intratur Mich. 13 Car. Rot. 507.

S. C. cited by Roll All. 74. and denied the 5 E. 4. to be Law.——S. C. cited Arg. Ld Raym. Rep 600.

3. If A. brings an Action upon the Case against B. for Words, and also for that he caused him to be indicted, upon which Indictment he was acquitted, and all this is found by Verdict, and Damages severally given for them; but intire Costs, and one intire Judgment given for all, scilicet, ideo Consideratum est quod querens recuperet Damna & Custagia in forma prædicta assessa &c. and in a Writ of Error it is adjudged the Action does not lie for the Words, the Judgment shall be reversed only for the Words, and Damages for them

Roll Rep. 24. pl. 2. S. C. adjudged.——Cro. J. 343. pl. 9. S. C. adjudged.——Hob. 6 pl. 12. Miles v. Jacob.

S. C. says the Judgment for the Indictment, together with the Damages, was affirmed also for all the Costs, because there was just Cause of Suit, which warranted the Costs, though Part of the suit was without Cause.——All 75. is a Nota, that Hoddesdon Prothonotary told the Reporter, that the Case of Miles v. Jacob in Hobart was not Law.——

them, and shall stand for the Residue, and the Costs shall stand intirely. Pasch. 12 Jac. My Reports between * *Jacob and Miles*, in Camera Scaccarii adjudged. Same Case Hobart's Rep. 8.

* This Case denied, and a Rule laid down, that where the Judgment is Part by the Common Law, and Part by the Statute, it may be reversed in Part; For that which is a Judgment at Common Law will remain a Judgment, and be compleat without the other. 1 Salk 24. Cutting v. Williams——11 Mod 25. pl. 2. S C and the Court denied the Authority of Miles v. Jacob in Hobart 6 For a Judgment intire cannot be reversed in Part.——2 Ld Raym. Rep. 825 in Case of Williams v. Cutting, and Holt Ch. J. said, that the Case of Jacob and Miles in Hob and Mo. 728. Reymer v. Grimston were not supported by any subsequent Authority

4. If A. brings an Action upon the Case against B. upon two Promises, and declares that he sold certain Tallow to the Defendant, and upon this the Defendant assumed to pay so much as it was worth, and that he also at another Day sold other Tallow, and the Defendant made such Promise for it, if the Defendant pleads, that after the first Assumpsit, the Defendant satisfied the Plaintiff for the said first Tallow sold to him, upon which Issue is taken; and as to the other Promise, the Defendant pleads non Assumpsit, upon which they are at Issue also, and the Jury find as to both Issues, that the Defendant assumed and promised Modo & forma prout' &c. and assess several Damages, and thereupon Judgment is given for the Whole for the Plaintiff; In this Case, though there were several Damages taxed, and the Plaintiff might have relinquished his Damages for the first, which was not well found, and took Judgment for the second which was well found; yet when one Judgment is given for both, the Judgment is erroneous. Pasch. 8 Car. B. R. between *Cretall and Murfield*, adjudged in a Writ of Error upon a Judgment in Canterbury. Intratur Hill. 6 Car. B. R. Rot. 1128.

F N. B. 98 (P) S P. and the English Editions cite 21 E. 3. 20 5 E 4. 6. 17 E 3 31. Disceit, 37. and Ibid in the new Notes there (a) cites 7 H 4 44.——S. P. Arg. Cro. E. 469. (bis).——S. P. per Curiam, Obiter. Jo 374 pl 11 Mich 11 Car B R.

5 If a Fine be levied of Land, of which Part is Guildable, and Part is ancient Demesne, and as to that which is antient Demesne, the Fine is reversed by Writ of Disceit, yet the Fine shall stand for the Residue; for a Mark shall be made on the Fine, in the Nature of a Cancelling of that which is antient Demesne only. 17 H. 7. Kelloway 43.

S. C cited by Roll. All. 74. Trin 24 Car. B. R.——S C. cited by Roll J. Sty 125

* Jo. 376.

6. In an Action of Debt upon a Bill, and upon a Contract upon an Emisset, if the Defendant pleads non est Factum as to the Bill, and nil debet as to the Contract, and both are found by Verdict against the Defendant, and Judgment against the Defendant quod capiatur for denying his Deed; and it is not also quod sit in Misericordia as to the Contract, as it ought to be, and intire Damages given; and a Writ of Error is brought for this, the whole Judgment shall be reversed, scilicet, as well the Judgment upon the Bill, as for the Contract. * Term. 11 Car. B. R. between *Eltonhead and Deereman* resolved, and a like Judgment given in the Marshalsea reversed accordingly. Intratur Hill. 10 Rot. 876.

Sty. 290. Trin. 1651. S. P. cited by Roll Ch. J. to have been adjudged accordingly.——S C. cited by Roll,

7. In a Writ of Dower if the Plaintiff recovers by Default, and upon this a Writ is awarded to the Sheriff or Bailiff, where the Recovery is to deliver to the Plaintiff tertiam partem per Metas, and to enquire of the Value of the Year, and how much Time is past after the first Demand of Dower, and what Damages she hath sustained; and upon this the Sheriff or Bailiff returns, that he had deliver'd the third Part of the Lands, and the Value found by the Jury to 30 l. per

per Ann. and that two Years are past after the first Demand, and Damages 50 l. and thereupon Judgment is given accordingly, to hold in Severalty the said third Part, and to recover the said Damages. In this Case, though the Judgment is not good as to the Damages, inasmuch as it is not averred that the Husband of the Plaintiff died seised, (as the Use is) nor is it so found by the Jury, nor was it so commanded by the Writ to be inquired, by which the Judgment as to this is erroneous, yet it shall be reversed only as to this, and shall stand as to the Recovery of the third Part of the Land. Trin. 13 Car. B. R. between *Tie and Adkins*, adjudged per Curiam in a Writ of Error, upon such a Judgment given in *Ipswich*. Intratur Hill. 12 Car. B. R. Rot. 759.

All. 75. as adjudged — See (B. a) pl 1 — and See (M.c) pl. 9 S. C.

8. Co. 5. *Specot's Case*, 58. b. 59. adjudged in a Quare Impedit, the Judgment to have a Writ to the Bishop, being the Judgment at the Common Law, shall not be reversed in a Writ of Error, though the Judgment given by the Statute of W. 2. for the Damages be erroneous and reversed.

9. In a Writ of Error upon a Judgment in Trespass against several, if the Judgment be erroneous because one of the Defendants was within Age, and appeared by Attorney, the Judgment shall be reversed in toto against all. Pasch. 9 Jac. B. R. Rot. 302. between * *Bird and Bird. Contra Orms and his Wife* in Trespass Quare clausum fregit & herbam conculcavit.

* Cro. 289. pl. 6. S. C. it was mov'd for the Plaintiffs in Error, that the Judgment being intire for Damages against both, it shall not be reversed for one only, but for both, and for this was vouched, that in Ejectment in Chester this very Term Error was brought by two for the Nonage of one, and Rule was given for Reversal thereof, but the Court said, they did not remember any such Rule given, and that they would well advise thereof, and cited 20 E. 4. 7. 28 H 6. 9. 19 Ass 8. —— S C. cited and S. P. adjudged, All. 74, 75. Trin. 24 Car B. R. in Case of Oates v. Aylett. —— Sty 121. Aylet v. Oates, S C. adjornatur Ibid 125. S. C. & S P. adjudged. —— S. C. cited Ld. Raym. Rep. 600. —— S. P. by Roll Ch. J. Sty. 406 Hill. 1654. Anon. —— Error of a Judgment in Ejectione Firmæ, because there were two Defendants, and one of them was within Age and appeared by Attorney where it ought to have been by Guardian, and Damages and Costs were given intire; Adjudged Error, and the Judgment reversed against both. Cro. J. 303. pl 5 Trin. 10 Jac. B. R. King v. Marborough —— S. C. cited Ld. Raym. Rep. 600.

10. If an Action be brought against A. as a Feme Sole, where she is Covert Baron, and against B. and C and they all plead to Issue, and A. as a Feme Sole, and after Judgment is given against them all accordingly, in this Case the Baron of A. with A. B. and C. may join in Error, and assign for Error the Coverture of A and thereupon the Judgment shall be reversed for all, because it is intire. Trin. 1651. between *Hayward and Williams* adjudged. Intratur H. 1649. Rot. 824.

