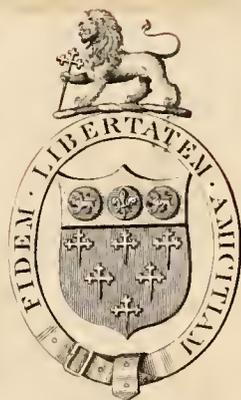




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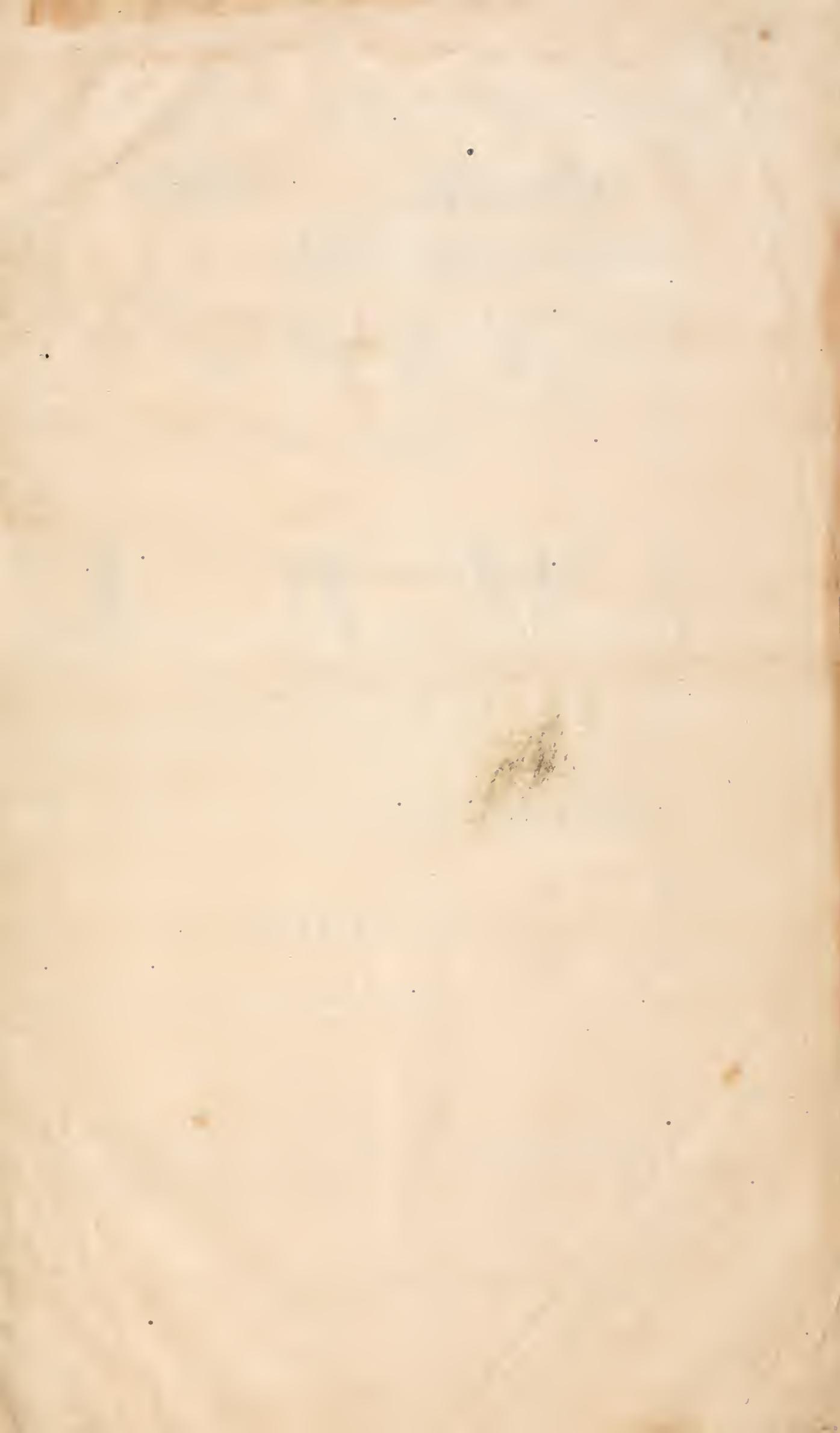
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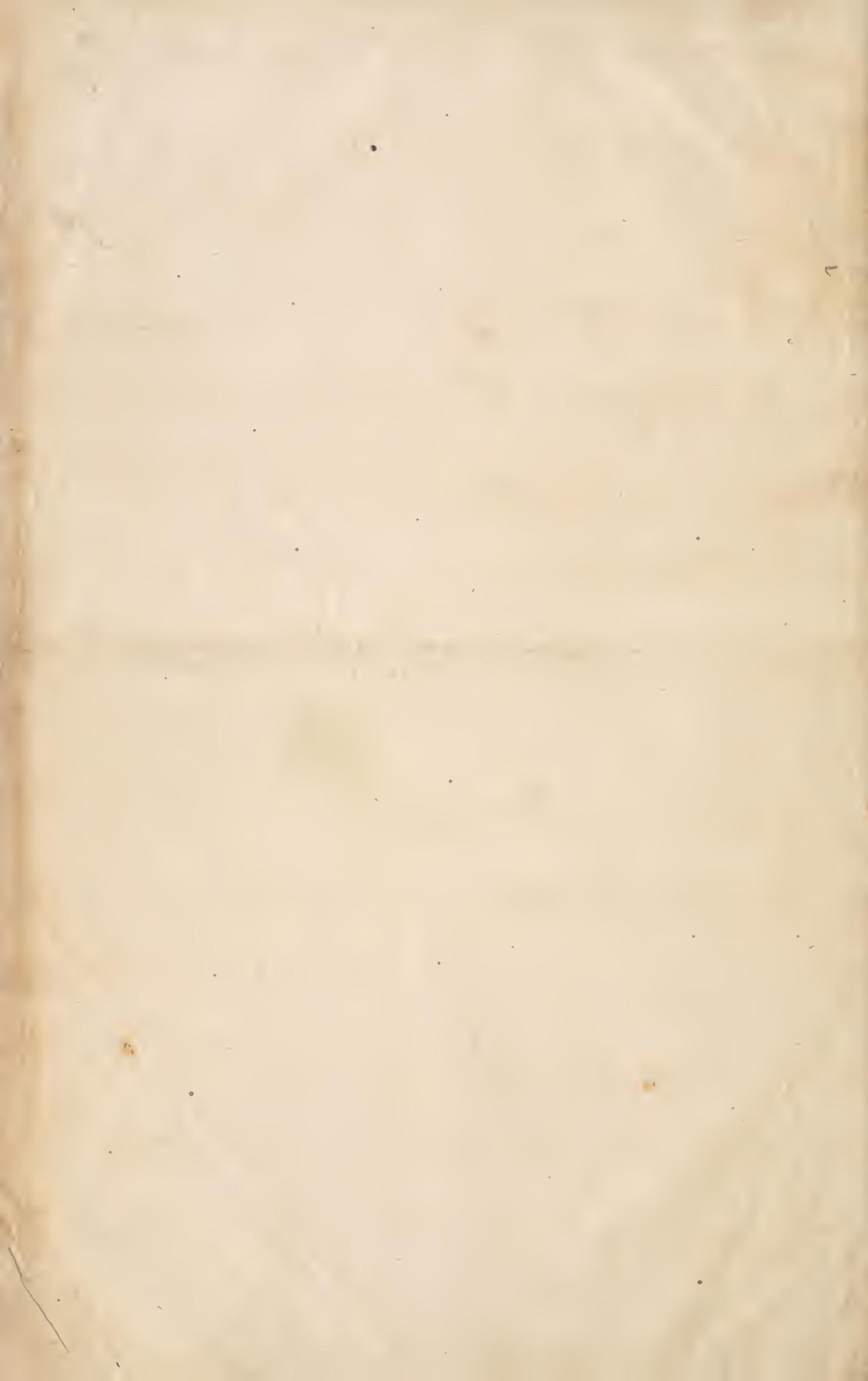
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Such is the Power of Wealth, that it Commands the Ear of Greatness  
And the Eye of Beauty, Gives Spirit to the Dull and Authority to the  
Timorous; And leaves him from whom it departs without Virtue and  
without Understanding, the Sport of Caprice, the Staff of Insolence  
the Slave of Meanness and the Pupil of Ignorance — — — — —

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OF THE

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in *Fleet-street*. M.DCC.XXXVI.

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NEW ARRIVEMENT

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Advertisement.

AS this WORK is to contain FOUR VOLUMES, the Publick may be assured that the remaining TWO will be printed with all Expedition; and that to the last Volume a GENERAL INDEX will be added to the *WHOLE*.

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WITH THEIR

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- (B) *The Nature of such Estate, both in respect of their own Actions, and Actions brought by Strangers.*
- (C) *Of a Partition, when the Things are dividable or intire, and the Manner thereof.*
- (D) *Of Partition by Writ de Partitione faciendā.*
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- (A) *Of the Nature of the Tenure, and what shall be deemed Copyhold.*
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- (C) *What Acts of Parliament shall be said to extend to Copyholds: And herein,*
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- (B) *In what Places he hath Jurisdiction.*
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- (B) *By whom and in what Manner created.*
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- (C) *What Things are incident to a Corporation.*
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- (B) *Of Covenants created by Implication of Law.*
- (C) *Where an Action of Covenant is the proper Remedy.*
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- (E) *Of Covenants real and personal ; and therein, of the Persons to whom they shall extend ; And herein,*
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  3. How inferior Courts must claim their Jurisdiction; and herein, of pleading to the Jurisdiction and demanding Conufance.
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- (B) *Of the Persons of whom it consists.*
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- (E) *Of the Method of passing Bills.*
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- (B) *As an ordinary and limited Court, proceeding according to Law, commonly called the Petty-Bag.*
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- (B) *How far its Presence suspends the Power of all other Courts.*
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- (A) *Of the Nature and Antiquity of this Court.*
- (B) *In what Cases it has a Jurisdiction.*
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Page 601.

- (A) *Of the Manner of holding this Court ; and therein, whether it can be held by Commission by the Earl Marshal only, and whether it may be prohibited if it exceeds its Jurisdiction.*
- (B) *In what Cases it has a Jurisdiction.*
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Page 604.

- (A) *Of the Manner of authorising Commissioners of Oyer and Terminer and Gaol-Delivery ; and herein, of the Determination of their Power.*
- (B) *Of their Jurisdiction when appointed.*
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**Court of the Justices of Assise and Nisi Prius.**

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- (A) *Several Ecclesiastical Courts, which exercise a Jurisdiction : And herein,*
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  6. *Of the Court of Peculiars.*
  7. *Of the Consistory Courts.*
  8. *Of the Court of the Archdeacon.*
  9. *Of the Court of Delegates.*
  10. *Of the Court of Commissioners of Review.*
- (B) *Of appealing from an inferior to a superior Court.*
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## A Table of the several TITLES,

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- (A) *To what Places the Jurisdiction of the Admiralty is confined.*  
(B) *To what Things its Jurisdiction extends ; and therein, of such Matters as arise partly on Sea, and partly on Land.*  
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### Of the Marshalsea and Balace Court. Page 632.

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- (A) *The Manner of holding this Court.*  
(B) *What Persons owe Suit to it.*  
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### Of the Court Leet. Page 645.

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**Curtesy of England.** Page 659.

- (A) *What Persons may be Tenants by the Curtesy, what not.*
- (B) *Of what Sort of Inheritances this Estate is allowable, of what not.*
- (C) *What Estate the Wife must have to let in the Husband to be Tenant by the Curtesy: And herein,*
1. The descensible Quality of such Estate.
  2. The Seisin of the Wife thereof.
  3. When this Estate and Seisin is to begin, and how long it must continue.
- (D) *Of the Husband's Title being initiate by having of Issue, and to what Purposes; and herein,*
1. What Sort of Issue this must be.
  2. When it must be born.
  3. What it must do to intitle the Husband to be Tenant by the Curtesy.
- (E) *The Nature and Quality of such Tenancy by the Curtesy.*
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**Customs.** Page 669.

- (A) *Of the Commencement and Length of Time necessary to establish a Custom.*
- (B) *What Persons are affected with or bound by a Custom.*
- (C) *Of such Customs as are against the Rules of the Common Law, yet not being unreasonable in themselves are good, and from the Conveniency of them bind in particular Places.*
- (D) *Where from the Benefits accruing from them they shall bind.*
- (E) *Where from the Certainty or Uncertainty of them, they shall be deemed good or void.*
- (F) *How to be construed, and to what Things a Custom shall be said to extend.*
- (G) *Custom how destroyed.*
- (H) *Of the Manner of alledging and pleading a Custom.*

**Customs**

**Customs of London.** Page 680.

- (A) *Of the Customs of London in general.*
- (B) *Of the Customs of London in respect to Orphans.*
- (C) *Of the Customs of London in respect to a Freeman's Estate: And herein,*
  - 1. What shall be esteemed such an Estate, as will be subject to the Custom, and what Disposition a Freeman may make thereof.
  - 2. Of the Childrens Part; and herein, of Suvivorship, Advancement and bringing into Hotchpot.
  - 3. Of the Wife's Part, and what shall bar her thereof.
  - 4. Of the Legatory or dead Man's Share.
- (D) *Of the Custom of London as it relates to Feme Coverts.*
- (E) *As it relates to Masters and Apprentices.*
- (F) *As it relates to Landlords and Tenants.*
- (G) *Of the Customs of London, which are in Furtherance of Justice, and for the more speedy Recovery of Debts.*
- (H) *Of the Custom of Foreign Attachment; And herein,*
  - 1. Of the Nature of the Debt or Duty, which may be attached.
  - 2. In whose Hands and at what Time the Attachment may be made.
  - 3. Of the Form of the Proceedings in a Foreign Attachment.

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**Abatement.**

# Abatement.

**A**batement in the general Acceptation of the Word (*a*) signifies a (*a*) For the Derivation and several Significations of the Word, *vide* (*b*) Plea put in by the Defendant, in which he shews Cause to the Court why he should not be impleaded, or if impleaded, not in the Manner and Form he then is.

*Co. Lit.* 134. *b.* 277. *a.* *F. N. B.* 115. If a Man dies seised of Lands, and a Stranger enters before the Heir, his Entry is called an Abatement; for this, *vide Lit. Sect.* 279. *Co. Lit.* 181. *a.* 242, 271. *a.* (*b*) As Pleas in Abatement enter not into the Merits of the Cause, but are dilatory, the Law has laid the following Restrictions on them: *First*, By the Statute 4 & 5 *Anna*, *cap.* 16. for Amendment of the Law, no dilatory Plea is to be received unless on Oath, and probable Cause shewn to the Court. *Secondly*, No Plea in Abatement shall be received after a *Respondeas Oustler*, for then would they be pleaded *in infinitum*. 2 *Saund.* 41. *Thirdly*, That they are to be pleaded before *Impar lance*; for this, *vide Yelv.* 112. 1 *Lutw.* 46, 178. 2 *Lutw.* 1117. *Doff. Pla.* 224. *Fourthly*, That when Issue is joined on them, if it be found against him who pleads such dilatory Plea, it shall be peremptory. 2 *Show. Rep.* 42. 6 *Mod.* 236. For the Order of Pleading, and the different Kind of Pleas, *vide* Head of Pleading.

We will consider this Title in the following Order, though several of the Divisions are more largely treated of under their proper Heads.

(A) Of Pleas in Abatement to the Jurisdiction of the Court.

(B) Of Pleas in Abatement to the Person of the Plaintiff, and therein of

1. OUTLAWRY.
2. EXCOMMUNICATION.
3. ALIENAGE.
4. PREMUNIRE.
5. POPI SH RECUSANCY.

(C) Of Pleas in Abatement, with Respect to the Person of the Defendant, and therein of privileged Persons.

(D) Of Pleas in Abatement to the Form of the Writ and Action, and therein of Misnomer, and the Want of Addition.

(E) Of Abatement by the Demise of the King.

(F) Of Abatement by the Death of the Parties.

(G) Of Abatement by Reason of Marriage or Coverture.

(H) Where the Writ is abated *ex facto*, or is only abateable.

(I) Where the Writ shall abate in toto or in Part.

(K) Where it shall abate by Reason of another Action brought for the same Thing.

(L) Where a Person may plead in Bar or in Abatement.

(M) Of the Manner of Pleading in Abatement, and the Proceedings on such Plea.

## (A) Of Pleas in Abatement to the Jurisdiction of the Court.

A Plea to the (a) Jurisdiction of a Court must be put in before (b) any (c) Impar lance, for by craving Leave to imparl, the Defendant submits to the Jurisdiction.

<sup>1</sup> *Lutw.* 46.

Of the Jurisdiction of the several Courts, and the Difference between the Courts of *Westminster* and other Courts of Records, and where inferiour Courts of Record cannot plead, but must demand Cognizance; *vide Tit. Courts* and their Jurisdiction. (b) Except where ancient Demesne is pleaded; because the Lord might reverse the Judgment by Writ of *Disceit*, and it goes in Bar of the Action it self; for this, *vide Dyer in Marg.* 210. *Stiles* 30. *Latch* 83. 5 *Co.* 105. 9 *Co.* 31. *Han. Ent.* 103. (c) For Impar lance, and the Difference between a General and Special Impar lance, *vide Tit. Impar lance.*

The Defendant must plead *in propria Persona*, for he cannot plead by Attorney without Leave of the Court first had, which Leave acknowledges their Jurisdiction; for the Attorney is an Officer of the Court; and if they put in a Plea by an Officer of the Court, that Plea must be supposed to be put in by Leave of the Court.

*Lutw.* 9.

<sup>1</sup> *Show. Rep.* 386.

The Defendant must make but half Defence; for if he makes the full Defence *quando & ubi Curia consideravit, &c.* he submits to the Jurisdiction of the Court.

## (B) Of Pleas in Abatement to the Person of the Plaintiff, and therein,

### 1. OF OUTLAWRY.

Outlawry in the Plaintiff is a good Plea in Abatement, for he thereby loses his *Liberam legem*, and is out of the Protection of the Law, because he would not be amenable and attendant to the Law; and therefore should not have any Privilege or Benefit from the Law. shall be said fore should not have any Privilege or Benefit from the Law. to be outlawed till the Return of the Exigent. *Bro. Nonability* 25, 23. *Aff.* 49. *Dyer* 222. but for this, *vide Head of Outlawry.*

*Co. Lit.* 128.  
*Doctr. Plac.*  
397.

But Outlawry does not intirely abate the Writ, but is only a temporary Impediment that disables the Plaintiff from Proceeding; for upon obtaining a Charter of Pardon, or reversing the Outlawry, he is restored to his Law, and shall oblige the Defendant to plead to the same Writ.

*Co. Lit.* 128.

This Disability is only pleadable when the Plaintiff sues in his own Right; for if he sues *in Auter Droit*, as Executor, Administrator, or as Mayor with his Commonalty, Outlawry shall not disable him, because the Person whom he represents has the Privilege of the Law.

*Doctr. Plac.*  
396. for such  
Plea would  
amount to  
*Exceptio ejusdem rei cujus*

Nor when he brings a Writ of Error to reverse an Outlawry, shall Outlawry in that Suit, or at any Stranger's, disable him; for if he were outlawed at several Men's Suits, and one should be a Bar to another, he could never reverse any of them.

*petitur dissolutio. Co. Lit.* 128. If there be an Attaint brought, Outlawry grounded on that Verdict cannot be pleaded. 7 *H.* 4. 40.

<sup>1</sup> *Lutw.* 36.

But when Outlawry is pleaded in Abatement, the Plaintiff shall not reply that the Outlawry is erroneous, for it is good till reversed.

As this is a dilatory Plea, when it is pleaded in another Court than where the Outlawry issued, the Defendant must bring it in immediately; for this being in Delay, if the Court should give Time, and it should not be brought in, the Delay of Justice would be from the Court; and since there is a Way of having it immediately, by producing it under the Great Seal, no Time shall be given to bring it *sub pede sigilli*; but otherwise when it is in the same Court, for then the Record is already in Court.

*Stamf.* 103.  
*Fitz. Coron.*  
233. Note;  
In pleading  
Outlawry in  
Disability in  
another  
Court, the  
ancient Way  
was to have

the Record of the Outlawry it self *sub pede sigilli* by *Certiorari* and *Mittimus*; but this being very expensive, 'tis now sufficient to plead the *Capias ut Legatum*, under the Seal of the Court, from whence it issues; and if the Plaintiff replies that there was no Judgment on which the *Capias ut Legatum* was grounded, the Court will give the Defendant a Day to bring in the Record. *Co. Lit.* 128. *Doct. Plac. Tit. Outlawry.* *Thomp.* 8, 9. *Brownl.* 5, 7. If the Defendant has a Day given him to bring in the Record, and in the *Interim* the Plaintiff removes it by Writ of Error, and reverses it; this shall not be peremptory on the Defendant, but he shall have Leave to plead a new Plea.

Outlawry in a County Palatine cannot be pleaded in any of the Courts of *Westminster*, for the Party is only ousted of his Law within that Jurisdiction.

*Fitz. Coron.*  
237.  
12 *Ed.* 4. 16.  
But it seems

that Outlawry in the County Palatine of *Lancaster* may be pleaded in the Courts of *Westminster*; because that County was created by Act of Parliament. *Doct. Plac.* 396. Where Outlawry may be pleaded in Bar or Abatement, *vide post*, Letter (L).

2. EXCOMMUNICATION.

When Excommunication is pleaded, the Bishop's Letter under his Seal, witnessing the Excommunication, must be shewn; and though the Plaintiff cannot deny the Plea, yet the Writ shall not abate, but the Defendant *eat inde sine Die*; because the Plaintiff upon producing his Letters of Absolution, shall have a Re-summmons or Re-attachment.

*Lit. Sect.* 201.  
8 *Co.* 68.  
Where it  
cannot be  
pleaded after  
a General  
Impar lance,  
1 *E.* 4. 36. 1 *Lutw.*

though it may after a Special Imparlance, *vide Tit. Imparlance* and *Plac. Gen.* 10. 9 *E.* 4. 36. 1 *Lutw.* 19. *Latch* 179.

Excommengement is (a) a good Plea to an Executor or Administrator, though they sue *in Auter Droit*; for an excommunicate Person is excluded from the Body of the Church, and is incapable to lay out the Goods of the Deceased to pious Uses.

*Co. Lit.* 134.  
45 *E.* 3. 13.  
*Theol.* 11.  
(a) But in an  
Action  
brought by

the Bailiffs and Commonalty, the Defendant cannot plead Excommengement in the Bailiffs, because they sue as a Corporation, and a Corporation cannot be excluded from the Communion of the visible Church. *Theol.* 11. Excommunication is no Plea on a *Qui tam*, because it is for Example; and the Statute having given the Informer an Ability to sue, and not excepted excommunicated Persons from the Liberty of informing, he is enabled to sue by the Statute, notwithstanding the Censures of the Church. 12 *Co.* 61.

When Excommunication is pleaded in the Plaintiff, he shall not reply that he has appealed from the Sentence, for the Sentence is in Force until it is repealed; and whilst it is in Force, he cannot appear in any of the Courts of Justice; but he may reply he is absolved, for then his Disability is taken away.

*Bro. Excom.* 3.  
3 *Bulfr.* 72.  
20 *H.* 6. 25.  
*Plac. Gen.*  
10, 72, &c.

When a Prohibition is brought against a Bishop, and he pleads Excommunication against the Plaintiff, and in the Sentence there is no Cause of such Excommunication shewn; this is no good Plea, for in such Case it will be intended that the Excommunication was for endeavouring to

*Theol.* 10, 11.  
28 *E.* 3. 97.  
Where the  
Sentence of  
Excommu-  
nication is

a Nullity; as where the Ordinary excommunicates for a Temporal Offence, the Court will write to the Bishop to assail him. *Bro. Excom.* 17. 1 *Roll's Abr.* 883.

hinder

hinder the Bishop's Proceeding, by Application to the Temporal Court; and if such Excommunication were allowed, it would destroy all Prohibitions; and the Plea of Excommunication in this Case is *Exceptio ejusdem rei cujus petitur dissolutio*.

The Court will not (a) receive the Certificate of Excommunication of one Bishop from another, because they must have the Certificate from the Bishop, whose proper Subject he was; and he might have been afoiled by his own Ordinary after the first Certificate to the Bishop.

(a) Nor will they receive a Certificate from a Bishop deceased, because he may stand afoiled by the present Ordinary. *Bro. Excom.* 21. *Fitz. Excom.* 26. cannot be certified by the Bishop's Commissary or Official, because the Court cannot write to them to afoil him; but it may be certified by the Vicar General, when the Bishop is *in remotis agendis*, or by the Guardian of the Spiritualities, during the Vacancy of the Bishoprick. *Co. Lit.* 131. *8 Co.* 68. *1 Roll's Abr.* 183, 434, 884. In Times of Popery Excommen- gement certified by the Pope or Delegates commissioned by him, did not disable the Plaintiff, because the Courts had no Person to whom they should write to have him afoiled. *16 E.* 3. 31. *Bro. Excom.* 17. *1 Roll's Abr.* 883. How it shall be certified by Delegates appointed by Commission out of Chan- cery, *vide 1 Lutw.* 17.

*Co. Lit.* 128.  
Vide Head of  
Aliens; and  
*vide 4 Mod.*  
285, 405.

### 3. ALIENAGE.

*Co. Lit.* 129. b.  
*Yelv.* 198.  
*1 Bulstr.* 134.  
Whether an  
Alien Enemy

may maintain an Action *in Auter Droit* as Executor. *vide Head of Aliens.*

An Alien Enemy, or one whose King is in Enmity with ours, cannot bring any Action either Real, Personal or Mix'd.

But an Alien in League may maintain Personal Actions, otherwise he would not be able to merchandize and trade amongst us; but he shall not maintain Real or Mix'd Actions, because there is no Necessity that he should settle amongst us.

*Bro. Denizen*  
10.  
*Co. Lit.* 129. b.

If Alienage be pleaded to an Alien in League, that must be in Disability of the Plaintiff; but if it be to an Alien Enemy, it may be pleaded to the Action; because it is forfeited to the King as a Reprisal for the Damages committed by the Dominion in Enmity with him.

### 4. PREMUNIRE.

*Lit. Sect.* 199.  
*Co. Lit.* 129.  
but for this  
*vide Tit. Pre-*  
*munire.*

Persons attainted of a Premunire are incapable of bringing any Action; for they are out of the Protection of the Law.

### 5. POPISH RECUSANCY.

But for this  
*vide Head of*  
*Popish Recu-*  
*sancy.*

This Disability of Popish Recusancy convict, is by Virtue of the Statute 3 *Jac.* 1. *cap.* 5. which disables to all Intents, &c. except where he sues for Lands, Tenements, Leases, Annuities, Rents and Hereditaments, or the Issues or Profits thereof, which are not to be seised into the King's Hands, his Heirs or Successors.

(C) Of Pleas in Abatement, with Respect of the Person of the Defendant, and therein of Privileged Persons.

The Officers of each Court enjoy the Privilege of being sued only in those Courts to which they respectively belong; the Reason whereof is, because of the Duty they are under of attending those Courts, and lest their Clients Causes should suffer if they were drawn to answer to Actions in other Courts.

What Persons are Privileged, *vide* Head of Privilege; and for Precedents of Pleas of Privilege, *vide* *Temp.* 4. *Rob. Ent.* 199. *Raft. Ent.* 106, 178, 472. *Brownl.* 161, 167, 268. *Hern.* 3. 3 *Just. Clericalis* 32 to 35 Where they are not obliged to put in Special Bail; and where Bail must be put when they sue, *vide* Head of Bail in Civil Causes.

But the Plaintiff must have the same Remedy against the Officer in his own Court, as in that where he sues him; for if Money be attached by foreign Attachment, in the Sheriffs Court in London, he shall not have his Privilege; because in this Case the Plaintiff would be Remediless.

So if a Writ of Entry, or other Real Action, be brought against an Attorney of the King's Bench, he cannot plead his Privilege; because if this should be allowed, the Plaintiff would have a Right without a Remedy; for the King's Bench hath not Cognisance of Real Actions.

Appeal, he shall not have his Privilege; for his own Court hath not Cognisance of this Appeal, he shall not have his Privilege; for his own Court hath not Cognisance of this

Also the Privilege which the Court indulges their Officers with, is restrained to those Suits only which they bring in their own Right, or are brought against them in their own Right; for if they sue or are sued as Executors or Administrators, they then represent common Persons, and are to have no Privilege.

So if an Officer of one Court sues an Officer of another Court, the Defendant shall not plead his Privilege; for the Attendance of the Plaintiff is as necessary in his Court as the Defendant is in his; and therefore the Cause is legally attached in the Court where the Plaintiff is an Officer.

So if a Privileged Person brings a Joint Action, or if an Action be brought against him and others, he shall not have his Privilege; but this is to be understood where the Action is joint, and cannot be severed; for if the Action can be severed, without doing any Injury, the Officer shall have his Privilege.

An Officer shall not have his Privilege against the (a) King; for, as the executive Power is lodged in the King, it would be unreasonable that his Court, which gives Relief to private Persons, should protect any Subject from being brought to Justice for offending against the Laws, which concern the whole Common-wealth.

at the Suit of an Informer, he shall have his Privilege.

If an Attorney of the Common Pleas be in *Custodia Maresch.* for want of Bail, at the Suit of A. he may (b) plead his Privilege.

*podia Mareschal.* at the Suit of A. and B. declares against him in *Custodia Mareschal.* if he has waived his Privilege as to A. he cannot take Advantage of it against B. For this *vide* 2 *Roll. Abr.* 275. 1 *Salk.* 12. 5 *Mod.* 310. *Coth.* 370. 3 *Lev.* 243.

*Bro. Priv.* 25. After a general Impar lance, an Officer cannot plead his Privilege, because by imparling he affirms the Jurisdiction of the Court; but by the better Opinion, it seems, that after a special Impar lance he may plead his Privilege.  
 22 H. 6. 6.  
 1 Roll. Rep. 294.  
 1 S. d. 29.  
 2 Roll's Abr. 273, 279. Hard. 365. 1 Lutw. 46. 1 Salk. 1.

1 Salk. 1. In an Action against B. he pleaded *Quod ipse est unus Attornat. Cur. Pease* vers. *Domini Regis de B.* without saying *Fuit tempore impetrationis brevis*; and a *Respondeas Ouster* was awarded.  
*Parsons*, — must plead  
*Prout patet per recordum.* 1 Salk. 1. *vide plus infra*, Letter (M.)