Sty. 254. S. C. but that is of a Writ of Error brought by the Baron alone; Adjornatur. —— Ibid. 280 S. C. but it is there stated as of a Fine brought by the Baron and Feme, without joining with the others, and S P. does not appear.

11. In an Action of Account, if Judgment be given quod computet, and after Auditors are assigned, and upon his Account Judgment is given against him also, and Damages and Costs, and after a Writ of Error is brought upon both Judgments, and thereupon the last Judgment is only erroneous. In this Case the last Judgment only shall be reversed, and not the first Judgment, but this shall stand in Force, for these are two distinct Judgments and perfect, for the first Judgment is ideo Consideratum est quod computet & Defendens in Misericordia. Hill. 43 El. B. R. between *Williams and White* in a Writ of Error upon a Judgment in Bristol, adjudged.

Cro. E. 806. pl 7 S C and because there was not Error found in the first Judgment it was affirm'd. — Win 5. White v. Williams, but S P. does not fully appear. —— S. C. cited by Roll Ch. J. Sty. 290. Trin. 1651.

12. If a Judgment be given against Executors in an Action of Debt, and after a Scire Facias a Judgment is given against them to have Execution of their proper Goods, and a Writ of Error is brought upon both Judgments, in this Case, if the first Judgment be good, and the last erroneous, the last Judgment only shall be reversed, and the first Judgment shall stand. Co. 5. Pettifer 32. adjudged as it seems; But it is not alleged that the Writ of Error was upon both Judgments, but only in redditione Executionis.

13. The Countess of Kent was *endowed in Chancery by the King*, and *among other Things there was assigned a Rent reserved by Patent to the King and his Successors upon Grant of a Fair to the Prior of B. and his Successors*; upon which Assignment *she brought a Sci. Fa.* in the Exchequer, and there had *Judgment to recover the Rent, and the Arrearages and Damages*; Whereupon Error was brought in Cam Scacc and *the Judgment reversed as to the Rent and Damages*; because she could not have Judgment of the Rent being the King's Inheritance, nor of the Damages in the Sci. Fa. but as to the Arrearages the Judgment was affirmed, because it was her Right to have it, and as to this she was privileged to sue in the Exchequer. Mo. 565. pl. 11. cites 14 E. 3. The Countess of Kent's Case.

S. C. cited 2 And. 129. —— Noy 117 cites 14 E. 3 Scire Facias 122 as cited by Crooke in in the Argument of Bolwell's Case.

14. If *a Fine was good before the Proclamations*, and the *Proclamations were ill*, and erroneously made, this *shall not take away the Force of the Fine* which was good before the Proclamations; and adjudged that the *Proclamations shall be reversed, and the Fine stand in Force*. Pl. C. 266. a. Mich. 4 & 5 Eliz. B. R. Fyshe v. Brocket.

15. In Case, Error was assigned that the *Damages* were *assessed intirely for divers Things which would support an Action, some of them being uncertainly and insufficiently alleged*; for he prescribed to have Omnia bona Forisfacta, which could not be without Charter, also to have de Fugatione quicquid accidere possit, which was also uncertain, so that when Damages for those Things intirely are assessed with other Things, and Judgment given, the Judgment is erroneous; and for that Cause the Judgment was reversed. Mo. 706, 707. pl. 987. Pasch. 33 Eliz. B. R. and 36 Eliz. B. R. Berkley v. Pembroke.

Cro. E. 560. pl. 17. S. C. & S. P. and Judgment reversed.

16. A Writ of Error is Quasi a Commission, and *may reverse for Part and affirm for Part*, and is not abateable, because the Fine is good for Part. Mo. 366. pl. 499. Pasch. 23. and Mich. 36 & 37 Eliz. in Case of Barton v. Lever.

17. Error was assigned of a Judgment in C. B that the *Action* was brought *against three Persons, one of whom was within Age*, and that they *all appeared by Attorney*, whereas he within Age should have appeared by Guardian, and so the Judgment being Joint was erroneous against all; And Roll Ch. J. was of the same Opinion, and so it was reversed. Sty. 430. Hill. 1653. Bocking v. Symons.

Eight Defendants in Trespass appear by Attorney, whereof two are Infants and Judgment was given for the Plaintiff; but on Error brought the Judgment was reversed against all. Lev 294 Trin 22 Car. 2. B. R. Grell v. Richards.

18. Error to reverse a *Judgment* given *in an inferior Court* where an Assumpsit was brought, and the *Plaintiff declared upon three several Promises*, and the *Jury found two for him, and the other Non Assumpsit*; and *Judgment was given for the two*, that he should recover, *but no Judgment for the third*, that he should be amerced Pro falso clamore, or that the Defendant Eat inde sine Die; And for this Cause Error was assigned. The Court said, the Judgment was altogether Imperfect; and so were inclined to reverse it, but gave further Time. Vent. 39, 40. Trin. 21 Car. 2. Gregory v. Eades.

2 Keb 506. pl. 80. Keeling Ch. J. said, that the Judgment is sufficient, but Twisden inclined e contra.—Ibid. 535. pl. 52. S. C. Judgment reversed Nisi &c.

(F. b)

(F. b) *What* Judgment shall be *reversed by Consequence*, by the Reversal of others.

Fol. 777.

1. AFTER a Recovery in Redisseisin, if the first Judgment be reversed, the Judgment upon the Redisseisin shall be reversed also. * 43 E. 3. 3. Co. 8. *Doctor Drury* 143. 11 H. 6. 17.

* Br. Error, pl. 23. cites S. C. —— Br. Error, pl. 157. cites 4 E. 4. 29

2. So if a Man recovers in Debt upon a Judgment, if the first Judgment be reversed, the second Judgment shall also. * 43 E. 3. 3. 11 H. 6. 17. b.

* Br. Error, pl. 23. cites S. C. —— Per Dodderidge the Reversal of the first does not reverse the second, but defeats it so, that the Plaintiff shall not have any Fruit by it, but it ought to be intended upon both in the same Court; But if in divers Courts, the second Judgment ought to be avoided by Plea, or Audita Querela. Palm. 187, 188. Trin. 19 Jac. B. R. in Case of Apsley v. Geve —— And by Chamberlain J. if one has Judgment in C. B. for Debt, and brings Debt upon this Judgment, (as he may in B. R. and has Judgment here; yet if the first Judgment be revers'd, it has been adjudg'd, that the second Judgment shall be reversed also. Palm 303. Mich. 20 Jac. B. R. in Case of Apsley v. Geve, in an Audita Querela brought by the Plaintiff —— Sid. 253. pl. 2 Pasch. 17 Car. 2. in Cam. Scacc. it was doubted that it could not be remedied in Cam Scacc. but that the Party ought to move in B. R for an Audita Querela, and so to be reliev'd. But they took Time to advise whether the Judgment in B. R. be not by the first Reversal Ipso Facto void.

3. So by reversal of the original Judgment, the Outlawry depending thereupon shall also be reversed. * 11 H. 4. 6. b. † 7 H. 6. 44.

* Fitzh. Error, pl. 64. cites S. C. —— † Fitzh. Error, pl. 18 cites S. C. —— Br Error, pl. 70 cites S. C.

4. But by the Reversal of the Outlawry the original Judgment shall not be reversed. 7 H. 6. 44. b.

Br. Error, pl. 70. cites S. C.

5. If a Man recovers in an Annuity and in a Scire Facias thereupon afterwards, and the Judgment upon the Scire Facias is after affirmed in a Writ of Error, yet if the first Judgment of the Annuity be reversed, the other shall be also. 11 H. 4. 48.

Br. Error, pl. 46. cites 11 H. 4. 4. S. C. —— Fitzh. Error, pl. 63. cites 11 H. 4. [and the Case is continued at fol. 47 b 48 a pl 22] —— Jenk. 73, 74 pl. 40. S. C. For the principal Judgment in the Annuity being reversed, all that depends upon it falls to the Ground. Sublato Fundamento cadit Opus. The Judges in B. R. by reversing this Judgment ex Obliquo reverse the said Judgment in C. B upon the Scire Facias, and also their own Judgment in Error upon the said Scire Facias. —— S. P. Br. Error, pl. 170. cites 15 E. 4. 4.

6. If a Man recovers upon an Original, and hath another Judgment in a Scire Facias, if the first Judgment be reversed, the other shall be also reversed. Co. 8. *Doctor Drury*, 143.

7. If a Man recovers in a Quare Impedit, and hath a Writ to the Bishop in a Quare non Admisit, and after the Judgment in the Quare Impedit is reversed, the Judgment in the Quare non Admisit shall be also reversed by this, though this was for the Contempt to the King. 26 E. 3. 7. b.