### (D) Of Pleas in Abatement to the Form of the Writ and Action, and therein of Misnomer, and the Want of Addition.

For the Difference between Original and Judicial Writs, and for the Defects in the Writ, *vide* Head of *Writs*; where such Faults may be amended, *vide* Tit. *Amendment*; where such Faults must be pleaded, and cannot be taken Advantage of in Error, *vide* Tit. *Error*, and *postea* Letter (H.) *Vide* 5 Co. 12. 9 H. 7. 16. 10 E. 3. 1. p. 2. 2 Inff. 662. Hob. 1, 51, 52, So. Carth. 172.

The Law is very strict in obliging Men to keep up to the legal Forms it prescribes; and therefore in the Writ, which is the Foundation of the whole Proceeding, requires that Certainty and Exactness, as that no Person should be arrested or attached by his Goods, unless there appears sufficient Grounds to warrant such Proceedings; so that if the Writ vary materially from that in the Register, or be defective in Substance, the Party may take Advantage of it.

(a) *Fitz. Brief* 219, 251. So if the Declaration varies from the Writ, as (a) by laying the Cause of Action in the Reign of a present King, where the Writ supposed it to have been in the Reign of a former King; or by giving the Defendant a Name different from that in the Writ; as where the Writ (b) calls him *A. B. of London*, Alderman, and the Plaintiff declares against him as *A. B. of London*, Esq; or where the Declaration is otherwise Defective; in not pursuing the Writ, or not setting forth the Cause of Action with that Certainty which the Law requires, or in laying the Offence in a different County from that in which the Writ was brought.

(b) *Yelo.* 120. *Vide* *Finch* of Law, 557. *Lat. b.* 173. *Vide* Head of *Amendment*.

For this *vide* Head of *Misnomer*, and the *Want* of *Addition*. *Misnomer* is a good Plea in *Abatement*; for since the Names are the only Marks and *Indicium* of Things that human Kind can understand each other by, if the Name be omitted or mistaken, there is a Complaint against no Body.

But though a Defendant may, by pleading in *Abatement*, take Advantage of a *Misnomer* when there is a Mistake in the Writ or Declaration, as to the Name of Baptism or Surname; yet in such a Plea he must set forth his right Name, so as to give the Plaintiff a better Writ. Name, or not taking the Advantage of it, such Mistake will be aided. *Vide* Tit. *Error*. *Vide* *Yelo.* 112. Must, in setting forth his Name, say that by such Name he was known at the Time of the Writ purchased. *Skin.* 620. *vide* 1 Salk. 7. 63. *Conlds.* 86.

1 Lutw. 36. One Defendant cannot plead *Misnomer* of his Companion; for the other Defendant may admit himself to be the Person in the Writ.

The Defendant, though his Name be mistaken, is not obliged to take Advantage of it; and therefore if he be impleaded by a wrong Name, and afterwards impleaded by his right Name, he may plead in Bar the former Judgment, and aver that he is *una & eadem persona*.

*J. Villars*, who pretended himself to be Earl of *Buckingham*, was arrested by the Name of *J. Villars*, *Armiger*; and on Motion, the Court gave him Leave to put in Bail, without joining in the Recognizance, and thereby not estop himself. *Vide* 1 Salk. 5. 7.

In Case of Felony at Common Law, if a Person were indicted by a wrong Name, he could not plead *Misnomer*, but was obliged to plead to the Felony; for the Fact being sworn against the Party present, it was thought there could be no Injury by the *Misnomer*, as might be where the Party appeared by Attorney; and Felons generally go by no certain Name, nor have they any fix'd Habitation.

But this altered by the Statute of Additions, viz. 1 H. 5. cap. 5. which was made to prevent the In-

convenience of troubling one Person for another. *Vide Cro. Car. 104. 21 E. 4. 72. 2 Inst. 870. 1 Sid. 40. Lit. Rep. 8. Vide Head of Misnomer, and the Want of Addition, and 2 Hawk. P. C. 186. 7.* that the Party accused may take Advantage of *Misnomer*, or the *Want of Addition*, but yet must plead over to the Felony; but though such Plea be found for him, he is not to be discharged, but must be indicted over again; neither shall such Plea, if found against him be Perempory, but he shall be tryed on his Plea in Chief.

Also the State, Place of Abode and Dignity of the Person impleaded is necessary to be set forth in judicial Proceedings, lest an innocent Person, by having the same Name with the real Defendant, should suffer; therefore the 1 H. 5. enacts, that in all Personal Actions, Appeals and Indictments, there shall be added to the Name of the Defendants their Estates, Degrees, Mystery and Place of Abode.

But for this, vide Head of *Misnomer* and *Want of Addition*.

Also Additions, which are Inducements to the Action, must be made use of; as if one is liable as Heir, he must be named Heir; so if as Executor, he must be named such.

But for this vide also Tit. *Misnomer* and *Want of Addition*.

### (E) Of Abatement by the Demise of the King.

At Common Law all Patents of Justices, Commissions, Civil and Military were determined by the Death of the King; also all Suits depending in the King's Courts were discontinued, so that the Plaintiffs were obliged to commence new Actions, or to have Resummons or Attachment on the former Processes, to bring the Defendants in; but to prevent the Inconvenience, Expence and Delay which this occasioned, were the Statutes of 1 E. 6. cap. 7. 7 & 8 W. 3. cap. 27. and 7 Ann. cap. 8. made, which vide under Title *Prerogative*.

### (F) Of Abatement by the Death of the Parties.

The general Rule to be observed in this Case is, that where the Death of any Party happens, and yet the Plea is in the same Condition as if such Party were living, there such Death makes no Alteration or Abatement of the Writ.

A Difference has been held with Respect to Real Actions, where there are several Plaintiffs, and there is Summons and Severance (as there is in most Real Actions) that in these the Death of one of the Parties abates the Writ, but not in Personal or Mix'd Actions, where one intire Thing is to be recovered; as if there be two Jointenants or Copartners, and they bring a Real Action, and one is summoned and severed, the other shall proceed for his Moiety; for having a Right to a distinct Moiety, there is no Reason why he should not have a Remedy for the Recovery of it, notwithstanding the Unwillingness of the other to join with him; but if the Person severed dies, the Writ abates, because he goes for the Whole, in Case of the Death of the Jointenant, or of the Copartner, without Issue, which would be improper on that Writ, where by the Summons and Severance he went only for a Moiety; for that would be making the Writ have a double Effect, viz. in Case of Summons

10 Co. 134.  
6 Co. 26.  
Cro. Eliz.  
892.  
Cro. Jac. 117.  
Co. Lit. 139.  
1 Jones 452.

Summons and Severance for a Moiety; and in Case of Survivorship for the Whole.

By the 8 & 9 *W.* 3. it is enacted, that if there be two or more Plaintiffs or Defendants, and one or more of them should die, if the Cause of such Action should survive to the surviving Plaintiff or Plaintiffs, or against the surviving Defendant or Defendants, the Writ or Action, shall not be thereby abated; but such Death being suggested upon the Record, the Action shall proceed at the Suit of the surviving Plaintiff or Plaintiffs, against the surviving Defendant or Defendants.

*Cro. Eliz.* 652. And before this Statute it was held, that if there were two Executors, and they brought an Action of Debt, and one of them died, that the Writ should not abate; for in this Case, Summons and Severance lies, after which the one Executor does not proceed for a Moiety, but for a Whole, as Representative of the Testator.

*Dyer* 279. So in a *Quare Impedit*, by two Jointenants, and one is summoned and severed, and the severed Person dies, the Writ shall not abate, because the Advowson is an intire Thing, and he proceeded for the Whole, after the Severance; and so he may after the Death of the severed Jointenant.

Severance. *Vide* 10 *Co.* 154. 1 *Brownl.* 64. 1 *Leon.* 263. *Co. Lit.* 139.

*Hurd.* 151, 164. If there were several Defendants in the original Action, and one died, the Writ did not abate; because there being a joint Demand, it survives against the Residue; but in this Case there must be a Suggestion on the Roll, because it would be Error to give Judgment against a deceased Person.

*Stille* 299.  
3 *Mod.* 249.  
*Cro. Car.* 426.  
1 *Jones* 367.  
1 *Rel. Abr.*  
756. 1 *Shew. Rep.* 186.

*Bridg.* 78. But in a Writ of *Error*, if there be several Plaintiffs, and one dies, the Writ shall abate, because the Writ of *Error* is to set Persons *in statu quo*, before the erroneous Judgment given below; and they that are Plaintiffs in Error were distinct Sufferers in the Judgment, since there might be different Executions issued thereupon, and different Heirs were made by such Judgment, on the Lands of each of them; and by Consequence the Survivor cannot prosecute the Writ of *Error* for the whole Waste, by a collusive Perwasion, or by Negligence or Design he should hurt the Representative of the deceased.

yet all things shall proceed, because the Benefit of such Judgment goes to the Survivor, and he only is to defend it. *Sid.* 419. *Yelv.* 208.

1 *Vent.* 34. In an *Audita Querela*, by two, the Death of one shall not abate the Writ; for the Survivor is not to be restored to any thing he has lost, but to discharge himself of the Execution; and thereupon, notwithstanding the Death of the other, he may proceed for a Discharge *in toto* for himself.

20 *H.* 6. 30. If there be several Persons named as Plaintiffs in the Writ, and one of them was dead at the Time of purchasing the Writ, this may be pleaded in *Abatement*; because it falsifies the Writ; and because the Right was in the Survivors, at the Time of suing the Writ, and the Writ not accommodated, as the Case there was.

18 *E.* 4. 1. By the (a) 17 *Car.* 2. cap. 8. it is enacted, that the Death of either Parties (b) between Verdict and Judgment, shall not be alledged for Error, so as Judgment be (c) entered within two Terms after such Verdict.

2 *H.* 7. 16. (a) Continued by 30 *Car.* 2. cap. 6. and made perpetual by the 1 *Jac.* 2. cap. 17. (b) If either of the Parties dies at any Time before the Assises, it is out of the Statute; but if after the Assises, though before the Trial, it is no Error; for the Assises is but one Day in Law. 1 *Salk.* 8, 9. (c) If after Verdict, and before the Day in Bank, the Plaintiff dies, and the Defendant signs Judgment the second Term after the Verdict, this is within the Statute, and the same as if he had actually entered Judgment on the Roll. 1 *Sid.* 385.

‘ By the 8 & 9 W. 3. it is enacted, that if any Plaintiff happen to die after an interlocutory Judgment, and before a final Judgment obtained therein, the said Action shall not abate by Reason thereof, if such Action might originally be prosecuted or maintained by the Executors or Administrators of such Plaintiff; and if the Defendant die after such interlocutory Judgment, and before final Judgment therein obtained, the said Action shall not abate, if such Action might originally be prosecuted or maintained against the Executors or Administrators of such Defendant and the Plaintiff; or if he be dead after such interlocutory Judgment, his Executors or Administrators shall and may have a *Scire facias* against the Defendant, if living after such interlocutory Judgment; or if he died after, then against his Executors or Administrators, to shew Cause why Damages in such Action should not be assessed and recovered by him or them; and if such Defendant, his Executors or Administrators, shall appear at the Return of such Writ, and not shew or alledge any Matter sufficient to arrest the final Judgment; or being returned, warned, or upon two Writs of *Scire facias* it be returned, that the Defendant, his Executors or Administrators had nothing whereby to be summoned, or could not be found in the County, shall make Default, that thereupon a Writ of Enquiry of Damage shall be awarded, which being executed and returned, Judgment final shall be given for the said Plaintiff, his Executors or Administrators, prosecuting such Writ or Writs of *Scire facias* against such Defendant, his Executors or Administrators respectively.

(G) Of Abatement by Reason of Marriage or Coverture.

Coverture is a good Plea in *Abatement*, which may be either before the Writ sued, or pending the Writ. By the first the Writ is abated *de facto*, but the second only proves the Writ abateable; both are to be pleaded, with this Difference, that Coverture, pending the Writ, must be pleaded *post ultimam continuationem*; whereas Coverture before the Writ brought, may be pleaded at any Time, because the Writ is *de facto* abated; (a) but if a Feme Sole takes out a Writ, and after marries, the Defendant was legally attached on such Suit; and therefore may plead in chief to it any Defence he has; but such Plea must be *Puis darrein continuance*.

Doct. Pl. 3.  
1 Sid. 140.  
1 Leon. 168;  
169.  
Vide Tit.  
Baron and Feme.  
(a) The Feme, by her Marriage, cannot abate her

own Writ; for this Would be taking Advantage of her own Act. 2 Rol. Rep. 53. But in an Action against Baron and Feme, the Baron died, and the Feme married again, *pendente placito*; and the Court inclined to think the Writ abated, because her Name was changed. Stile 138.

If a Writ be brought by A. and B. as Baron and Feme; whereas they were not married until the Suit depended, the Defendant may plead this in *Abatement*; for though they cannot have a Writ in any other Form, yet the Writ shall abate, because it was false when sued out.

Fitz. Brief. 476.

If a Writ be brought against a Feme Covert as Sole, she may plead her Coverture; but if she neglects to do it, and there is a Recovery against her as a Feme Sole, the Husband may avoid it by Writ of *Error*, and may come in at any Time and plead it.

Latch 24  
Stile 254,  
280.  
2 Rol. Rep. 53.  
For this,  
vide Tit. Baron and Feme

If an Action be brought in an inferior Court against a Feme Sole, and pending the Suit she intermarries, and afterwards removes the Cause by *Habeas Corpus*, and the Plaintiff declares against her as a Feme Sole, she

1 Salk. 8.  
Hetherington  
vers. Reynolds.

D may

may plead Coverture at the Time of suing the *Habeas Corpus*; because the Proceedings here are *de novo*; and the Court takes no Notice of what was precedent to the *Habeas Corpus*; but upon Motion on the Return of the *Habeas Corpus*, the Court will grant a *Procedendo*; for though this be Writ of Right, yet where it is to abate a rightful Suit, the Court may refuse it; and the Plaintiff had Bail below to this Suit, which by this Contrivance he is ousted of, and possibly by the same Means of the Debt.

*Cro. Jac.* 356. In Ejectment against Baron and Feme, after Verdict for the Plaintiff,  
*Cro. Cav.* 509. Baron dies between the Day of *Nisi prius* and the Day in *Bank*; ad-  
 1 *Rol. Rep.* 14. judged that the Writ should stand good against the Feme, because it is  
*Moor* 469. in Nature of a Trespass, and the Feme is charged for her own Act; and therefore the Action survives against her. So if the Wife had died, the Baron should have Judgment entred against him.

*Cro. Cav.* 232. If a Feme Sole Plaintiff, after the Verdict, and before the Day in  
 1 *Bull.* 5. *Bank*, takes Husband, she shall have Judgment, and the Defendant cannot plead this Coverture, for he has no Day to plead it at.

### (H) Where the Writ is abated ex facto, or is only abateable.

2 *H. 6.* 4. Here the general Rule to be observed is, that where the Writ is *De*  
*Doct. Pl.* 3. *facto* a Nullity and destroyed; so that Judgment thereupon would be er-  
 Where the Court *ex officio* may abate the Writ. roneous; there the Writ is *De facto* abated; as if an Action be brought against a Feme Covert, as Sole, this makes another Man's Property liable, without giving him an Opportunity of defending himself; which would be contrary to common Justice, and therefore the Writ is *de facto* abated.