8. If a Judgment be given in an inferior Court against A. and after another Judgment against B. his Pledge there, and B. upon this is taken in Execution upon the Judgment; and after the principal Judgment is reversed in a Writ of Error a special Writ may be awarded

Br. Error, pl. 134. cites S. C

awarded to deliver him, because it appears by the Record that he was Pledge. 1 H. 7. 12. b. adjudged.

9. If the Demandant recovers against the Tenant, and the Tenant against the Vouchee, if the Heir of the Vouchee reverses the Judgment of the Value, because the Vouchee was dead at the Judgment rendered, this shall reverse the Judgment against the Tenant also. Quære, 18 E. 3. 38.

10. If the Principal be outlawed of Felony, and the Accessory attainted and executed; and after the Principal reverses the Outlawry, and is indicted and found not guilty of the Felony; by this Reversal and Acquittal the Attainder against the Accessory is annihilated, for his Heir may have a Mortdancester it seems, because he hath no Remedy by Writ of Error or otherwise to reverse it, for this depends upon the Principal. Tempore, E. 1. Mortdancester 46. Co. 9. *Lord Sanchar.* 119. b.

11. A Man may defeat two Records by one and the same Writ of Error, for if a Man *recovers in Assise, and after* recovers *by Redisseisin*, and brings Writ of Error of the Judgment in the Assise, and reverses it, by this the other Recovery is reversed also. Br. Error, pl. 23. cites 43 E. 3. 3. per Finch.

12 *So* where a Man recovers *Damages in Waste or other Action*, and *brings Debt of the Damages recovered*, and recovers, *and after the first Judgment is reversed by Error*, there by this the last Judgment is reversed also, though it be upon two Originals; for the one depends upon the other Ibid. Per Finch quod non negatur.

13. B. brought Writ of *Error against E. who vouched to Warranty T.* and the *Voucher counter-pleaded*, and *passed for the Demandant*, and he recovered, and the *Vouchee brought Writ of Error, and had Scire Facias returnable now, at which Day the Tenant brought another Writ of Error of the same Judgment*, and assigned Error, and prayed Scire Facias and had it; notwithstanding that the Vouchee had brought Writ of Error, and this for Doubt that the Vouchee was faintly prosecuted, and yet by the Reversal by the one, the other shall be restored; and it was held there that the Vouchee shall assign Error between the Demandant and the Tenant, and so may the second Vouchee do. Br. Error, pl 39. cites 8 H. 4. 3.

Br. Attaint, pl 125. cites S C —— Br. Voucher, pl 48. cites S C.

14 *And* that if he in *Reversion reverses Judgment by Error*, the Tenant for Life shall be restored. Ibid.

15. *And if Tenant by Rescent* reverses Judgment by Error, the Tenant for Life shall be restored. Ibid.

16. If *Error* be *in the Original*, then *as well the Process* of Outlawry *as the Original* shall be reversed. Br. Error, pl. 47. cites 11 H. 4. 6. Per Gascoine and Huls.

17. If the first Judgment be reversed the *Execution depending upon it* is defeated eo Facto. Br. Error, pl. 70. cites 7 H. 6. 44. Per Hals. Nestburie and Paston.

S. P. Br. Error, pl 193. cites 6 E. 4. 9 10. *And* that by the Reversal *of Assise* the *Redisseisin and the Execution upon it is also reversed.*

18. If the Outlawry be reversed by Writ of Error, yet *the first Judgment remains for the Party*; Per Cheiney, which Brooke says seems to be Law. Br. Error, pl. 70. cites 7 H. 6. 44.

19. In Audita Querela it was agreed, that by *reversing of the first Judgment* by Error, *the Execution* upon it is also reversed. Br. Error, pl. 193. cites 6 E. 4. 9. 10.

20. *And* by the Reversal *of Assise* the *Redisseisin and the Execution upon it is also reversed.* Ibid.

21. In Deceit it was admitted clearly, That in Writ of Error the Plaintiff shall recover *the Land and the Issues and Profits incurred in the*

Mesne Time, quod nota, and it was doubted if so in Deceit. Br. Error, pl. 174. cites 18 E. 4. 11.

22. Where *Error* is *in the Judgment in* Writ of Debt, and *another Error* is *in the Outlawry upon Capias ad Satisfaciendum* and exigent upon it, *a Writ of Error* shall not serve to reverse both Judgments; Per Hussey; But Fairfax contra; and that 11 H. 4. 4. *in Redisseisin* a Man was *outlawed for the Damages*, and both Judgments were reversed by one and the same Writ of Error, and the principal Case was that the Writ of Error was brought *de Redditione Judicii in* Writ of *Debt*, *and in Promulgation of the Outlawry in it*; and so see that Writ of Error lies as well of Error in the Outlawry as in the Execution upon it; For this Outlawry was upon the Capias ad Satisfaciendum, and exigent for the Execution after the Judgment. Br. Error, pl. 150. cites 8 H. 7. 9. 10.

23. A *Quod ei deforceat* is brought in Wales, and prosecuted in the Nature of a Writ of Right, according to the Course there; by Force of the Statute of 12 E. 1. The *Tenant joins the Mise upon the mere Right*, and afterwards *makes Default*; and *without a Petit Cape* awarded, *Judgment final is given against him*; the *Tenant brings a Writ of Right*, against the *Demandant*, who had Judgment ut supra and Execution; he *pleads the first Judgment* in Bar; And *Judgment is given that it is a good Bar*; the *Plaintiff*, who was the Tenant *against whom the first Judgment was given*, *brings a Writ of Error upon this last Judgment*; and *assigns for Error*, *that a Petit Cape was not awarded before the first Judgment*; non allocatur; the first *Judgment was affirmed*; For although it be erroneous, yet it is in Force until it be reversed; and this Writ of Error is not to reverse the first Judgment, but the second Judgment; the second Judgment was affirmed in Error. A Writ of Error should have been brought to reverse the first Judgment, and if had been reversed, yet it had not reversed the second Judgment; for the *second Judgment was collateral and independant*, and it is executed. Jenk. 259. pl. 56. cites 5 Rep. 85. b. 38 Eliz. Penryn's Case.

24. A *Plaintiff in Debt recovers and has Execution*, and the *Sheriff suffers the Defendant to escape*. The *Plaintiff recovers against the Sheriff*, and afterwards the *Judgment for the Original Debt is reversed*, yet the Judgment against the Sheriff is not reversed. Jenk. 259. pl. 56.

25. *So where a Defendant is taken in Execution on a Judgment* upon a Recognizance, and the Sheriff suffers him to escape. Jenk. 259. pl. 56.

26. *But where the latter Judgment depends upon the former*, as Redisseisin upon an Assise or a Sci. Fac. to execute a Judgment in Debt, it is otherwise. Jenk. 259. pl. 56.

27. A *Judgment* was given *in Dower for the Demandant*, and *another Judgment that she shall recover her Damages*, and this *second Judgment* for the Damages *was reversed* by a Writ of Error, *because she did not aver that her Husband died seised*, in which Case she is to have no Damages; yet the first Judgment for the Dower stood unreversed. Sty. 290. Trin. 1651. Spittlehouse v. Farmery.

(G. b)

(G b) In what Cases *Collateral Things* shall be *reversed by Reversal of others.*

Things *executed.*

Br. Error, pl 66 cites S. C. —— (*) Fol 778. S. C cited 5 Rep. 90. b. in Hoe's Case per Curiam. —— 8 Rep. 142. b. 143. b. cites S. C.

1. IF the Conusee of a Statute recovers in Detinue by erroneous Judgment against the Garnishee, and sues Execution; if the Garnishee in a Writ of Error reverses the Judgment given in the Detinue, yet the Execution is not reversed (*) by this, because it is a Collateral Thing executed. 7 H. 6. 42. Co. 8. *Doctor Drury* 142. b.

S P. 3 Mod 325. Mich. 2 W. & M. B R. per Curiam, Gold v. Strode.

2. A. in Execution for Debt on erroneous Judgment escapes, *Debt is brought against the Sheriff on* the *Escape*, and *Plaintiff has Judgment and Execution*; afterwards the *first Judgment is reversed*, yet the *Judgment against the Sheriff*, upon this Collateral Matter being executed, *stands good.* 8 Rep. 142. b. Pasch. 8 Jac. in Drury's Case cites 7 H. 6. 42. a.