*Vide Cro. Eliz.* 121, 185,  
 193, 330. *Gouls.* 106. 2 *Leon.* 162. 3 *Leon.* 93. 1 *Rol. Rep.* 176. *Palm.* 311. *Hob.* 37, 162, 279, 281.  
*Godb.* 119. *Stile* 477. *Yelv.* 56. 3 *Co.* 85. a. *Vaugh.* 95.

*Carth.* 172. So if the Return of a *Pluries Mandamus* is laid to be after the Begin-  
 But in this Case the Court gave Leave to amend ning of a Term, and the *Memorandum* of the Bill is entered generally of that Term, this makes the Writ a perfect Nullity; for by the Plaintiff's own shewing he had no Cause of Action at the Time when the Action was brought.

(a) 1 *Salk.* 2. Where the Writ is only abateable, it must be abated by pleading in  
 1 *Show.* 109. Time; for Matters (a) in and (b) before the Writ, cannot be taken  
 1 *Rol. Abr.* 783. Advantage of in *Error*.

That a Man shall not assign that for *Error*, which he might have pleaded in *Abatement*. *Carth.* 124. There is a Difference between Original and Judicial Writs; for in the former, Matter of Form abates them as well as Substance; *aliter* in the latter; for if the Substance be good, the Want of Form will be aided. 4 *H. 6.* 34. 4 *E.* 3. 13, 14. (b) Otherwise of Faults in the Proceedings after the Writ. *Bro. faux Latin*, 9. 48. For this, *vide Tit. Error*.

*Carth.* 124. Therefore if a Feme Covert bring an Action in her own Name, *per*  
*per Holt.* *attornatum*, and the Defendant pleads in Bar to the Action, he shall never afterwards assign the Coverture for *Error*.

*Cro. Eliz.* 554. So though it be a good Plea for a Defendant to say, that a Stranger  
*Skin.* 12. is Tenant in Common with the Plaintiff, yet if he does not plead it in  
 1 *Salk.* 4. *Abatement*, he shall not have Advantage of it in Arrest of Judgment.

*Cro. Jac.* 651. So if a *Quare Impedit* be brought against the Bishop and Incumbent  
 1 *Bull.* 4. 5. only, without naming the Patron, though this might have been pleaded  
 2 *Brownl.* 229. in *Abatement*, yet if the Defendant pleads in Bar, &c. it cannot after,  
*Palm.* 306, upon a Writ of *Error*, be assigned for *Error*; for though the Want of  
 311. the Patron's being made a Defendant might make the Writ abateable, yet it  
 2 *Rol. Rep.* 239. was

was not thereby actually abated; and nothing shall be assigned for Error concerning the Writ, but what actually abates it.

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 assign for Error that he was a *Knight of the Bath*, and ought to be so named; for he has lost this Advantage by appearing to the other Name, and thereby concluded himself.

If a Writ be brought to the Damage of 40*l.* and the Plaintiff declares *Ad damnum* 200*l.* and the Verdict gives 30*l.* this is no Error after Verdict, for the Writ is not abated *de facto*; but only abateable by Plea.

is, that if the Declaration varies in Form, the Defendant must plead it in *Abatement*; but if it varies in Substance the Defendant may move it in Arrest of Judgment, or take Advantage of it in Error; because the Court has no Authority to proceed, having prosecuted a different Matter from that which the Writ has given the Court Authority to take Cognisance of. *1 Jones 304. Cro. Eliz. 722. Cro. Jac. 654.* For this *vide Tit. Error.*

### (1) Where the Writ shall abate in Toto or in Part.

Whatever proves the Writ (a) false at the Time of suing it out, shall abate the Writ entirely; as if it appears by the Plaintiff's own shewing that he had no Cause of Action for Part; therefore if an Action of Trespas be brought against two Defendants, and the one pleads that the other was dead, *die impetrationis brevis*, or that there is none such *in rerum natura*, the whole Writ shall abate; for it is the Plaintiff's Fault, to use the Authority of the Court, to call in a Man that was dead; and it was no less an Abuse of the Process to issue it against a feigned Person.

against two, if one pleads Non-tenure, and the other takes the whole Tenancy on himself, the Writ shall not abate in the Whole, but stand good against him that hath accepted the Tenancy, because he has a proper Defendant to the Action; and the Non-tenure of the one; does in no way prejudice the other Defendant. *Raft. Ent. 365. Doct. Pl. 7.*

But if one of the Defendants die pending the Writ, this shall not abate the Action against the other Defendant; for this is the Act of GOD, and no Default in the Plaintiff.

If there be two Executors, and one is named of D. and says he is of C. the Writ shall abate against both; because they are both Representatives of one Person, and must both be legally summoned; and as they are both but one Person in the Eye of the Law, the Plaintiff cannot (b) proceed against the one without the other; but in this Case, the other Defendant will be obliged to plead, though the Defendant's Plea in *Abatement* shall be first determined; and if it be found for him, shall abate the Writ *in Toto*.

for the Writ, when abated for Want of Form, is abated *quoad* all; though they have pleaded to Issue, *8 Co. 159. Carth. 96.* But if two Executors sue, and set forth themselves to be Executors, and that they proved the Will; but upon the Probate set forth, it appears that one only proved the Will; and the Defendant pleads this in *Abatement*, a *Respondeas ouster* will be awarded; for both have a Right them; and he that did not prove may come in when he pleases. *Salk. 3. vide Head of Executors.*

At Common Law, Non-tenure of Parcel of the Lands abated the whole Writ; for this satisfied the Writ which alledged the Defendant to be Tenant of the Whole; but it was thought very hard that a Writ which was good in Part, should be totally destroyed by this Plea; and there-

From this Statute arose the Distinction in our Books, that the Plaintiff cannot destroy, but he may abridge his Demand. therefore 25 E. 3. cap. 16. enacts, that the Writ shall only abate for that Part of which Non-tenure is alledged.

Co. Lit. 362. At Common Law, if the Tenant plead *Non-tenure and Disclaimer*, the Plaintiff could not aver his Writ, and say he was Tenant; for in Real Actions anciently there were no Damages given; and the Plaintiff by this Plea, has the Effect of his Writ, which is to be put into Possession of the Lands; but if *Non-tenure* be pleaded, without *Disclaimer*, the Plaintiff may aver his Writ, and shew that the Tenant has the Reversion in Fee in him as well as the Freehold, or take Judgment at his Election.

4 E. 4. 32. If the Demandant enters into any of the Lands, pending the Writ, this shall abate the Writ *in Toto*.

1 Saund. 182. The Plaintiff declared for Arrears of a Rent-charge, and demanded a larger Sum than was due to him, upon his own shewing, by 7l. 10s. Duppa and Mayo. The Defendant pleaded a bad Plea, and the Plaintiff had Judgment for his whole Demand; but perceiving his Mistake on the Entry of the Judgment, he releases the 7l. 10s. and it was held a good Release; and that it was not a Falsification of his Writ, but rather an Affirmance; but in the Argument of the Case, if the Defendant had taken Advantage of it in due Time, it would have abated the Writ.

Co. Lit. 285.a. If an Action is well begun, and Part of the Action determines by Act in Law, and yet the like Action is given for the Residue, the Writ shall not abate, but the Plaintiff may proceed for the Residue; but where, by the Determination of Part, the like Action does not remain for the Residue; there the Action, though well commenced, shall abate.

Co. Lit. 285.a. As if an Action of Waste be brought against Tenant *per auter vie*, and, pending the Writ, *Cestuy que vie* die, this shall not abate the Writ *in Toto*; but the Plaintiff may proceed to recover Damages on this Writ, for the Lessor might have an Action for the Damages, though *Cestuy que vie* had died before any Action of Waste brought.

Co. Lit. 285.a. So if an Ejectment be brought, and the Term determine pending the Writ, yet the Action shall proceed for Damages only.

Co. Lit. 285.a. But if Tenant *per auter vie* had brought an Assise, and, pending the Writ, *Cestuy que vie* died, altho' the Action was well commenced, yet the Writ shall not abate; because no Assise lies for Damages only.

Co. Lit. 285.a. So if an Action of Waste were brought by Baron and Feme in Remainder, in especial Tail, and pending the Writ, the Wife die without Issue, the Writ would abate, because all Actions of Waste must be *Ad exhereditationem*.

Co. Lit. 285.a. So if a Writ of *Annuity* be brought, and, hanging the Writ, the Annuity determine, the Writ faileth for ever; because the like Action cannot be maintained for the Arrearages only.

11 Co. 45. When a Writ is brought for two Things, and it appears the Plaintiff cannot have any other Action for the one of them, the Writ shall stand for the Part that is good; but where it appears he can have another Writ in another Form for one, there the whole Writ shall abate; because, when there can be no better Writ brought for the Parcel, it ought to continue; but if another Writ could be brought for that Parcel, it is bad, and ought to abate *in Toto*.

(K) Where it shall abate by Reason of another Action brought for the same Thing.

The Law abhors Multiplicity of Actions; and therefore whenever it appears on Record, that the Plaintiff has sued out two Writs against the same Defendant, for the same Thing, the second Writ shall abate; for if it were allowed that a Man should be twice arrested, or twice attached by his Goods, for the same Thing, by the same Reason he might suffer *in Infinitum*; and it is not necessary that both should be pending at the Time of the Defendant's pleading in *Abatement*; for if there was a Writ in Being at the Time of suing out the second, it is plain the second was vexatious and ill, *ab initio*.

9 H. 6. 12.  
Mo. 418.  
539.  
5 Co. 61.  
Doct. Pl. 10.  
67. Where a  
Prior Writ  
of Appeal  
may be  
pleaded in  
*Abatement* to  
a second Ap-

peal. 2 Hawk. P. C. 190. where a Prior Suit depending, may be pleaded to an Information. 2 Hawk. P. C. 275. But it is no good Plea in *Abatement* of an Indictment, as it is of an Appeal or an Information, that there is another Indictment against the Defendant for the same Offence; but in a such Case the Court, in Discretion, will quash the first Indictment. 2 Hawk. P. C. 367.

But then it must appear plainly to be for the same Thing; for an Assise of Lands in one County, shall not abate an Assise in another County; for these cannot be the same Lands.

4 H. 6. 24.  
Doct. Pl. 10.

In General Writs, as *Trespafs*, *Assise*, *Covenant*, where the special Matter is not alledged, and the Plaintiff is nonsuited before he Counts, the second Writ is sued pending the other; yet the former shall not be pleaded in *Abatement*; because it does not appear to the Court that it was for the same Thing; for the first Writ being general, the Plaintiff might have declared for a distinct Thing from what he demanded by the second Writ; but when the first is a Special Writ, and sets forth the particular Demand, as in a *Præcipe quod reddat*, &c. there the Court can readily see that it is for the same Thing; and therefore, though the Plaintiff be nonsuited before he Counts, yet the first shall abate the second Writ, it being apparently brought for the same Thing.

5 Co. 61.  
Doct. Pl. 11.  
12.

An Action depending in an inferior Court cannot be pleaded to an Action brought in one of the Courts at *Westminster* for the same Thing.

5 Co. 62.  
vide for this  
Tit. Courts.

The Law will not allow two *Quare Impedit*s to be brought for the same Presentation, viz. a second by the Defendant against the Plaintiff, when there is one pending in Court by the Plaintiff, against the Defendant, *Et sic in brevi de partitione*, because the Defendant can have the same Remedy on the first Writ as he could on a second.

Lyer 92, 93.

The Law is so watchful against all vexatious Suits, that not only it will not suffer two Actions of the same Nature to be pending for the same Demand, but not even two Actions of (a) a different Nature.

(a) There-  
fore it is a  
good Plea in  
*Trespafs*, that

the Plaintiff has brought a Replevin for the same Thing; because in both Cases Damages are to be given for that Caption. 8 H. 6. 27. Doct. Pl. 10. So in an Assise of *Darrein Presentment*, a *Quare Impedit* depending for the same Presentation is a good Plea. Hob. 154.

In a *Quare Impedit*, brought by the Earl of *Bedford*, against the Bishop of *Exeter* and Others, the Defendants pleaded that the Plaintiff had brought another *Quare Impedit* for the same Presentation, which is still depending, and undetermined, with an Averment that it was the same Plaint, Avoidance and Disturbance; the Earl replies, That since his former Writ purchased, the same Church being still void, he presented *Henry Curtis* to the Bishop, who refused him, which is the Disturbance he now complains of, and Traverses that it is the same Disturbance on which both Actions were brought, the Defendant demurs; and ruled the Writ should abate; for though there must be a Disturbance naturally

Hob. 157.

to maintain the Action, yet the principal Effect of the Suit, is to recover the Presentation; and the Nature of a *Quare Impedit* is to be Final, or Nonsuit, or Discontinuance, which this would defeat; for by this Rule, the Plaintiff might bring a new one, without leaving the former Suit. And though in this Case there was (a) a new Defendant, yet the Writ abated; because there were two *Quare Impedit*s against the same Man; and therefore a fresh Defendant could no more enable him to bring a second *Quare Impedit*, than a new Disturbance could.

(a) That where an Action of Trespass is brought, and afterwards Replevin for the same Thing, there must not be more Defendants in the Replevin, than there was in the Action of Trespass; because it cannot square with the Averment, that it is *una eademque captio*. *Doct. Pl. 10*. In Trespass against two Defendants, they both pleaded in *Abatement* another Bill of Trespass pending against one of them; and three Judges against *Holt*, who doubted, held the Plea good as to both. *Carth. 96, 97*.

*Allen 34*. If a second Writ be brought tested the same Day the former is abated, it shall be deemed to be sued out after the *Abatement* of the first.

*Dyer 227*. If an Action, pending in the same Court, be pleaded to a second Action brought for the same Thing, the Plaintiff may pray that the Record may be inspected by the Court, or demand *Oyer* of it, which if not given him in convenient Time, he may sign his Judgment.

*Carth. 453*,  
417.

### (L) Where a Person may plead in Bar, or in Abatement.

*Co. Lit. 128.b*. Outlawry may be pleaded always in *Abatement*, but not in Bar, unless the Cause of Action be forfeited.

*2 Lutw. 1604*. In Personal Actions, where the Damages are uncertain, Outlawry cannot be pleaded in Bar; but in Actions on the Case, where the Debt, to avoid the Law Wager, is turned into Damages, there Outlawry may be pleaded in Bar; for it was vested in the King, by the Forfeiture, as a Debt certain, and due to the Outlaw; and the turning it into Damages, whereby it becomes uncertain, shall not devert the King of what he was once lawfully possessed of.

*3 Lev. 29*.  
*2 Vent. 282*.  
*3 Leon. 197*,  
*203*.  
*Cro. Eliz. 204*.  
*Owen 22*.

*11 H. 7. 11*. Outlawry may be pleaded in Bar after it is pleaded in *Abatement*, because the Thing is forfeited, and the Plaintiff has no Right to recover.

*Bro. Denizen 10*. Alienage may be pleaded either in Bar or *Abatement*; but with this Difference, that Alienage can be only pleaded in *Abatement* to an Alien in League, but may be pleaded in Bar to an Alien Enemy; because the Cause of Action is forfeited to the King, as a Reprizal for the Damages committed by the Dominion in Enmity with him.

*Co. Lit. 129*.