3. If *a Man is tried Frank in Trespass to the Damage of* 10 *l.* and the *Defendant brings a Writ of Error* or Attaint, and *pending this the Plaintiff brings Debt on the Recovery of the* 10 *l. and recovers, no Protestation being taken of the Villeinage*, the *first Judgment is reversed* by Error or Attaint, the Defendant shall not be estopped of the Villeinage by the Recovery in the Action of Debt; For *by the Reversal of the first Action all that depended upon it is reversed.* Br. Estoppel, pl. 197. cites 18 E. 4. 6

4. If one to whom another is indebted be *outlawed*, and the *Debtor pays the Money to the Queen*, and afterwards the *Outlawry is reversed*; now the Creditor shall recover the Debt against him. 5 Rep. 90. b. cites 7 E. 4. 2.

5 So if the *Goods of an outlawed Person are sold by the Sheriff* upon a Capias Utlagatum &c. and after the *Outlawry is reversed by Writ of Error* the Defendant shall have Restitution of his Goods. *But* if the Sheriff by Force of a *Fieri Fac.* sells Goods, and after the Judgment is reversed in Writ of Error, the Defendant shall not have Restitution of his Goods, but the Value of them that they were sold for. And there are two *Reasons of this Diversity*, 1st, that if the Sale of the Sheriff by Force of a Fi. Fa. shall be avoided by subsequent Reversal of the Judgment, no one will buy, and consequently no Execution will be made. 2dly, In the Case of Fi. Fa. the Sheriff is compellable to levy the Debt of the Goods of the Defendant, and therefore there is great Reason that it shall stand; But in the Case of Cap. Utlag. the Sheriff or Escheator is not compellable to sell them, but may keep them to the King's Use. 5 Rep. 90. b. Trin. 42 Eliz. in Scacc. in Hoe's Case.

6. *Recompence in Value upon Voucher once lawfully executed* shall not be divested, though the *Title of the Demandant to the Land*, which he recovers, be *afterwards disaffirmed and evicted.* 5 Rep. 90. b. 91. a. cites 3 E. 3. 51.

(H. b.)

(H. b) Judgment. Reſtitution.

See (R) pl. 2. in the Notes.

1. IN an Aſſiſe if the Tenant loſes by Verdict, he ſhall be reſtored to the Lands, if it be reverſed in a Writ of Error. 8 H. 6. 2.

2. So if the Tenant in an Aſſiſe loſes by Verdict, he ſhall be reſtored to the Meſne Iſſues, if it be reverſed in a Writ of Error. 8 H. 6. 2.

3. So if the Tenant loſes in a Writ of Entry ſur Diſſeiſin, and after it is reverſed for Error, he ſhall be reſtored to the mean Iſſues. Contra 1 E. 3. 22 but Quære.

4. Where an *erroneous Recovery* is had *againſt Tenant for Life*, he in Reverſion and the Tenant ſhall have ſeveral Writs of Error, and Judgment for one of them, and Execution ſhall reveſt their Eſtates. Jenk. 69. pl. 31. cites 9 R. 2. Error.

5. By Reverſal of the Judgment *by the Vouchee*, him in *Reverſion*, *Tenant by Reſceipt* &c. *by Error, or Attaint*, the *Tertenant ſhall be reſtored.* Br. Reſtitution, pl. 6. cites 8 H 4 3.

Br. Error, pl. 39. cites S C.

6. Upon a *Fi. Fa.* the *Sheriff ſold a Term* for Years, by Virtue of the Writ Venditioni Exponas, and paid the Money in Court to the Plaintiff; afterwards the Judgment was reverſed for Error. The Queſtion was, if the Term ſhould be reſtored or only the Money? Manwood, Dyer, and Wray, thought the Defendant ſhould not be reſtored to the Term, (it being lawfully Sold in Default of the Party) but that he ſhould have only the Money for which it was ſold. D. 363. pl. 24. Trin. 20 Eliz. Anon.

S. P. Reſolved accordingly 8 Rep. 96. b Trin 7. Jac. C. B. the third Reſolution in Matthew Maning's Caſe.—D. 363. Marg. pl. 24. cites it as adjudged accordingly 26 Eliz. But if the Term be *extended upon an Elegit*, and Judgment reverſed for Error, the Termor ſhall be reſtored to the ſame Term and not to the Value of it. Paſch. 17 Jac. B. R. Bathurſt's Caſe.

7. If an erroneous Judgment be reverſed, *as to the mean Profits, it ſhall have relation until the Time of the firſt Judgment given*, for it is to favour Juſtice, and to advance the Right of him who hath Wrong by the erroneous Judgment; But if any *Stranger hath done a Treſpaſs upon the Land in the mean Time*, *he who recovereth, after the Reverſal, ſhall have an Action of Treſpaſs*, and if the Defendant pleads that there is no ſuch Record, the Plaintiff ſhall ſhew the ſpecial Matter, and ſhall maintain his Action, for as he is to anſwer the mean Profits to the Perſon who hath Judgment of Reſtitution, ſo the Law gives him a Remedy againſt all Treſpaſſes in the Interim. 13 Rep. 21. Hill. 27 Eliz. in Canc. Anon.

8. An *Attaint* was brought *in C. B of a Verdict in B. R. If Execution had been awarded in C. B. and the Verdict had been afterwards diſaffirmed*, the Court of C. B. might have awarded a Writ of Reſtitution, though if the Verdict had been affirmed they could not have awarded Execution, becauſe they had only Tenorem Recordi. Cro. Eliz. 371, 372. pl. 10. Hill. 37. Eliz. B. R. York v. Allen.

9. A Term of Years appriſed by a Jury upon an *Elegit* to an 100 l. and *delivered in Execution to the Plaintiff himſelf* at the ſame Value was denied per tot. Cur. to be reſtored, though the Surmiſe of the Sci. Fa. was that the Plaintiff had levied the 100 l. of the Profits of the Land demiſed; *But* if *at the Time of Appriſment* and *before the Delivery*, he had tendered the 100 l. en Pais, or *after in Court*, he ſhould have Audita

A Term ſold to J. S. in truſt for the Plaintiff, was decreed to be re-conveyed, the

Term being alledged to be of much greater Value

Audita Querela. Mo. 813. pl. 1216. Hill. 11. Jac. C. B. Comyn v. Brandlyn.

N. Ch. R. 143 Gascoign v. Sturt.—Where the Sale was to the Party himself, Restitution was granted but otherwise in case of a *Stranger*. Yelv. 180. Goodier v. Ince cites Robotham's Case and Worrel's Case.

It is no more than a bare Delivery *in Specie*, and so ought to attend the Fate of the Execution, and if that be reversed to be restored in Specie again. Yelv. 180. S. C.——The *Difference* is between this Sale and Delivery upon *Elegit to the Party himself*, and a *Sale to a Stranger upon a Fi. Fa.* For the Fi. Fa. gives Authority to the Sheriff to sell, and bring the Money into Court, and so shall not be restored on Reversal of the Execution, because the Stranger comes to it duly by Act in Law. But the Sale and Delivery of the Lease to the Party himself upon an Elegit is no Sale by Force of the Writ delivered in Extent, which being reversed the Party shall be restored to the Term itself. Cro. J. 246. Goodyer v. Ince. S. C.

10. Debt was brought by A. *as Administrator where he was Executor*, and 82 l. recovered; if the *Money is levied* A. may well retain it; Per Doderidge. Cro. J. 394. pl. 6. Hill. 13. Jac. B. R. Slingsby v. Lambert.

11. A Judgment was reversed, and a *Writ of Restitution awarded to enquire what were the Profits of the Land a tempore Judicii Prædicti*, which was wrong, for *it ought to be what Profits* &c. *the Plaintiff had taken Colore Judicii*, and thereupon a new Writ of Restitution was awarded, and upon the Return thereof an Exception was taken to the Writ, that it ought to be what Profits he had taken after the Execution sued, but adjudged that the Writ was good, because upon the Reversal of the Judgment the *Defendant is to be restored to all that he had lost*, and what the Plaintiff in the Judgment had taken by Colour thereof after the Judgment. Cro. J. 698. pl. 5. Mich. 22 Jac. B. R. Sympson v. Juxon.

Palm. 324. S. C. the Defendant ought not to be answered for Profits from the Time of the first Judgment, because no Execution was had against him till a Year after, but he ought to have a special Sci. Fac. in such Case, and the former Writ was quashed, and a special Writ awarded.——If Writ of Restitution upon erroneous Judgment reversed be of Profits taken 4 August, (the Day when the first Judgment was given) it is ill, but it ought to be *Virtute*, or *Occasione Judicii*; For if he received the Profits by any other way, those shall not be restored. 2 Roll Rep. 475 Mich. 22 Jac. B. R. Simmonds's Case, and seems to be S. C.

12. *Restitution is of Duty*, But *Re-Restitution is of Grace*; Per Twisden and Kelyng Justices. Raym. 85. Mich. 15 Car. B. R. The King v. Burgess, on Judgment of Forcible Entry.

13. In Case *Judgment* be *reversed* on a Writ of *Error*, a Sci. Fa. lies on Suggestion of a Payment of the *Money condemned* by the first Judgment, and upon 2 Nihils returned then Restitution lies, and a Writ of Execution, though the Party Plaintiff in the first Action knows nothing of the Matter, and the Case of **Weeks v. Long** in the Court was agreed to be so. 2 Show. 210. pl. 217. Trin 34 Car. 2. B. R. Pigg. v. Gardiner.

14. Writ of Restitution lies not against any that are *not Parties* to the Record. 2 Salk. 587. pl. 1. Trin. 3 W. & M. in B. R. The King and Queen v. Leaver.

Show 261. S. C. & S. P. by Holt Ch. J. and that if it did it must be by Scire Facias, and that so it was in 1 Cro. 328.

15. Writ of Restitution will not lie against *Disseisor* or *Feoffee of Recoveror in Ejectment* after Reversal of the Judgment, because they are *Strangers* to the Record; Per Holt Ch. J. Pemberton assenting. 2 Salk. 587 pl. 1. Trin. 3 W. & M. in B. R. The King and Queen v. Leaver.

16. If a *Feme* recovers Damages and then Marries, and the *Judgment is reversed*, Restitution lies against her and her Husband; Per Holt Ch. J. 2. Salk. 587. pl. 1. Trin. 3 W. & M. in B. R. The King and Queen v. Leaver.

17. By

17. By Virtue of a *Fi. Fa.* on a Judgment in Debt *Sheriff sold Cattle*, it was moved on Reversal of the Judgment to bring the Money for which the Cattle were sold into Court, for the Benefit of the Defendant who was then a Prisoner, but it was disallowed; Then it was moved to pay Defendant as much Money as the Cattle were sold for, but that was denied likewise because they might be *sold for less than the real Value*, and if the Defendant brings *Trespass* he will *recover the full Value*, and therefore the Plaintiff must agree with him to prevent such Action. 4 Mod. 161. Hill. 4 & 5 W. & M. in B. R. Western v. Creswick.

(I. b) *To what* Thing he shall be *restored* after Reversal.

To a *Collateral Thing executed.*

1. If a Man recovers Damages, and hath Execution by Fieri Facias, and upon the Fieri Facias the Sheriff sells to a Stranger a Term for Years of Land of the Party, and after the Judgment is reversed, he shall be restored only to the Money for which the Term was sold, and not to the Term itself, because the Sheriff had sold it by the Command of the Writ of Fieri Facias. Co. 8. *Doctor Drury*. 143. *Matthew Manning* 19. b. Co. 5. *Hoe* 90. b. Dyer 20 El. 363. 24.

There is a *Diversity between mean Acts done in execution of Justice, which are compulsary and voluntary Acts*, and therefore if an erroneous Judgment is given in Debt, and the Sheriff by Force of a Fieri Facias sells a Term of the Defendant's, and the Judgment is afterwards reversed by Writ of Error the Party shall never be restored to the Term, but to the Money for which they were sold; But where a Man is outlawed, and a Capias is directed to the Sheriff to take the Body & Bona, & Catalla quæ per inquisitionem venerint in manus nostras; if in such Case the Sheriff sells the Goods, and the Outlawry is afterwards reversed, the Party shall be restored to his Goods, because the Sheriff was not commanded by the Writ to sell them; Per Curiam. 8 Rep. 143. a. Pasch. 8 Jac. in Dr. Drury's Case.——5 Rep. 90 b. Trin. 42 Eliz. in the Exchequer in Hoe's Case. S. P.——Goldsb 130. pl. 9. Gawdy Serjeant cited the Case of Hanmer v. Luddington, 20 Eliz in which Case he was of Counsel, and that S. P. was adjudg'd therein accordingly.——But if the Term be extended on Elegit, and Judgment reversed for Error, the Term itself shall be restored. Dy. 363. Marg. pl. 24. cites Pasch. 17 Jac. B. R. Bathurst's Case.

2. If the Goods of an outlawed Man are sold by the Sheriff upon a Capias Utlegatum, and after the Outlawry is reversed by Writ of Error, he shall be restored to the Goods themselves; because the Sheriff was not compellable to sell these Goods, but only to keep them to the Use of the King. Co. 5. *Hoe's* Case 90. b.

2 Vern. 313. S. C. cited.

3. If a Man recovers Damages in a Writ of Covenant, as the particular Case was against B. and hath an Elegit of his Chattels, and of the Moiety of the Lands, and the Sheriff upon this Writ delivers a Lease for Years of Land, which B. had to the Value of 50*l.* to him that recovered, per rationabile pretium & extentum, (as the Words were) to have as his own Term in full Satisfaction of 50*l.* Part of the Sum recovered; and after B. reverses the said Judgment, he shall be restored to the same Term, and not to the Value; for though the Sheriff might have sold the Term upon this Writ, yet here is no Sale to a Stranger, but a Delivery of the Term to the Party that recovered by way of Extent, without any Sale, and therefore the Owner shall be restored. Pasch. 16 Jac. B. R. between *Buckhurst and Mayo*, adjudged per Curiam; for the Sheriff is not bound by this Writ to sell the Land, as he is in a Fieri Facias;

Facias; Quære this Case, for this is a Sale, the whole Term being delivered to the Party according to the Value in Gross, not yearly.

4 The Law would be the same, if Personal Goods were delivered to the Party per rationabile pretium & extentum, upon the Reversal of the Judgment he should be restored to the Goods themselves, for the Cause aforesaid. Pasch. 16 Jac. in the Case between *Buckhurst and Mayo*, agreed per Cur.

5. If a Man recovers by erroneous Judgments, and *presents to a Benefice, or enters into the Perquisite of his Villein*, and after the Judgment is reversed by Writ of Error, these being Collateral Things shall not be devested. 8 Rep. 142. b cites it as so held in 4 H. 7. 11.

6. If an *Advowson comes to the King by Forfeiture upon an Outlawry*, and the *Church becoming void the King presents*, and then the *Outlawry is reversed for Error*, yet the King shall enjoy that Presentment, because there it came to the King as a Profit of the Advowson; Per. Cur. Mo. 269. pl. 421. Mich 30 & 31 Eliz. Beverley v. Cornwall.

7. *But if* a Church be *void at the Time of the Outlawry*, and the Presentation is thereby forfeited as a Chattel principally and distinct of itself, and then *the Outlawry is reversed*; *the Party shall have Restitution of the Presentation*; Per Cur. Mo. 269. pl. 421. in S. C.

8. M. the *Husband seised in Fee levied a Fine*, and *afterwards* 1 Mariæ *was outlawed of Treason*; the *Conusee conveyed the Land to the Crown*, and afterwards the Daughter and *Heir of the Husband reversed the Outlawry*. *The Wife of M. sued to have Dower* within the five Years after the Outlawry reversed, but long Time after the five Years after the Fine levied. In this Case it was resolved, that she was not barred by the five Years after the Fine, but *she might have five Years after the Outlawry reversed.* Mo. 639. pl. 879. 27 Eliz. in Canc. Menvil's Case.

9 A. seised of Land in Fee was *attainted of High Treason*, and the *King granted the Land to B.* and afterwards *A. committed Trespass upon the Land*, and afterwards *by Parliament A was restored, and the Attainder made void, as if no Act had been*, and shall be as availble and ample to A. as if no Attainder had been; and afterwards *B. brings Trespass* for the Trespass mesne; and it was adjudged in 10 H. 7. fol 22. b. That the Action of Trespass was not maintainable, because that the Attainder was disaffirmed and annulled ab initio. 13 Rep. 20. Hill. 27 Eliz. in Canc. Menvil's Case.

10. *And* in 4 H. 7. 10. it was holden, That *after Judgment reversed in a Writ of Error, he who recovered* the Land by erroneous Judgment *shall not have* an Action of *Trespass for a Trespass mean.* 13 Rep. 20. in S C.