Whatever destroys the Plaintiff's Actions, and disables him for ever from recovering, may be pleaded in Bar; but the Defendant is not always obliged to plead in Bar, but may plead in *Abatement*; as in Replevin for Goods, the Defendant may plead Property in himself, or in a Stranger, either in Bar or in *Abatement*; for if the Plaintiff cannot prove Property in himself, he fails of his Action for ever; and it is of no Avail to him who has the Property, if he has it not.

*1 Vent. 249*.  
*2 Lev. 92*.  
*1 Salk. 5. 92*.  
*Carth. 243*.  
*Prisal in another lieu*, must be pleaded in *Abatement*, and cannot be pleaded in Bar.

In an Action of Debt, on a Judgment obtained, the Defendant cannot plead a Writ of *Error* brought and pending, either in Bar or in *Abatement*.

*1 Salk. 3. 4*.  
*Carth. 244*.

*1 Show. 98. 146*. *Carth. 136*. *vide Carth. 1, 2*. where it is said, that it may be pleaded in *Abatement*, though not in Bar; but *Quare*, and *vide Tit. Error*.

If a Defendant pleads Matter in *Abatement*, and concludes in Bar, this shall be esteemed a Plea in Bar, and the Court will give final Judgment;

*1 Lev. 312*.  
*2 Mod. 64*.  
*1 Mod. 244*.  
*2 Rol. Rep. 64*.

ment; because, by pleading to the Action, the Writ is admitted to be good; and he puts the whole Matter upon his Plea.

So if a Man pleads in Bar; and concludes in *Abatement*, this shall be esteemed a Plea in Bar; because he could have no Writ; if he could have no Action, and where there could be no Action, the Dispute about the Writ would be insignificant.

6 Mod. 103.  
18 H. 6. 27.  
Lutw. 34.  
36. cont.  
1 Show. Rep. 4.

(M) Of the Manner of pleading in Abatement, and the Proceedings on such Plea.

A Plea in *Abatement* must be put in within four Days after the Return of the Writ; because the Person coming in by the Process of the Court, ought not to have Time to delay the Plaintiff.

Lutw. 1181.  
Hob. 19.

The Defendant in *Abatement*, shall not plead two Outlawries, or two Excommunications; for Duplicity is a Fault in *Abatement* as well as in Bar.

Hob. 250.  
Carth. 8, 9.

In Pleas in *Abatement*, which relate to the Person, there is <sup>no</sup> a Necessity of laying Avenue, for all such Pleas are to be tryed where the Action is laid.

Salk. 4, 6.  
Carth. 363.

If the Defendant demurs in *Abatement*, the Court will give final Judgment; because there can be no Demurrer in *Abatement*; for if the Matter of *Abatement* be *dehors*, it must be pleaded; if intrinsic, the Court will take Notice of it themselves.

Salk. 220.  
6 Mod. 198.  
But a Demurrer in *Abatement* to an Indict-

ment for a capital Offence, or Appeal of Death, shall not conclude the Party, but he shall have Leave to answer over to the Offence. 2 Hawk. P. C. 334.

*Plaintiff*

If the Defendant demurs in Bar, to a Plea in *Abatement*, he discontinues the Suit; because he does not maintain the Writ.

Salk. 218.  
1 Show. 159.  
Carth. 139.

If there be two Defendants, and they plead two several Pleas in *Abatement*, and there be Issue to one, and Demurrer to the other, if the Issue be found for the Defendant, the Court will not proceed on the Demurrer, & *sic vice versa*; for in both Cases the Writ being once abated, it would be impertinent to judge whether it ought to abate on the other's Plea.

Hob. 250.

Where the Matter of *Abatement* appears on the Face of the Record, the Plea shall begin and end with a *Petit judicium de brevi*; but where the Matter is *dehors*, the Defendant shall only end his Plea with a *Petit judicium*.

Mocr 30.  
Carth. 363.  
3 Mod. 136,  
145.  
1 Salk. 298.

On a Plea in *Abatement*, no Advantage can be taken of the Errors in the Declaration; for nothing but the Writ is then in Question; for nothing else is pleaded to.

Lutw. 1592.  
Carth. 172.  
3 Lec. 351,  
334.

If on a Plea in *Abatement*, a *Respondeas Ouster* is awarded, and afterwards the Defendant pleads in chief, and there is a Verdict for the Plaintiff, yet if the Plea in *Abatement* does not appear to have been entred on the *Nisi prius* Record, Judgment will be arrested; for it being entred on the Plea-Roll (which was in Court) it must be mentioned in the *Nisi prius* Roll, otherwise it does not appear that it was a Verdict in the same Cause.

Carth. 447.  
5 Mod. 392.

The Judgment for the Defendant, on a Plea in *Abatement*, is *Quod breve* or *Narratio cassetur*; and for the Plaintiff, a *Respondeas Ouster*; but if Issue be joined on a Plea in *Abatement*, and it be found for the Plaintiff, it shall be peremptory against the Defendant; and the Judgment shall be *Quod recuperet*; because the Defendant chusing to put the whole Weight of his Cause upon this Issue, when he might have had a Plea in chief, is an Admittance that he had no other Defence.

Yelv. 112.  
2 Show. 42.  
Not peremptory on Indictments for capital Offences.  
2 Hawk. P. C. 334.

Upon

- <sup>1</sup> *Salk.* 4, 5. Upon a *Respondeas Ouster*, the Defendant pleads the General Issue, the Plaintiff shall sign Judgment, if the Defendant's Attorney, on redelivering back a Copy of the Issue, will not pay for it; and it seems the old Course was to deliver in a Copy of the whole Record, *viz.* the Declaration, Plea in *Abatement*, &c. and Issue; but the Court made a Rule for the future, that a Copy of the Declaration and Issue should only be paid for.
- Salk.* 7, 8. Upon a *Respondeas Ouster*, no Notice need be given of it; for the Defendant is supposed to be attending his Cause in the Papers, to maintain his Plea.

## Account.

*Co. Lit.* 172. a. **T**HE Writ or Action of *Account*, lay only at Common Law against one as Guardian in Socage, Bailiff or Receiver, except in Favour of Trade and Merchandise.

<sup>1</sup> *Salk.* 9.  
*Carth.* 89.  
*Chan. Ca.* 249.  
<sup>1</sup> *Vern.* 283.  
470.  
<sup>2</sup> *Vern.* 176.  
*Abridg. in Equ.* 10.

The Proceedings in this Action being difficult, dilatory and expensive, it is now seldom used, especially if the Party has other Remedy, as *Debt*, *Covenant*, *Case*, or other Action; or if the Demand be of Consequence, and the Matter of an intricate Nature, for in such Case it is more adviseable to resort to a Court of Equity, where Matters of *Account* are more commodiously adjusted, and more advantagiously determined for both Parties, the Plaintiff being in that Court, intitled to a Discovery of Books, Papers, and the Defendant's Oath; and on the other Hand, the Defendant allowed to discount the Sums paid or expended by him, and all reasonable Allowances to discharge himself of Sums under 40 s. by his own Oath, if by Answer or other Writing, he charges himself by the same, to discharge himself, which will be good, if there be no other Evidence; and is intitled, after the Account is stated, to a Decree in his Favour, if any Thing be due to him on the Ballancing thereof.

We shall therefore, under this Head, but briefly consider,

- (A) Against whom, either by the Common Law, or by Statute, this Action lies.
- (B) Of the Manner of bringing Account, with Respect to the Persons against whom it is brought, and herein of charging one as Receiver, when Bailiff, et vice versa.
- (C) The Nature of the Demands for which it may be brought.
- (D) In what Cases this is the proper Action, or some other may be brought.
- (E) What shall be a good Bar to this Action.
- (F) Of the Auditors, and what shall be a good Discharge before them.

(A) Against

(A) Against Whom, either by the Common Law or by Statute, this Action lies.

By the Common Law, *Account* lay only against a Guardian in Socage, Bailiff or Receiver, or by one in Favour of Trade and Commerce, naming himself Merchant, against another naming him Merchant, and for the Executors of a Merchant; for between these there was such a Privity, that the Law presumed them conuzant of each other's Disbursements, Receipts and Acquittances.

The Statute 13 E. 3. cap. 23. gives an Action of *Account* to the Executors of a Merchant, the 25 Ed. 3. cap. 5. to Executors of Executors, the 31 Ed. 3. cap. 11. to Administrators; and by the Statute 3 & 4 Ann. cap. 16. Actions of *Account* may be brought against the Executors and Administrators of every Guardian, Bailiff and Receiver, and by one Jointenant, Tenant in Common, his Executors and Administrators, against the other as Bailiff, for receiving more than his Share, and against their Executors and Administrators.

one Jointenant, or Tenant in Common, received all the Profits, the other could not have his Action, unless he actually appointed him Bailiff or Receiver. *Co. Lit.* 172. a. 186. a. 200. b. So if two had a Wara in Common, and one took all the Profits. *F. N. B.* 118. So if there had been two Executors, and one had received all the Debts of the Testator; for between these there was not such Privity as the Law required. *Ero. Tit. Account* 58. 39 Ed. 3. 28.

Though an Infant may be an Executor, or may be charged in Trover, being a Tort; yet if he be made Factor, Bailiff or Receiver, he shall not be accountable for what he does during his Infancy, either in Law or Equity, for the same Reason that other Acts of his bind him not; therefore when such one is appointed Factor, his Friends should give Security for his accounting.

If I make J. S. my Bailiff or Receiver, and he makes a Deputy, I must have *Account* against the Bailiff or Receiver himself, and not against the Deputy; for the Receipt of the Deputy was to the Use of his Master.

ry, on Exceptions to a Master's Report, it was held sufficient for a Servant or Apprentice, in Answer to a Bill for an *Account*, to say in general, that whatever he received was by him received and laid out again by his Master's Orders.

An Apprentice, by the Name of an Apprentice, is not chargeable in *Account*.

able for the ordinary Receipts upon his Master's Trade; yet upon collateral Receipts, which concern not the ordinary Trade of his Master, he is chargeable as well as another. then he must be charged as Bailiff or Receiver.

(B) Of the Manner of bringing Account, with Respect to the Persons against Whom it is brought; and herein of charging one as Bailiff, when Receiver, & vice versa.

If the King appoints J. S. or he of his own Head takes upon himself the Charge and Care of the Estate of a Lunatick, he is but in Nature of a Bailiff, and accountable to the Lunatick, his Executors or Administrators.

*Co. Lit.* 172. A Man shall not be charged in *Account*, as Surveyor, Controller, Apprentice, Reve or Heyward, or a (a) Disseisor, or other Wrong-doer; (a) So if a Disseisor appoint *J. S.* for, to maintain an Action of *Account*, there must be a Privity either in Law or by the Provision of the Parties.  
to receive his Rents,  
the Disseisor cannot have a Writ of *Account* against *J. S.* 3 *Leon.* 24. *Dalt.* 99. *S. P.*

2 *Rel. Abr.* 550. At Common Law, if a Man were disseised, and his Entry taken away, he could never recover, by any Action, the mean Profits; but the (b) But whether he could have an Action of Trespafs, seems to have been much controverted; for which *vide Roll's Abr.* 554. 10 *Co.* 51. 1 *And.* 352. 1 *Co.* 51. *Hob.* 98. 1 *Roll's Rep.* 101. *Godb.* 388.

1 *Chan. Rep.* 32, 229. But the Chancery interposed, and at last carried the Remedy farther than had been admitted at Common Law; for though in the Case of *Owen and Aprice*, which was adjudged 4 *Car.* 1. the Court left the Plaintiff to his Remedy at Common Law, for the Recovery of the mean Profits, and would not assist by their Decree. So in the Case of *Eyre and Jackson*, 14 *Car.* 2. they refused to assess any Damages for a Trespafs; for that was a Matter determinable at Common Law, and to be ascertained by a Jury; but afterwards they began to make the Person, who was the Disseisor of the Mean Profits, accountant to him that had the Right; and this was first begun where Lands were settled for the Payment of Debts, there such Trustees, and the Heir of the Debtor, were Accountants to the Creditors for whom the Profits were to be received; and this was very clear and plain; because such Person came in and took the Profits under the Trust; and this was settled in the Case of *Gilpin and Smith*, 18 & 19 *Car.* 2. Afterwards they came to extend their Notions; and the Person that took the Mesne Profits by wrong, was taken as the Trustee for, and accountant to, him that had the Right; and this was settled in the great Case of *Coventry and Hall*, which was in the Years 33, 34 & 35 *Car.* 2. and was this: Sir *Thomas Thynn*, having treated with the Lord Keeper *Coventry*, for a Marriage between his Son and *Catharine* the Daughter of the Lord Keeper, the said Sir *Thomas* covenanted to settle Lands on his Son, but the Conveyance was defective; because it wanted the Words, *That he should stand seised*; the Son recovered the Lands by a Decree in Chancery, notwithstanding the Defect in the Conveyance, against the Heir at Law of Sir *Thomas* the Father; and afterwards came with his Bill for the Mesne Profits; and though the Heir at Law was intitled to the Mesne Profits at Law; because the Conveyance was defective; and the first Decree, which set up the Title under the Settlement, had ordered no Account for the Mesne Profits; yet the Court, on this Bill, carried back the Account against the Heir at Law, for all the Profits received by him; and though it was objected, there was no Agreement, nor no Trust, that the Heir should receive the Profits for the rightful Proprietor; yet the Court resolved that he should account from the original Justice, which intitled the Proprietor to seek an *Account* against that Person that had taken the Profits of the Land; which in Equity and Justice belonged to him; and though the Heir had the Title in Law, yet since, in Equity and Conscience, the Estate belonged to another, such Heir ought to account with him for the Profits he had made of what was his; and from hence Equity began to make all Persons account for the Mean Profits they had received to such Persons as had the equitable Title; but in the Case, where the Husband sold Lands for valuable Consideration, and the Wife, after his Death, recovered her Dower against the Purchaser,

Purchaser, and brought her Bill in Chancery for the Mesne Profits, from the Time of the Death of her Husband; the Lord Ch. *Cowper* would not relieve her; for that he said he could not alter the Law of Dower, which gave no Damages against a Purchaser under the Husband; and he saw no Reason in Equity to introduce a different Rule.

A Bailiff cannot be charged as Receiver, because if he be charged as (a) Bailiff upon his Account, he shall have Allowance of his Charges and Expences, which he is not intitled to when he is charged as a Receiver; also he is not allowed, in an Action brought against him as Receiver, to plead that he was before charged as Receiver.

(a) 1 Roll's  
Abr. 119.  
By Bailiff is  
understood  
a Servant

that hath Administration and Charge of Lands, Goods and Chattels, to make the best Benefit for the Owner, against whom an Action of *Account* doth lie for the Profits which he hath raised or made, his reasonable Charges and Expences deducted. *Co. Lit. 172. a.* A Receiver is one who receiveth Money, and is to render an Account of it, but is not allowed any Charges or Expences, but what is agreed on by the Parties; and in this Case the Plaintiff is to declare by whose Hands he received it. *Co. Lit. 172. a.* If a Bailiff be charged as Receiver, it seems the best way is to plead it Specially. 2 *Lev. 126.* Whether a Person may not in the same Action be charged as Bailiff and Receiver, *Quare*, and *vide* 2 *Roll's Abr. 119. Cro. Car. 240.*

### (C) The Nature of the Demands for which it may be brought.

An Action of *Account* lies not for a Thing certain; as, if a Man delivers 10*l.* to *B.* to merchandise with, he shall not have Account of the 10*l.* but of the Profits, which are uncertain.

*Bro. Tit.*  
*Account* 355.  
2 *Brown. 76.*

No Action of *Account* lies for Rent reserved on a Lease; so if a Lessee of Goods waste them, yet no Action of *Account* lies against him.

1 *Roll's Abr.*  
116.

If the Bailee of Goods waste them, or refuse to deliver them, no Action of *Account* lies, but an Action of *Detinue* or *Trover* and *Conversion*.

1 *Roll's Abr.*  
116.  
*Owen* 86.

If *A.* hath a Term for Years in a Rectory, and Tithes being set forth and severed from the nine Parts, *B.* without any Pretence of Title, carries them away and sells them, yet *A.* shall not have a Writ of *Account* against *B.* for, after Severance, the Tithes immediately vested in *A.* and the Taking by *B.* was merely wrongful, and therefore without Privy.

3 *Leov. 24.*

### (D) In what Cases this is the proper Action, or some other may be brought.

If a Man, by Obligation, acknowledges that he has received Money *ad proficiendum et computandum*, the Obligee may either sue the Bond, or have an Action of *Account*, at his Election.

1 *Roll's Abr.*  
118.  
*Dyer* 20.  
*Cro. Eliz.* 644.

So if *A.* acknowledges, by Deed, that he has received 100*l.* from *B.* to be adventured to the *West-Indies*, and thence to *England* back again, and covenants to render a true Account thereof upon his Return, though *B.* may have a Writ of *Covenant* upon this Deed, yet he may also have a Writ of *Account* thereupon, at his Election.

1 *Roll's Rep.*  
52.  
2 *Bulst.* 256.

*Assumpsit*, in which the Plaintiff declared, that the Defendant, intending to go beyond Sea, delivered a Box full of Goods to the Defendant, which he promised to dispose of, and to give the Plaintiff an Account thereof at his Return; the Defendant pleaded in *Abatement*, that he was Bailiff to the Plaintiff, to merchandise the said Goods; and that he ought to bring an Action of *Account*, and not an Action on the Case; and upon Demurrer, it was adjudged, that here being an express Promise,

1 *Salk.* 9.  
*Wilkins* vers.  
*Wilkins*,  
*Carth.* 89. *S.C.*  
Where it is  
said that the  
Judgment  
was three  
Judges 4-

gainst *Holt*, mise on which the Action is founded, *Assumpsit* will lie as well as *Account*; who doubted, and that where-ever one acts as Bailiff, he promises to render an Account, and who told the count.

Plaintiff, that when it came to be tried, he would not suffer him to give all the Account in Evidence, or to enter into the Particulars thereof; but that he should direct his Proof only as to the Damages which he had sustained for not accounting according to the Promise; for he would not ravel into an Account in such Actions. *Comber. 149. S.C.*

*1 Salk. 9. Poulter v. Cornwall. Vide 2 Skew. Rep. 301.* In *Assumpsit* for Money received *ad computandum*, and Verdict for the Plaintiff, it was moved in Arrest of Judgment, that this Action did not lie, but *Account*; for if a Man receives Money to a Special Purpose, as to Account, or to Merchandise, it is not to be demanded of the Party as a Duty, till he has neglected or refused to apply it according to the Trust under which he received it; and the Declaration must show a Misapplication or a Breach of Trust; but it was held, that in this Case the Verdict had aided the Declaration; for it must be intended there was Proof to the Jury that the Defendant refused to account, or had done somewhat else that rendered him an absolute Debtor.

### (E) What shall be a good Bar to this Action.

*1 Roll's Abr. 121.* In Account against one as Bailiff, it is a good Plea that he was never his Bailiff.

*Bro. 34. 1 Roll's Abr. 121.* In Account against a Bailiff, it is a good Plea that he was the Plaintiff's Servant to drive his Plough, and keep his Cattle for the drawing of his Plough, *absque hoc*, that he was his Bailiff in other Manner, because he is not accountable for this Occupation.

*1 Roll's Abr. 123.* It is a good Plea in Bar to an Action of *Account*, that the Plaintiff hath released to him all Actions.

So if the Plaintiff had refused to him all the Advantage and Profit that he might have by the Account. *1 Roll's Abr. 123.*

*Cro. Car. 116. Heil. 114.* So it is a good Plea in Bar, that the Plaintiff and Defendant submitted to the Award of *J. S.* who awarded that the Defendant ought to be acquitted against the Plaintiff.

*Bro. 48. 1 Roll's Abr. 123.* So it is a good Plea in Bar, that after the Receipt of the Sum of which the Account is demanded, by the Mediation of their Friends it was agreed between them, that the Defendant should make an Obligation of *100 l.* for the *100 l.* received, and the Profit thence to arise, which Obligation of *100 l.* he did make and deliver accordingly to the Plaintiff; for the Acceptance of the Obligation destroys the Duty, and the Sum in Demand is thereby as strongly released as by a Release of all Actions. *Vide Yelv. 202.*

*1 Roll's Abr. 123, 124.* It is no good Plea in Bar to the Action, that the Defendant has made Payment of the Money which he hath received to account with, or that he hath made Satisfaction for the same.

So if the Plaintiff pleads that the Defendant has given him an Acquittance for the Sum received. *Bro. Tit. Account 59.* For these Pleas, being Matters which show that he was once accountable, are only to be made use of before the Auditors. *Vide Dyer 22, 145. 6 Co. Ferrers's Case. 4 Leon. 91. Stile 353, 410.*

## (F) Of the Auditors, and what shall be a good Discharge before them.

In an Action of *Account* there are two Judgments; the first is *Quod computet*, after which the Court assigns Auditors, usually two of the Officers of the Court, who are armed with Authority to convene the Parties before them *de die in diem*, at any Day or Place that they shall appoint, till the *Account* is determined; the Time by which the Account is to be settled, is prefix'd by the Court; but if it be of a long and confused Nature, the Court, on Application, will enlarge the Time. If either of the Parties think they do him Injustice, he may apply to the Court; and if the Defendant denies any Article, or demurs to any Demand, it is to be tryed and determined in Court.

Whatever may be pleaded to the Action, shall never be allowed of as a good Discharge before the Auditors; therefore, where in *Account* the Defendant pleaded *Never his Receiver*, &c. and this being found against, he was adjudged to account; and before the Auditors, he pleaded a Submission of all Debts, Accounts, &c. to *J. S.* who awarded that the Defendant should pay 10*l.* only in Discharge of all Debts, Accounts, &c. which he paid accordingly; this was held no good Plea; for this Award made before the Action brought, ought to have been pleaded in Bar thereof; which being omitted, he hath lost the Advantage thereof, and shall not plead it before Auditors.

It is a good Discharge before Auditors, for a Factor to say, That in a Tempest, because the Ship was sur-charged, the Goods were cast overboard into the Sea.

So it is a good Discharge before Auditors, That he was robbed of the Goods without his Default or Negligence.

It is a good Discharge before Auditors in *Account*, as a Receiver of 10*l.* if he tenders the 10*l.* and (a) swears that after the Time that the Money was delivered him, that he found not that he durst buy, for Fear of Loss; for he is not obliged to run any Hazard himself.

receives Money to Trade and Merchandise therewith; for no other Receiver is in any Case obliged to buy or sell. 1 *Roll's Abr.* 124. *Quere* whether such Oath be necessary; and *vide* 2 *Med.* 101. 1 *Bulst.* 104.

If a Bailiff of a Manor receives the Rents and Profits of the Tenants, and retains them two or three Years, yet in a Writ of *Account*, he is not to account for the Profits thence arising in the mean Time; for he had not any Warrant to Merchandise with the Money, or to gain or lose thereby.

If in *Account* the Defendant pleads before Auditors, That the Goods for which he is to account were *bona peritura*; and, notwithstanding his Care in keeping them, were worse, and that they remained in his Hands for Want of Buyers, and were in Danger of growing worse, and that therefore he sold them upon Credit, to a Man beyond Sea; this is no good Plea; for a Factor cannot sell even *bona peritura* upon Credit, without a (a) particular Commission so to do.

1 *Med.* 42.  
1 *Brownl.* 24.  
*Co. Ent.* 46.  
Of Auditors  
assigned by  
the Parties  
themselves,  
by Virtue of  
the Statute  
*W. 2. cap. 11.*  
*Vide* 2 *Inst.*  
350.  
*Godb.* 24.  
1 *Leon.* 219.

*Cro. Car.* 116.  
*Taylor* vers.  
*Page.*  
*Hell.* 114.  
*S. C.*

1 *Roll's Abr.*  
124.  
*Bro. Tit.*  
*Account* 10.  
*Co. Lit.* 89.

1 *Roll's Abr.*  
124.  
(a) This  
must be un-  
derstood of  
one who re-  
ceives Money  
Case obliged  
*vide* 2 *Med.* 101.

1 *Roll's Abr.*  
125.

2 *Med.* 100.

(a) Factors  
now have  
usually such  
Commission.

## Accord and Satisfaction.

5 E. 4. 7.  
 Plow. 5. b.  
 1 Roll's Abr.  
 129.  
 Vide Raym.  
 450.  
 2 Keb. 332.  
 2 Jones 158,  
 168.  
 Vide Head of  
 Award,  
 That an A-  
 ward may be  
 pleaded in  
 Bar to an  
 Action, tho'  
 not executed ; and how it differs from an *Accord*.

**A**CCORD is an Agreement between two Persons to give and accept something in Satisfaction of a Trespass, &c. done by one to the other. This Agreement, when executed, may be pleaded in Bar to an Action for the Trespass ; for in all Personal Injuries, the Law gives Damages as an Equivalent ; and when the Party accepts of an Equivalent, there is no Injury or Cause of Complaint ; and therefore present Satisfaction is a good Plea ; but if the Wrong-doer only promises a future Satisfaction, the Injury continues till Satisfaction is actually made ; and consequently there is a Cause of Complaint in Being ; and if the Trespass were now barred by this Plea, he can have no Remedy for the future Satisfaction ; for that supposes the Injury to have Continuance.

- (A) What shall be deemed a good Accord and Satisfaction.  
 (B) To what Actions may Accord and Satisfaction be pleaded.  
 (C) Of the Form and Manner of pleading Accords.

### (A) What shall be deemed a good Accord and Satisfaction.

An *Accord* must appear to be advantagious to the Party, otherwise it can be no Satisfaction ; therefore in an Action of *Trespass* for taking the Plaintiff's Cattle, it is no good Plea to say, that there was an *Accord* that the Plaintiff should have his Cattle again ; for this is not any Satisfaction.  
 9 E. 4. 19.  
 1 Roll's Abr.  
 128.  
 But it was to drive them to a certain Place ; so that it would be a Charge to him to do it ; this would make it a good *Accord*. 2 Roll's Rep. 96. In Covenant against the Executor of Tenant for Life, &c. he pleads an *Accord* that he should quietly depart, and leave the Possession, &c. and held good ; though after the Death of Tenant for Life, he had no Interest, but a Licence in Law only to carry away his Goods. Yelv. 124. per three Judges against one.

An *Accord* that each of them should be quit of Actions against the other, is not (a) good ; because it is not any Satisfaction.  
 1 Roll's Abr.  
 128.  
 Stile 245.  
 (a) But an *Accord* that each should give the other a Quart of Wine, in Satisfaction of Actions, is good. 1 Roll's Abr. 128.

In an Action upon the Statute of *Rich. 2.* if the Defendant saith, That after the Entry an *Accord* was made between them, that the Plaintiff should re-enter into the Land, and that the Defendant should deliver the Evidences of the Plaintiff to the Plaintiff, this is not any Bar of the Action ;  
 9 E. 4. 19.  
 1 Roll's Abr.  
 128. S. C.  
 Cro. El. 194.  
 S. C. cited.  
 Dyer 356.  
 S. C. cited.

Action; for the Delivery of the Plaintiff's (a) own Evidences can be no Satisfaction of the Tortious Entry. (a) But if he made Title to the by the Feof-

Evidences, it would be a good Bar. *1 Roll's Abr.* 128. that the Delivery of the Deed, fee to *Cestuy que Use*, is a good *Accord*, because it belongs to the Feoffee. *Cro. Eliz.* 357.

An *Accord* that the Defendant should endeavour to make up and adjust Differences between the Plaintiff and *J. S.* that he did endeavour, and at his own Cost make up such Differences, is a good Plea. *1 Roll's Abr.* 128.

In *Trespafs* for Trampling his Grass, the Defendant pleads that he was amerced in the Court-Baron of the Plaintiff for the same *Trespafs*, which was affeer'd to Two Shillings; for which he hath agreed with the Plaintiff; and held a good Plea by the Acceptance thereof; though the Amercement in the Court-Baron was Extortion. *Bro. Tref-* pass 66.

In an Action upon the Case, for scandalous Words, the Defendant pleads, That after the Words spoken, the Plaintiff sued the Defendant in the Military Court before the Lord Marshal; where it was ordered by that Court, with the Consent of the Plaintiff and Defendant, in Discharge of this Suit, and all other Differences between them, that the Defendant should make a Submission in Writing, in a Place appointed, and before certain Persons, &c. and avers that he did so accordingly, &c. and on Demurrer it was held no good Plea; for it being a Point of Honour only, (b) could be no Discharge of the Damages. *1 Roll's Abr.* 128, 129.

and should ask Forgiveness on his Knees, whether this was a sufficient Consideration or Satisfaction. (b) Where the Defen-  
*2 Roll's Rep.* 96. *dubitatur.* *Vide Stile* 245. *1 Salk.* 71. and Head of Awards.

Debt upon an Obligation, dated the Twenty-third of *March*, 24 *Car.* 2. upon Condition to pay 10*l.* the Defendant pleaded an *Accord* the Last of *April*, 31 *Car.* 2. whereby it was agreed that the Defendant should give the Plaintiff a new Security for this Debt, and for another due to him by Obligation likewise; and he being the Executor of the Obligor, and the Person with whom this *Accord* was made, gave Security, pursuant to the *Accord*, by a Bill sealed by himself; the Plaintiff demurred; and by the whole Court Judgment was given for the Plaintiff; for one Obligation given in Satisfaction for another is no Discharge, whether grounded upon an *Accord* or not; for the Concord does not mend the Matter; and yet here the new Obligation binds him *de bonis propriis*, whereas the first Obligation bound him only *de bonis testatoris*. *3 Lev.* 55, 56. *Lob-*ly and *Gil-*dart.

a Penalty was the Debt; and therefore the second being for less, could not be a Satisfaction for a greater Sum. *1 Lutw.* 466. *Vide 5 Co.* 117. *4 Mod.* 88.

If an *Accord* be to do two Things, and he doth one and not the other, yet this is no Bar of the Action; because the Plaintiff hath not any Remedy for that which is not performed. *1 Roll's Abr.* 129.

be executed, *vide supra*, and *Plow.* 5; *11. b.* 9 *Co.* 79. *b.* 2 *Fones* 158, 168. *2 Keb.* 332. *1 Salk.* 76. and *Raym.* 450. where it is said, that an *Accord* may be pleaded without Execution, as well as an Arbitrament; but *Quare*. That the *Accord* must

But if an *Accord* be that the Defendant shall do a certain Thing at a Day to come, in Satisfaction of an Action, if he doth perform it at the Day, this is a good Bar of the Action, though it was Executory at the Time of the *Accord* made, inasmuch as he hath accepted it in Satisfaction. *6 H.* 7. 11. *b.* *1 Roll's Abr.* 129.