11. When *a Man recovers* any Possession or Seisin of Land in any Action *by erroneous Judgment*, and afterwards *the Judgment is reversed*, the Plaintiff in the Writ of Error shall have a Writ of Restitution, and that Writ recites the first Recovery; and the Reversal of it in the Writ of Error is that *the Plaintiff in the Writ of Error shall be restored to his Possession and Seisin Una cum exitibus thereof from the Time of the Judgment* &c. Per Curiam. 13 Rep. 21. Hill. 27 Eliz. in Canc. in Menvill's Case.

12. The *Sheriff sells a Term upon a Scire Facias*, and afterwards the *Judgment is reversed*; Resolved the Party shall not be restored to the Term, but to the Money for which it was sold, if the Sale be without Fraud. Mo. 573. pl. 788. Mich. 41 & 42 Eliz. B. R. Anon.

13. Where

13 When an erroneous Judgment is given, and the Judgment is afterwards reversed by Writ of Error, *Collateral Acts executory are barred* by it; But *otherwise it is of Things executed*; Per Curiam. 8 Rep. 142. b. Pasch. 8 Jac. in Drury's Case.

14. *As if* an Action of *Escape* be brought *against the Sheriff*, and the Judgment is reversed by Writ of Error the Action is gone, and *he may plead Nul tiel Record. But if* Judgment and *Execution be had* against the Sheriff before the Reversal the same remains in Force. Ibid. cites 34 H. 6. 2. b. and 21 E. 4. 23. b.

15 But there is a *Diversity between a Recovery by prior Title, and a Reversal of a Judgment by Writ of Error*; as if a Woman has Judgment and Execution in Dower in Ancient Demesne, and it is after reversed in a Writ of False Judgment; and because she had held the Lands for two Years between the first Judgment and Reversal, the Value of the Land is inquired, and taxed at 20 Marks in a Scire Facias against her, she cannot plead a Recovery in a Writ of Right Close in Nature of a Cui in Vita. 8 Rep. 143. a. b. per Curiam, cites 20 E. 3. Scire Facias 123. in Herbert's Case.

16. No Restitution of Goods taken on an erroneous Execution *for which Damages had been* already *recovered in an Action of Trespass*. Raym. 74. Pasch. 15 Car. 2. B. R. Sumer v. Felgate.

2 Sid. 125. S. C. but S. P. does not appear. — Lev. 95. S. C. related by Twisden J. but S. P. does not appear.

17. The Defendant in Error recovered 100 l. Damages in Debt in C. B. and there *had an Elegit into the County of W. reciting that another Elegit issued into London*, and was *returned Nihil*. And *upon a Testatum est it was commanded to extend all the Goods and Lands*; whereupon the *Sheriff returned, that he took a Lease for Years of Tithes, which he delivered to him, ut Bona & Catalla sua, for the said Debt.* The Writ being with a Testatum, whereas there was not any Writ before awarded into London, was held to be Error; And it was resolved, That *the Sale and Delivery of the Lease to the Plaintiff himself upon an Elegit was no Sale*, by Force of the Writ delivered in Extent, which being reversed, the Party shall be restored to the Term itself. Cro. J. 246. pl. 4 Trin. 8 Jac. B. R. Goodyere v. Ince.

Brownl. 107. Goodier v. Jounce, S. C. accordingly. But it had been *otherwise if the Sale had been to an Estranger* by the Sheriff of the Term for an 100 l. according to the Opinion of 28 Eliz. Dy. for it is the Party's Folly that he does not pay the Judgment; and if such Sales should be made void, none should buy Goods of the Sheriff, by Reason whereof many Executions would remain undone; and this by the Opinion of the whole Court.

(K. b) In Judgments and Executions.

Fol. 779.

1. If A. recovers in a base Court within the County Palatine of Chester, and upon this a Writ of Error is brought there before the Chief Justice, and upon this the first Judgment was reversed; and by the Custom in such Cases, he at whose Suit it is reversed ought to have Costs; and there upon the Reversal Judgment is given that the Party shall be restored to all that he had lost, but no Judgment is given upon the Roll certified in the Writ of Error in B. R. that any Judgment was given for the Costs, and yet a Scire Facias is certified for levying the Costs, adjudged this is Error. Trin. 9 Car. B. R. between *Foden and Maddock*, per Cur. Intratur Pasch. 8 Car. Rot.

Rot. 397. But at another Day upon Examination of the Record it appeared to be well.

2. If Judgment be given against the Bail, and after a Scire Facias is brought against the Bail, and a Judgment against them, and also Judgment given against them for Costs de incremento, this is erroneous, because no Costs ought to be given in a Scire Facias. Hill. 11 Car. B. R. between *Hardy and Browne*, adjudged per Curiam in a Writ of Error upon such Judgment in Rippon Court. Intratur Trin. 10 Car. Rot. 979

Cro. C. 471. pl. 3. Goodier v. Pl[illegible]t. S. C. but not exactly S P — See tit. Judgment (X) pl. S. S. C.

3. In a Formedon in descender, if the Demandant demands one Messuage, one Garden, ten Acres of Meadow, and ten Acres of Pasture; and the Tenant as to the Messuage, Garden, two Acres prati & Pasturæ, Parcel of the ten Acres prati, and ten Acres Pasturæ, pleads a Feoffment of the Father of the Demandant with Warranty and Assets, and as to the Residue he traverses the Gift &c. to which the Demandant as to the first Plea takes Issue upon the Assets, and this is found for the Demandant, upon which Judgment is given, that the Demandant shall recover Seisin of the said Messuage, Garden, and two Acres prati & Pasturæ; and as to the Residue the Demandant relinquishes his Issue. This Judgment is erroneous, because it does not appear how much of the two Acres was Meadow, and how much Pasture; so that the Sheriff knew not of what Thing to give the Demandant Seisin. Pasch. 13 Car. B. R. between *Prat and Goodier*, adjudged in a Writ of Error upon such Judgment in Banco, and this reversed accordingly. Intratur Hill. 11 Car. Rot. 349.

Cro C. 481. pl 4 South v Griffith. S. C. all the Justices præter Hobart held, that both in C. B. and B. R. a Capias against the Principal ought to be taken forth and return'd Non est inventus, otherwise no Scire Facias ought to be against the Bail ——— Jo. 396. pl. 4. S. C. but S P. does not appear ——— Error *by the Bail, for that Judgment was given against him upon a Scire Facias where no Capias was awarded against the Principal* before the Scire Facias awarded against him And it was held, that the Writ of Error well lay in this Case for the Bail. And *the Judgment in the Scire Facias was reversed*; and the like Writ was allowed between Coles *and* Babington. Cro E 733. pl. 65. Mich 41 & 42 Eliz in Cam. Scacc Price v. Price. ——— Cro. E. 730 pl 69. in Cam. Scacc Cockeyn v. Lady Hawkins S. P held that the Writ well lay, for that the Suit against the Bail is within the Intent of the Statute of 27 Eliz. and is in the Nature of an Action of Debt, and Judgment was affirm'd. ——— Same Cases of Cro E. cited Comb 325. Pasch. 7 W. 3. B. R but Holt Ch J. said, he did not approve those Cases, but preferr'd the latter Authority of Barcock v. Thompson, which see at (G. a) supra, pl. 2. ——— See tit. Bail (B) pl. 1. S. C. and the Notes there.

4. In an Action in Banco, if Judgment be given against the Principal, and after a Scire Facias is brought against the Bail, and upon this Judgment is given against the Bail; yet if there be not any Capias of Record sued against the Principal before the Scire Facias brought, this is erroneous. Pasch. 14 Car. B. R. between *Griffith and South*, adjudged in a Writ of Error upon such Judgment, and Judgment against the Bail was reversed accordingly. Intratur Hill. 13 Car. Rot. 559.

5. If the *Sheriff makes Execution in the Franchise* this is good; for he is Officer immediate to this Court. Br. Error, pl. 153. cites 11 H. 4. 9. per Hill

6. *But* per Norton, if *Bailiff of the Franchise makes Execution in the Guildable*, this is Error, quod non negatur. Ibid.