If in *Trespafs* the Defendant pleads a Concord between himself and the Plaintiff, that he should pay the Plaintiff 3*l.* in Hand, and should undertake to pay the Plaintiff's Attorney's Bill, and avers that he had paid *Raym.* 203. *1 Mod.* 69. *2 Keb.* 690. *S. C. Cock* and *Honeychurch.*

paid 3%. and was always ready to pay the Attorney's Bill, but he never shewed him any; this is no good Plea; because the *Accord* is not shewed to be fully executed.

Raym. 450.  
2 Jones 158.  
S. C. between  
Case and  
Barber.

If in an *Indebitatus Assumpsit, &c.* the Defendant pleads an Agreement between the Plaintiff and Defendant, and 7. S. the Son of the Defendant, that the Plaintiff should deliver to the Defendant certain Clothes which the Plaintiff then had in his Custody; and that the Plaintiff should accept the said Son her Debtor for 9*l.* to be paid so soon as he received certain Pay from the King, due to him as Lieutenant of a certain Ship, in full Satisfaction, &c. and that after, so soon as the Son received his said Pay, he was ready and offered to pay, &c. and that he yet is ready; this is no good Plea; for it doth not appear that there was any good Consideration why the Son should pay, but (a) a bare Agreement, without Consideration; and admit the Promise good, if not in Writing, by 29 Car. 2. no Action lies thereupon; and therefore it ought to have been shewed that it was in Writing; for when such Agreement is pleaded in Bar, it must appear to the Court, that an Action will lie thereupon; for the Defendant shall not take away the Plaintiff's present Action, and not give him another upon Agreement pleaded.

(a) Vide 2  
Jon. 168. and  
Parol Agree-  
ments, Title  
Agreements.

3 Lev. 189.  
Russell and  
Russell.

If in Covenant to permit the Plaintiff to receive 100*l.* per Ann. Rent, the Defendant pleads a Concord between the Plaintiff and Defendant, that each of them should deliver his Part of the Indenture into the Hands of a third Person, to be cancelled, and that each of them should be discharged of all Actions upon the Indenture, and avers that he had delivered his Part to the third Person, yet this is no good Plea; because it does not appear to be executed on both Parts.

## (B) To what Actions may Accord With Satisfaction be pleaded.

4 Co. 1.  
9 Co. 79. b.  
(a) But in  
Detinue, for  
Charters

An *Accord* with Satisfaction is no good Plea to an Action (a) Real; for a Right or Title to a Freehold cannot be barred by any collateral Satisfaction. concerning a Freehold and Inheritance, an *Accord* is a good Plea. 7 E. 4. 33. 2 Co. 78. So in *Waste* against Lessee for Years, though in the *Tenet* an *Accord* is a good Plea; because a Chattel only is to be recovered. N. Bendl. 35. Mo. 6. 9 Co. 78. 6 Co. 44. So in *Ravishment de gard*, and *Quare ejet infra Terminum*. 9 Co. 78. An *Accord* with Satisfaction is a good Plea in an *Ejectione Firme*; for an Ejectionment includes a Trespass; and they are so interwoven, they cannot be severed; and in all Actions which suppose a Wrong *vi & armis*, where a *Capias* and *Exigent* lay at Common Law, there an *Accord* is a good Plea. 9 Co. 77. 1 Brownl. 134. S. C. 2 Brownl. 128. S. C. Godb. 149. In an Appeal of *Mayhem* an *Accord* with Satisfaction is a good Plea, notwithstanding the Writ be *Felonia*. 6 Co. 44. 9 Co. 78. So in *Attaint*, 13 E. 4. 1. 6 Co. 44. Cro. Eliz. 357. Dier 75. If an *Accord* be a good Plea in a *Quare Impedit, Quare*; and vide 11 H. 7. 13. b. 6 Co. 44. a. 2 Brownl. 128, 129. 1 Brownl. 134.

(b) 6 Co. 43.  
1 Lutw. 358. S. P.  
Cro. Fac. 254.  
S. P. (c) Vide  
2 Rol. Rep. 187.  
Cro. Fac. 99.  
Palm. 110.  
6 Co. 43.  
All. 39.  
Cro. Fac. 304.  
Yelv. 123.  
2 Keb. 51.  
Relw. 106.  
Noy 110.  
Cro. Fac. 109.

When a Duty in certain, accrues by the Deed *Tempore confectiois scripti*; as by (b) Covenant, Bill, or (c) Obligation, to pay a certain Sum of Money, this certain Duty takes its Essence originally and only by Writing; and therefore ought to be avoided by Matter of as high a Nature, though the Duty be merely in the Personalty. But if in Covenant against an Assignee, a Breach is assigned, in not repairing the House, the Defendant may plead an *Accord* between himself and the Plaintiff, and Execution thereof, in *satisfactioe & exoneratione reparationum præd'*; for no certain Duty accrued by the Deed, but the Action is founded upon a Tort or Default subsequent, together with the Deed, and Damages only to be recovered, which are in the Personalty.

An *Accord* with Satisfaction generally is a good Plea in all Actions, 6 Co. 44. where Damages only are to be recovered. Dyer 75.

(C) Of the Form and Manner of pleading Accords.

The best and safest Way to plead an *Accord*, is to plead it by Way of *Satisfaction*, and not by Way of *Accord*; for if it is to be pleaded by Way of *Accord*, a precise Execution thereof, in every Part, must be pleaded; and if there be a Failure in any Part, the Plea is insufficient, but if it be pleaded by Way of *Satisfaction*, the Defendant need plead no more, but that he paid the Plaintiff 10 s. in full Satisfaction of the Action, which he received.

If in *Covenant*, by the Heir of the Reversioner against the Executor of Tenant for Life, for not repairing, &c. the Defendant pleads that the Testator died 19 *March*, and that the 22 *March* concordat' & agreed' fuit between the Plaintiff and Defendant, that the Defendant should quietly depart and leave the Possession to the Plaintiff, and that in consideratione inde the Plaintiff did agree to discharge him of the Breach in non reparando, and shews that the 25 *March* he did depart, &c. this is no good Plea; because the Concord is uncertain as to the Time of his Departure; and though he shews a Departure within five Days, yet he cannot help the original Insufficiency of the Concord, which is the Foundation of all.

9 Co. 80. Vide 1 Roll's Abr. 129. 1 Danv. Abr. 241. Yelv. 124, 125. Between Sandford and Cutliff; adjudged by Yelv. and Croke: And Williams said, the Time being indefinite, the Departure ought to have been immediately. Noy 110. S. C. cited.

In an *Assumpsit* for Wares sold and delivered, the Defendant pleaded that he gave and delivered unto the Plaintiff a *Bever Hat* in Satisfaction and Discharge, &c. and that the Plaintiff accepted the said Hat in full Satisfaction and Discharge of the Promises, &c. the Plaintiff replied *pro testando* that the Defendant never gave him any such Hat in Satisfaction and Discharge of the said Promises, *pro placito dicit*, that he never accepted a *Bever Hat* in Satisfaction and Discharge, &c. On Demurrer it was insisted first, that the Issue ought to be upon the giving in Satisfaction, and not upon the receiving in Satisfaction; because every Gift or Payment must be directed by him who gives or pays, and not by him who receives it; but the Court held it well enough, and that the whole Matter concerning the Payment, as well as the Acceptance in Satisfaction, would be tried upon this Issue; as to the said Objection of its being pleaded to be given in Satisfaction and Discharge of the Promises, &c. when it should be pleaded in Satisfaction of the Money mentioned in the Promises, and not of the very Promises, the Court held it of no Weight.

Cartb. 347. 5 Mod. 86. 2 Salk. 627. S. C. Young and Rudd.

## Actions in General.

**T**HE Design of entring into Society being the Protection of our Persons and Security of our Property, Men in civil Society have a Right, and indeed are obliged to apply to the Publick for Redress, when they are injured; for were they allowed to be their own Carvers, or to make Reprisals, which they might do in the State of Nature, such Permission would introduce all that Inconvenience which the State of Nature did endure; and which Government was at first invented to prevent: Hence therefore, they are obliged to submit to the Publick the Measure of their Damages, and to have recourse to the Law and the Courts of Justice, which are appointed to give them Reason and Ease in their Affairs; and this Application is what we call bringing an (a) *Action*.

(a) *Actio nihil aliud est*

*quam jus prosequendi in iudicio quod sibi debetur. Co. Lit. 285. or otherwise a legal Demand of one's Right. Co. Lit. 285. 2 Inst. 40. it implies a Recovery of, or Restitution to something, Co. Lit. 289. and differs from a Writ of Error, which is no Action, but only a Commission to the Judges to examine the Record, &c. Jenk. 25. 2 Inst. 40. Yelv. 209. but yet, if by Writ of Error, the Plaintiff therein may recover, or be restored to any Thing, it may be released by the Name of an Action. Co. Lit. 288. b. Vide for this 2 Roll's Abr. 405. The Suit till Judgment is properly called an Action, but not after; and therefore a Release of all Actions is regularly no Bar of an Execution. Co. Lit. 289. a. 1 Roll's Abr. 291.*

Under this Head we shall briefly take Notice

- (A) Of the different Kinds of Actions.
- (B) In what Cases an Action will lie, and for whom, and against whom.
- (C) In what Cases distinct Things may be laid in the same Action.

### (A) Of the different Kinds of Actions.

*Co. Lit. 284. 2 Inst. 40.* Actions are divided into Criminal or Civil; Criminal are either to have Judgment of Death, as Appeals of Death, Robbery, &c. or only to have Judgment of Damages to the Party, Fine to the King and Imprisonment; as Appeals of *Mayhem*, &c.

*Co. Lit. 284. 2 Inst. 40.* Civil Actions are again divided into Real, Personal or Mix'd; and here it may be proper to inquire a little into the Nature of those Real Actions which were formerly in Use, and how they came to be discontinued.

*Co. Lit. 164. Vide Ejectment, Replevin, Trespass, Assise.* Actions Real, or relating unto Lands, are either *Droitural*, that is of the Right of the Ancestor; or Possessory, which complains of the Violation of a Right of which they themselves were possessed of.

The Law always distinguished between a Right of Entry and a naked Right to the Land itself; and therefore there were different Remedies; for to recover the naked Right, the Law only gave a Writ of *Right*; and in this Action, the Defendant at his Election might put himself upon his Country, or wage Battel; but when the Disseisee had a Right of Entry, it was presumed that the Disseisin was fresh and recent; and therefore

therefore the Trial was *coram paribus curtis*; but if the Disseisee did not come till the Heir was seated in the Possession, and had paid Relief to the Lord, then the Entry of the Disseisee was taken away, and his Title became doubtful; and then they appealed to Providence in such Decisions; and if any Freeman would, with his own Body, defend the Title of the Possessor, the Demandant was obliged to find a Champion to enter the Lists with him.

But to recover the Right of Possession, the ancient way was by Writ of Entry, where the Process was by *Summons*, *Grand Cape* before Appearance, and *Petit Cape* afterwards, as in the Writ of Right, and the General Issue was *disseisvit vel non disseisvit*; and this Issue was tryed by a Jury, because when the Disseisin was fresh, they did not put it upon the Hazard of a Battle, as they did in those Cases where the long Possession had made the Right doubtful.

But in the Writ of *Entry* they recovered no Damages; for that such Writ only demanded the Freehold, and was not mix'd with the Personalty; and therefore to recover the Profits which are meerly Personal, they had an Action of *Trespafs*, which was the proper Remedy for the Damages sustained.

There were anciently only three Sorts of Writs of *Entry*; one against the Disseisor himself, the other, which was against his Feoffee, which was called the *Writ of Entry in the Per*; the third was after a second Alienation, which was called a *Writ of Entry in the Per and Cui*; but the Statute of *Marlb. cap. 30.* gave a Writ of *Entry in the Post*, which did not lie at Common Law against an Alienee at a third Hand.

And as a Man might have brought such Writ of *Entry* as his own Disseisin, so he might have brought it for the Disseisin of his Father, or he might have brought it for a Disseisin done to his Grandfather, which was called a Writ of *Ayel*, or a Disseisin done to his Great Grandfather, which was called a Writ of *Besail*, or any collateral Cousins that were more remote than Brothers and Sisters, Uncles and Aunts, Nephews or Nieces; and this was called a Writ of *Cofnage*.

But because the Process in a Writ of *Entry* became tedious, when such Actions were removed out of the Lord's Court into that of the King's, and thereby the Process which issued from three Weeks to three Weeks in the Lord's Court, was depending so many several Terms in the King's Court, therefore the Assise was invented, which was in the Nature of a Commission to put the Disseisee in Possession by Trial at one Assises; and this was so sudden and immediate a Remedy, that the Writ of *Entry* became obsolete; and therefore when the Assise was the usual Remedy, the Writ of *Entry* began to be called a *Writ of Entry in the Nature of an Assise*.

There were likewise other Remedies, as the *Formedon in Remainder and Reverter*, and a *Formedon in Descender*, which was given by the Statute *De donis*, which created Estates-tail.

But the Proceedings on these Real Actions, being dilatory and expensive, and in many Cases concluding the Party upon one Trial, a more commodious Method was contrived to dispute the Title to Lands, which begun in the Reign of *Hen. 7.* in this Manner, by forming a Term for Years, and then the Lessee's bringing an Ejectment to recover the Term, and thereby to assert the Title of the Lessor of the Plaintiff; before this Time, if a Termor for Years, who only claimed as a Bailiff to the Freeholder, had been ousted of his Possession, he had only a Remedy to recover Damages in Ejectment, and could not recover the Term itself; but in the Reign of *Hen. 7.* the Courts of Equity having obliged such Wrong-doer to a specifick Restitution, the Courts of Law have likewise given an *Habere facias possessionem* to recover the Term in *Specie*.

For which  
vide the se-  
veral Heads.

Vide Heads  
*Trespass*,  
*Trover* and  
*Conversion*,  
and *Actions*  
on the *Case*.

Vide *Tir.*  
*Trover* and  
*Conversion*.

1 *Roll's Rep.*  
128.

Personal Actions are *ex contractu*, or those founded on Contract, as Debt, which is to restore the Thing *in Numero*; or *Detinue*, which is to restore the same in Specie, or Damages, where it cannot be had; also Actions of *Account*, *Covenant*, *Assumpsit*, *Quantum Meruit*, *Quantum Valebat*, *Covenant* and *Annuity*.

Or *Ex delicto*, as *Trespasses* founded upon Force, which are *Trespasses vi & armis*, or upon *Fraud*, which are Actions upon the *Case*.

Therefore, if a Man gets the Goods or Chattels of another by lawful Means, as by *Bailment*, *Borrowing* or *Pledging*, he cannot have an Action of *Trespass*, but must bring *Detinue* or *Trover*; because the Party had not violated his Possession.

So where a Man comes to buy Goods, and they agree upon a Price and a Day for the Payment, and the Buyer takes them away, no *Trover* lies, but an *Assumpsit* for the Money, because the Property was changed by a lawful Bargain.

If I borrow a Horse to go to *Dover*, and go to other Places, the Owner may have an Action on the *Case* against me, for exceeding the Purposes of the Loan; for so far it is a secret and fallacious Abuse of his Property; but no general Action of *Trespass*, because it is not an open and violent Invasion of it.

## (B) In what Cases an Action will lie, and for Whom, and against Whom.

It is clear, that for all Injuries done to a Man's Person, Reputation or Property, he shall have an Action, and that for every Right he is to have a Remedy; for Want of Right and Want of Remedy are the same Thing.