7. After *Recovery* in Debt *of* 400 *l. a Fi. Fac. issued, upon which* 100 *l. was levied and returned*, afterwards a *Ca. Sa. issued for the whole* 400 *l.* and thereupon the Defendant was outlawed. It was assigned for Error that the Ca Sa. *ought to have been only for* 300 *l.* and the Judgment of Execution was reversed, because the levying of the 100 l. was returned of Record upon the Fi. Fa. Mo. 598. pl. 819. Mich. 34 & 35 Eliz. Wells *v.* Denny.

(L. b)

(L. b) *What* Act will *aid an Error*.

Appearance.

1. If a Summons be not well made, if he appears of Record, this takes away the Error, for the Summons is affirmed. 42 E. 3. 30.

Br. Error, pl. 25. cites S. C.—Br Faux Judgment, pl. 4. cites S. C.

2. If a Man was never summoned, yet if he appears it is not Error. 46 E. 3. 30.

Br. Error, pl 25. cites S. C.—Br. Faux Judgment, pl. 4. cites S. C.

3. If an Omission be made of any Writ or Process, or one Writ awarded in Lieu of another; yet if the Judgment be not given thereupon, but after the Party appears and pleads to Issue, and Judgment is given upon the Verdict; this is not (*) erroneous, because he had not taken Advantage of this before pleading to Issue. 3 H. 6 9. for he had Day by the Roll, and so no Discontinuance. 29 E. 3. 31. b.

(*) Fol 780

4. If a Man in Banco brings a Bill upon his Privilege, but hath no Writ of Attachment of Privilege, yet if the Defendant after appears and pleads, this shall be helped by the Appearance. Trin. 13 Jac. B. R. between *Havert and Gibbons*.

Roll Rep. 205. pl. 7. S. C. & S. P. accordingly, per Coke Ch. J. quod fuit concessum per Haughton J.——3 Bulst. 61. S. C. but as to this Error Curia advisare vult.

5. If a Man be indicted, and no Addition is given to him as ought, yet if the Defendant appears and pleads to Issue, and this is found against him; this is helped, for the Addition is ordained by the Statute, for that the Party which is to be outlawed ought to have Notice of it, and here he hath Notice, & constat de Persona by the Appearance. Hill. 18 Jac. B. R. *Johnson's Case* adjudged, this being moved in arrest of Judgment.

Cro. J. 609. pl. 5. S. C. adjudged — 2 Roll Rep. 225 S. C. adjudged per totam Curiam — See tit. Additions, (P) per totum.

6. In Debt if a Capias be the first Process, and not a Summons, as ought to be by the Law, though the Defendant appears and pleads to Issue, and this is found against him, upon which Judgment is given, yet this misawarding of the Process is erroneous and not helped by the Appearance. Pasch. 3 Jac. B. R. between *Banks and Pembleton* adjudged in a Writ of Error. Pasch. 5 Jac. B. R. between *Cook and Ballard* adjudged, which Intratur Trin. 4 Jac. Rot. 681. Hill. 4 Jac. B. R. between *Mone and Catchnud* adjudged, which Intratur Trin. 4 Jac. Rot. 1609. Contra Pasch. 11 Jac. B. R. between *Inch and Goodfield* adjudged.

See Infra, (G. c) pl. 4. — See tit Customs, (I 2) pl 11. and tit. Process, (D) pl. 1, 2. and the Notes there.

7. If a Man be summoned to appear in an Inferior Court, and the Defendant does not appear, and notwithstanding the Plaintiff puts in a Declaration and declares against him, and after the Defendant appears, and after makes Default, by which Judgment is given against him by Default, the Appearance hath helped the putting the Declaration before Appearance, and so it is not erroneous. Trin. 15 Jac. B. R.

B. R. between *Harris and Goodale* in a Writ of Error upon a Judgment in Ipswich adjudged, and the Judgment affirmed per Curiam. But Houghton said, that this was neither a Discontinuance nor Discontinuante; but Montague and Doderidge said, that this was a Discontinuance.

8. If in Trespass for an Assault and Battery in an Inferior Court, if there be a Plaint entered, and a Declaration before any Appearance of the Defendant, and after the Defendant appears without Process and pleads to Issue, and this is found for the Plaintiff, and Judgment accordingly, this is erroneous, and not helped by the Appearance or Pleading, inasmuch as there was a Declaration against no Body, the Defendant not being then in Court. Mich. 14 Car. B. R. between *Brown and Clagg* adjudged in a Writ of Error upon such Judgment in the Court of Marshalsea; and the Judgment reversed accordingly. Intratur Pasch. 14 Car. Rot, 325.

(G. c) pl. 23. S. C.

9. If an Action be brought in an Inferior Court against J. S. if the Plaintiff declares against him in Custodia of the Serjeant and Minister of the Court, and it does not appear that the Serjeant had any Process or Precept to arrest him, and the Defendant appears and demurs for this Cause upon the Declaration, and upon this Judgment is given against the Defendant, this is erroneous, for upon his Appearance he pleaded this Matter. Trin. 1649. between *Lowe and Doddesworth* adjudged in a Writ of Error upon a Judgment in York, (as it seems) and the Judgment reversed accordingly.

Br. Faux Judgment, pl 4 cites S C.

10. He who appears *at the Summons*, *or is essoined upon the Summons*, shall not say after that the Summons wanted Form, or that there is false Latin, or that he was not summoned &c. Br. Error, pl. 25. cites 46 E. 3. 30.

4 Le. 28. pl. 145. Savage v. Knight, S. C in totidem verbis; but adds that it was said, that after the Defendant appeared a Plaint was entered; but it was answered that this did not help the Matter; For there ought to be a Plaint out of which Process shall issue, as in the Sovereign Courts, out of Original Writs.

11. Error was brought of a *Judgment* given *in an Inferior Court*, *because there was no Plaint entered, and upon the Record nothing was entered but that the Defendant Summonitus fuit* &c where *the first Entry ought to be, A. B. queritur versus C. D.* &c. and the Summons so entered is not any Plaint; and for that Cause Judgment was reversed. Le. 185. pl. 260. and 302. pl. 415. Mich 29 & 30 Eliz. Knight v. Savage.

12 In Error on a *Judgment in Account* it was assigned (amongst others) That *the Writ* of Account *was brought in Norfolk*, and the *Cap' ad Computandem was awarded to London*; whereas it ought to have been to the Sheriff of the County where the Action was brought. Coke said it was helped by the Statute of Jeofails, and he appeared upon this Process, and so had made it good; and Error in Process cannot be alleged after In Nullo est erratum pleaded; for if it had been alleged the other Party might have alleged Diminution; the Judgment was affirmed. Cro. E. 83. Hill. 30 Eliz. B. R. in Case of Robiert v. Andrews.

13. A *Capias* was directed *to the Sheriff of B.* and it was *returned by one who was not Sheriff*, and this was held a manifest Error; but because the Defendant had appeared after, and pleaded, it was held not material, and that his *Appearance had made it good.* Cro. E. 582. pl. 6. Mich. 39 & 40 Eliz. B. R. Thoroughgood v. Scroggs.

14. Error of a *Judgment in Debt*, because the *Original Writ had not the Sheriff's Name to the Return* thereof; But in Regard the Defendant had appeared, and pleaded Nul tiel Record, it was holden nat material although the Writ had not been returned, and after Appearance he

he shall never take Advantage of the *misawarding of the mean Process*; the Judgment was affirmed. Cro. E. 767. pl. 6. Trin. 42 Eliz. B. R. Dabiton v. Thorp.

15. The Appearance of the Defendant *will help* and salve *a Miscontinuance of Process, but* there is no Case in the Law to prove that any Appearance will help and salve a Discontinuance of Process; Per Williams J. and the whole Court agreed clearly in this, *that no Appearance will help* and salve *a Discontinuance* of Process. Bulst. 143. Trin. 9 Jac. in Case of Bradley v. Banks.

The Appearance of the Party will help Misconinuance of Process; Per Roll Ch. J. Sty. 237. Mich. 1650.

16. Error assigned was, that the *Writ was in Debt for 40 l.* and *the Capias and all the Process to the Return of the Pluries Capias accordingly*; and *then the Entry was, that Querens obtulit se in Placito Debiti* 40 *s.* and upon Default of the Defendant an *Exigent was awarded*, and the *Defendant after appeared and pleaded and confessed the Action*; and this was held no Error, being helped by the Appearance; for as an Appearance saves Defaults in mean Process, so it saves the Default of the Continuance by an Obtulit se; the Judgment was affirmed. Cro. J. 311. pl. 10. Mich. 10 Jac. B. R. Lovelace v. Jeniper.

Jenk. 341. pl 99. S. C.

17. *A Judgment in a Second Deliverance* given in C. B. was reversed, because there *was not any Writ of Second Deliverance certified*, although it was awarded upon the Roll, and the Parties appeared and pleaded to it. Cro. J. 424 pl. 8 Pasch. 15 Jac. B. R. Newman v. More.

18. In Error of a *Judgment in Dower* it was assigned, that there *was not any Original Writ nor Warrant of Attorney for the Defendant.* But upon Diminution alleged *the Writ was certified*; but for the *Warrant of Attorney, because it was not assigned of Record that Diminution might be alleged, it was held that it was now assignable.* Cro. C. 351. pl. 16. Hill. 9 Car. B. R. Wickham v. Enfield.

19. *Audita Querela was brought, and a Scire Facias thereupon bearing Date before the Audita Querela*, and the *Defendant appears*, and for this Cause demurs. The Court held that this Fault is cured by the Appearance; for Audita Querela is more properly a Commission than a Writ, and *if the Party be in Court, the Matter ought to be examined without inquiring into the Nature of the Process* by which he was brought in, for it might be that he appeared without Process. Sid. 406. Hill. 20 & 21 Car. 2. B. R. Vaughan v. Loyd.

Vent. 7. S. C. and the Demurrer disallowed But it was said that if an *Original bears Date on a Sunday* or the like, the Appearance of the Party would not help it.

20. *But* it was agreed that a *Scire Facias upon a Judgment differs*, and that a Fault therein will not be cured by Appearance, because the Sci. Fac. *is in Nature of a Declaration.* Sid. 406. in S. C.

Vent 7. S. C. & S. P. agreed per Cur for there the Sci. Fac. is the Foundation and Quasi an Original, and the Judgment is given upon it; but here the Sci. Fac. is only to bring in the Party to answer, and in the Nature of a mesne Process, and the Judgment is given upon the Aud. Quer.

21. If an *Inferior Court awards a Capias where no Summons was first returned*, as there ought to have been, yet this Fault in the Process is aided by Appearance, and is not assignable on a Writ of Error; Per Hale Ch. J. Vent. 220. Trin. 24 Car. 2. B. R. in Case of Read v. Wilmot.

Vent. 249. Mich. 25 Car. 2 B. R. Anon. S. P. ruled accordingly. ——— S. P. per Cur. for by Appearance all Defaults are saved, though it be in an Inferior Court, and so Wylde said it had been of late constantly ruled, contrary to Cro. J. 108. Pratt v. Dixon. Freem. Rep. 458. pl. 642. Trin. 1678. Wheeler's Case.

22. In Error of a Judgment out of an Inferior Court an Exception was taken, that the *first Process was a Capias*; sed non allocatur; because it was cured by Appearance. 2 Lutw 953. Mich. 3 Jac. 2. Buszard v. Bull.

23. In Error to reverse a *Judgment in an inferior Court*, it was assigned, *that the Process of Attachment was returned* thus, *Nihil habet ubi summon' potest &c. and thereupon a Capias awarded*, which was irregular, for an Alias Attachment should have been awarded, and there was *not any Custom returned to warrant the Usage of a Capias in Process*, for that is given by Statute, which extends not to inferior Courts; But the Court held both these Errors to be cured by the Appearance of the Defendant. Carth. 206. Hill 3 W. & M. Boson v. Phyler.

24 Appearance helps only when the Party comes and *pleads to Issue*, not when the Party comes in and *challenges the Process* upon the Account of its Defect; Per Eyre J. 1 Salk. 59. pl. 2. Trin. 6 W. & M. in B. R. in Case of Wilson v. Laws.

25. A *Summons* in Trespass out of the Court of *Ely* was *returnable generally the same Day*, and a Return the same Day of a Summoneri, and an Attachment and Return the same Day of a Nil, and then a *Capias returnable the same Day*, and thereupon brought in in Custody, Declaration, Plea, Demurrer and Judgment, and Writ of Inquiry executed and returned, and Judgment final, all in one Day; Resolved, that the *bare Appearance upon the Capias* being compulsory did not help this Error, because it was what the Defendant *could not avoid*. 12 Mod. 523. Trin. 13 W. 3. Biddolph v. Veal.

26. A *Writ of Error* was *executed the same Day with the Return of the Pone*, and so might be before any Pone issued out, and Judgment was reversed for this Error; For no Appearance and Pleading can help that. 12 Mod. 524 Trin. 13 W. 3. Biddolph v. Veal.

What Defects are aided by Appearance, See Tit. Default, (E. 2)

(L. b. 2) Aided by Intendment.

1. SHeriff returned upon a Capias *Cepi Corpus*, and the *Record is that he always appeared by Attorney*, and per Cur. this is not Error, For it shall be now intended that it was by Assent of the Parties, and then no Error; Quod Nota. Br. Error, pl. 184. cites 21 E. 4 77.

2. Error upon Outlawry *of Felony upon Indictment*, which was, *that Presentation was before A. B. and C. D. Justices of Peace, that J. S. &c. such a Day &c.* and *did not speak of Commission of Oyer and Terminer of Felonies*; And per Hussey and Jenny the Omission of it is Error; But Fairfax contra; For it shall be *intended by these Words, Justices of Peace*, that they have Commission; But Hussey said, No; For where *Mayor*, *Steward*, or the like, *is Coroner*, *Indictment taken before A. B. Mayor* or Steward super visum Corporis, *is not good without this Word, (Coroner.)* Br. Error, pl. 186. cites 22 E. 4. 12.

(M. b) Pleading *abateable*.

What Act *will help* an Error.

1. If in Trespass of Charters taken, the Plaintiff does not count of the Quantity of the Land comprised in the Charters, (admitting that he ought) yet if the Defendant does not take Advantage thereof, but pleads, and Judgment is given against him, this helps the Error, and he shall not assign it for this. 20 Ass. 3.

Br. Error, pl. 119. cites S. C. but S. P. does not appear. —— F. N. B. 21. (E) S. P. accordingly, but adds, tamen Quære. —— See (P. b) pl. 12.

2. If a Feme Sole brings Trespass, and recovers, and a Writ of Inquiry of Damages is awarded, and before the Return thereof the Plaintiff takes Husband, and after the Writ is returned, and Judgment given thereupon without any Exceptions taken by the Defendant, he shall not have Advantage of this in a Writ of Error, because the Writ was only abateable by Plea. Mich. 40, 41 Eliz. B. R. between *Smith and Odyham* adjudged.

3. If an Action be brought against Sir Francis Fortescue Militem, & Baronettum, and he appears and pleads to Issue, and a Verdict and Judgment is given for the Plaintiff, the Defendant in a Writ of Error shall not have Advantage to say, that he was a Knight of the Bath, not so named, inasmuch as he had appeared to the other Name and pleaded, and so had concluded himself. Pasch. 16 Jac. B. R. between *Markham and Sir Francis Fortescue* adjudged.

Cro. J. 482. pl. 15. Fortescue v. Markham. S. C. adjudg'd. —— Roll Rep. 450 pl. 12 S. C. & S. P. adjudg'd accordingly. —— See (F. c) infra, pl. 5. S. C. —— And see tit. Estoppel (L) pl. 12. S. C.

4. Upon a Trial between a Peer of the Realm and another, the Sheriff does not return any Knight as he ought; if the Peer does not challenge the Array, but the Jury gave a Verdict he shall not have Advantage thereof afterwards. Pasch. 9 Car. between the *Lord Powis and Kirtman*, adjudged in a Writ of Error upon a Judgment in Banco, for he may waive his Priviledge and the Trial be without any Knight.

5. It is a good Rule that *where any Matter may be pleaded in Abatement it shall never be assigned for Error.* Per Holt Ch. J. Carth. 123. cites 2 Saund. 212. and 48 E. 3. 10. b. 3 H. 4. 6.

(N. b)

(N. b) What Act will *help* an Error, *where the Error appears of Record.*

1. If a Man be indicted for a Conspiracy, and no Year or Place alleged of the Conspiracy, though the Defendant did not take Exception to it, but pleaded Not-Guilty, and Judgment is given against him, this Pleading shall not help the Error. 24 E. 3. 35. b. 36. adjudged.

2. So if a Man be indicted as of a Conspiracy, where the Matter shewed it was Extortion and not Conspiracy, though the Defendant pleaded Not-Guilty, and a Judgment is given against him, yet this shall not help the Error, for this appears upon the Record. 24 E. 3. 36. adjudged.