*Co. Lit.* 145.  
*Stile* 4.

It is also agreed, that where a Person has several Remedies, he may chuse which he pleases; but he cannot devise or lay hold on any but those prescribed by the Laws of his Country; for if this were allowed, it would be constituting as many Actions as there are Men, which would be highly inconvenient.

Vide *Limita-*  
*tion of Actions*.

But in this the great Difficulty is, when a Man shall be said to have suffered an Injury, or to have such a Right as will intitle him to an Action; and here the Rules established by that Society, of which he is a Member, must govern; and therefore, though a Man had a Right, and is barred by the Statute of Limitations, yet he can have no Remedy.

*Yelv.* 196.

*Cro. Car.* 270.

1 *Brownl.* 111.

6 *Co.* 18.

1 *Roll's Abr.*

9.

(a) But if a

Carpenter  
undertakes

to build a House for me, and does it ill, an Action on the *Case* lies against him. *Kelov.* 78. 1 *Roll. Abr.*

9. So if a Carpenter promises to mend my House before such a Day, and he does not do it, by which the House falls, an Action on the *Case* lies. 1 *Roll. Abr.* 9. but for this vide *Assumpsit* and *Actions on the Case*.

1 *Roll. Abr.*

107.

1 *Mod.* 69.

*Noy* 184.

Also in Cases where there may be *damnum absque injuria*, the Party can have no Action; as if a School be set up in the same Town where an ancient School has been Time out of Mind, by which the old School receives Damage, yet no Action lies.

11 *H.* 4-47.

1 *Roll. Abr.*

107.

So if I retain a Master in my House to instruct my Children, though this be to the Damage of the common Master, yet no Action lies.

As the Law grants Redress for all Injuries, and gives a Remedy for every kind of Right, so it is open to all kinds of Persons, and none are excluded from bringing an Action, except on account of their Crimes or their Country; as Men attainted of Treason or Felony, Popish Recusants, Persons outlawed or excommunicated, convict in a *Præmunire*, or Alien Enemies.

*Co. Lit.* 128.  
*Vide* the several Heads.

A Man that hath a special and limited Property in Goods, as a Carrier that hath Goods delivered to him, a Sheriff who hath levied Goods, a Bailee who hath Goods in his keeping, &c. shall have Actions against Strangers who take them away, because they are answerable in Damages to the absolute Owner.

2 *Bull.* 311.  
1 *Sid.* 438.  
1 *Mod.* 30.  
2 *Sand.* 47.  
2 *Keb.* 588.  
*Yelv.* 44.

*Cro. Jac.* 73. *Dyer* 98, 99.

Also a Man who has Cause of Action against two may bring it against which he pleases; as if *A.* takes the Goods of *C.* and *B.* takes them from *A.* *C.* shall have his Action against *A.* or *B.* at his Election, because both damaged *C.* in their Taking.

1 *Sid.* 438.

So if two of the Sheep of *A.* have been lost, and one of them is found again, and the Shepherd of *A.* affirms it to be one of them, whereupon *A.* pays for the Feeding of it, and causes it to be Shorn and Marked with his own Mark, and after the Shepherd knowing this to be the Sheep of *A.* falsely and fraudulently affirms to the Bailiff of the Manor, to which Waif and Stray belongs, that the said Sheep is a Stray, whereupon the said Bailiff seizes it, &c. *A.* may have an Action against his Shepherd, for that by his false Practice he hath created a Trouble, Disgrace and Damage to him; and tho' he hath good Cause of Action against the Bailiff, yet this will not excuse the Shepherd.

*Allen* 3.  
*Newman* and *Zachary.*  
1 *Roll. Abv.* 101. *S. C.*

So if one Slanders my Title, whereby I am wrongfully disturbed in my Possession, tho' I have Remedy against the Trespassor, yet I may have an Action against him who caused the Disturbance.

*Allen* 3.

If there are several Proprietors of a Ship which hath usually transported Goods for Hire, and a Master placed therein by the Part-Owners, who hath 60 *l.* Wages for every Voyage from *London* to *T.* and *F. S.* without making any Contract with the Part-Owners, and none of them being present, delivers certain Goods aboard to the Master, to be carried for Hire from *London* to *T.* and the Ship safely arrives there, but the Goods are spoiled through the Neglect of the Master, an Action lies against the Part-Owners; for though the Master is chargeable in respect of his Wages, so are the Proprietors in respect of the Freight, at the Election of the Plaintiff.

*Carth.* 58.  
*Bafon* and *Sandford.*  
2 *Salk.* 440.  
3 *Lev.* 258.  
3 *Mod.* 322.  
*S. C.* But *Q.* whether all the Part-Owners are not to be sued; but clearly, if

they are not, it must be pleaded in Abatement

### (C) In What Cases distinct Things may be laid in the same Action.

The Distinction herein with respect to real Actions, depends on the different kind of Writs, for all Original Writs are of two Sorts, *viz.* *Breve nominatum* & *innominatum*; the First contains the Time, Place and Demand very particularly, and therefore in such Writ several Lands by several Titles cannot be demanded in the same Writ: The other contains only a general Complaint, without expressing Time, Damages, &c. as the Writ of Trespass. *Quare Clausum fregit*, &c. and therefore several Lands coming to the Demandant by several Titles, may be demanded in such Writ.

8 *Co.* 87.  
but for this *Vide F. N. B.* 209.  
*Owen* 11.  
*Kelv.* 105.  
*Dyer* 145.  
2 *Brownl.* 274.

*Cro. Car.* 20, 516.  
*1 Vent.* 366.  
*1 Keb.* 847.  
*Bro. Foinder in Action* 97.  
*Register* 95, 139.

As to Personal Actions, the Difference arises from the above-mentioned Division of Personal Actions, *viz.* such as are *ex contractu*, and such as are *ex delicto*, or founded on a *Tort*; therefore Debt on an Obligation and on a *Mutuatus* may be joined, because the Writ is general, and the Declaration upon both will be warranted by the Authority given by the general Words of the Writ; so Debt and Detinue may be joined in the same Writ, because there are Writs in the Register in which they are both comprised in the same Writ; so Debt upon a Lease and for Cloaths, they being in the Words of the same Writ; but Debt and Account, or Debt and Trespass (a) cannot be joined.

(a) The true Reason why

Actions may or may not be joined is not the Difference of the Defendants Pleas; for if that were the Reason, Debt upon an Obligation, to which the Plea is *Non est factum*, and on a *Mutuatus Nil debet* could not be joined; therefore the true Reason arises from the Difference of the Process, and the Fines paid on taking out the Original; for in Debt the old Process was Summons, Attachment and Distress, and on taking out the Original a Fine was paid to the King, which was in Proportion to the Sum demanded; but in Trespass the Process was a *Capias*, because the Man that had committed a *Tort* might be supposed to fly from Justice; and in this Action the Court set a Fine on him in Proportion to his Offence, and levied it by a *Capiatur*. *1 Vent.* 366.

*8 Co.* 87.  
*Fenk.* 211.  
*3 Lev.* 93.  
*Raym.* 233.

In Personal Actions several Wrongs or Trespas may be joined, because they may be comprised in the same Writ, and so may several Actions on the Case, where the Case is of the same Kind; as an Action for a Fraud on the Delivery of the Goods, and on the Warranty of the same Goods, being both on the Contract; so against a common Carrier on the Custom of the Realm, and *Trover* may be joined, because both on the *Tort*, it being a Violation of the Custom not to deliver the Charge.

*1 Lev.* 101.  
*1 Salk.* 10.  
*3 Keb.* 59.  
*3 Mod.* 322.  
*1 Sid.* 244.

But Actions founded upon a *Tort* and upon a Contract cannot be joined, as *Assumpsit* and *Trover* against a Carrier, for though these come under the general Head of Actions on the Case, yet are they more distinct Cases than Debt and (b) Account, which cannot be joined.

(b) *Bro. Foinder in Action* 97.

*3 Lev.* 99.  
*Bage and Bromwell.*

If *Trover* and *Assumpsit* are joined in one Action, and upon Not guilty the Jury *quoad* the *Trover* find for the Defendant, and *quoad* the *Assumpsit* for the Plaintiff, yet he shall not have Judgment, for these cannot be joined in the same Action, and the Severance by the Jury will not help it, the Declaration being naught at first.

*Allen* 9.  
*Style* 43. 202.

One Action will lie for entering the House of the Plaintiff, breaking his Chests, and carrying away his Goods, and for beating his Servant *per quod servitium amisit*, for a General Action of Trespass and a Special Action upon the Case may be joined in one Action.

*Cro. Car.* 20.  
*White and Ridsen.*

If in an Action upon the Case the Plaintiff declares, That whereas *accomodasset* to the Defendant a Gelding *ad equitand' ab L. usque E. & ibidem salvo deliberand'* to the Plaintiff, the Defendant intending to deceive the Plaintiff rid upon the said Gelding from *L.* to *E.* and *E.* unto *L.* again, and by that Riding so much abused the said Horse, that he became of little Value; and though the Plaintiff at *E.* demanded a Re-delivery of the said Gelding, yet the Defendant refused, and yet doth refuse to deliver him, and hath converted the said Gelding to his own Use; this Declaration is not (c) good, because it contains distinct Matters, for Part is founded upon the Contract, and Part upon the *Tort*, which are several Causes of Action.

(c) But the Plaintiff had Judgment, being after

Verdict; but *per Hobart*, the Defendant might have demurred for the Doubtfulness of the Declaration. *Vide* Head of *Amendment* and *Jeofail*. In Case the Plaintiff declared upon a Promise to deliver to him ten Pots of good and merchantable Pot-Ashes, and that the Defendant had delivered ten Pots not merchandizable, but mixt with Dirt, &c. and further, that the Defendant *vendidit* to the Plaintiff ten other Pots of Ashes *Warrantizando*, &c. that they were good and merchandizable, but had delivered them bad and not merchandizable, knowing them to be naught; on Demurrer *dubitatur*. *1 Vent.* 365.

An Ejectment and Assault and Battery were joined in one Writ, and Not guilty pleaded, and a Verdict and intire Damages given for the Plaintiff; and it seems to have been aided after Verdict.

Hob. 249.  
1 Brocnl. 235.  
S. C.  
and Winch

held the Writ naught, but the Damages being found severally, the Plaintiff released those for the Battery, and had Judgment for the Ejectment.

Where one hath a Right to recover in the same kind of Action, though he derives his Right from different Titles, yet being conjoined in him, he may recover in one Action; as if in Debt upon 2 E. 6. for not setting forth of Tithes, though the Plaintiff shews, that by Prescription the Rector of *A.* hath had two Parts, and the Vicar of *A.* the third Part of the Tithes there, and that the said Rector and Vicar, by several Leases, did demise to the Plaintiff, *per quod* he became *Proprietarius* of the said Tithes, and the Defendant sowed, &c. this Action is well brought, for though the Vicar and Parson could not join because they claim severally by divided Rights, yet when both Titles are conjoined in one Person, the Matter of the Title is also conjoined; and this being a Personal Action and founded upon a Wrong, it is sufficient to shew generally, that the Plaintiff is *Firmarius* or *Proprietarius* of the Tithes, without saying by what Title.

Telv. 63.  
Champernoon  
v. Hill.  
1 Brocnl. 86.  
Cro. Jac. 68.  
Moor 914.  
Noy 3. S. C.

If *A.* being seised of a third Part of a Messuage, &c. in Fee, demises the same to *B.* for Years, who assigns to *C.* and *A.* by Bargain and Sale inroll'd, conveys his Reversion to *D.* and his Heirs, who was then seised of another third Part in Fee, and afterwards the said *D.* Leases his third Part also to the said *C.* for Years, and dies; and his Heir by Bargain and Sale inrolled, conveys the Reversion of the said two third Parts to *E.* and his Heirs, after which Waste is done, *E.* (*a*) may bring one Action of Waste upon these several Leases, for that neither the Interest of the Terms nor of the Inheritance were severed or divided to several, but were in one Person at the Time when the Waste was done.

Popb. 24, 25;  
Haydock v.  
Warnford.  
Cro. Eliz. 290.  
Owen 11. S. C.

(*a*) And the rather because the Assignment of Waste is in one and the

same Thing. *Per Popb. Ch. Just. Vide Head of Waste.*

If in Covenant the Plaintiff shews that *A.* was seised in Fee of one Messuage, and possessed of another for a certain Term of Years yet en- during, and let both to the Defendant for a lesser Term of Years, and that the Defendant did covenant to Repair, &c. and shews that *A.* by one Deed did grant to the Plaintiff the Reversion in Fee, and by another the Reversion for Years, &c. and that after the Houses were out of Repair, &c. this Action is well brought, for as upon several Leases or upon several Grants of a Reversion one Action of Waste lies, so for the same Reason one Writ of Covenant will lie.

Cro. Jac. 329.  
Pyot and  
Lady St.  
John.  
1 Lev. 110.  
S. C. cited.

But one cannot in the same Action join a Demand in his own Right, and that which he has in the Right of another; as if in *Affumpsit* against an Administratrix, the Plaintiff declares upon a Sale of Goods to the Intestate for 200 *l.* and upon another Sale to the Defendant her self for 27 *l.* and that upon Account the Defendant was found indebted to the Plaintiff in these Sums, and promised, &c. the Declaration is naught; for the Charge being in several Manners, *viz.* in her own Right as Administratrix, it ought to have been by several Actions.

Hob. 88.  
Harrend and  
Palmer.

For this vide  
Head of Exe-  
cutors and Ad-  
ministrators,  
and Cro. Eliz.  
406.  
Moor 419.

Hob. 184. Noy 19. 1 Vent. 268. 2 Lev. 110, 111, 228. 2 Keb. 814. 3 Lev. 74.

Several Persons may join in an Action where their Interest is joint; as if the several Cattle of *A.* and *B.* are distrained, and *C.* in Consideration of 10 *l.* to him paid by *A.* and *B.* assumes and promises to them to procure the Cattle to be re-delivered to them, if they are not re-delivered accordingly, one joint Action lies, for the Consideration is intire and cannot be divided.

For this vide  
Head of  
Jointenants.  
Style 156.  
1 Roll. Abr.  
31. S. C.

and *Q.* whe-  
ther one of  
them may bring the Action alone.  
So

2 *Lev.* 27.  
*Littleley and*  
*Covvton.*  
 2 *Keb.* 631.  
 2 *Sand.* 115.  
 1 *Vent.* 167.  
 S. C.  
 agreed *per*  
*totam Curiam,*  
 but because the Plaintiffs had declared that all the Grain ought to be Ground at those two Mills, or one of them; which might be if all ought to be Ground at one of the Mills, and nothing at the other; for their Expedition they prayed a *Nil Cap. per billam.*

So if *A.* hath one Mill and *B.* another in the same Manor, which they have used to repair, and Time out of Mind all the Grain which was Ground and Spent in the Houses of the Tenants of the said Manor, and was not Ground at one of the said Mills, hath always, and ought to be Ground at the other, and *C.* a Tenant of the said Manor, Grinds at another Mill, &c. *A.* and *B.* may join in one Action against *C.* for the Damage is intire to both their Mills.

3 *Lev.* 362.  
*Ward & al'*  
*v. Brampton.*

If within the Parish of *A.* there is a Custom for the Parishioners yearly to elect two Persons to be Church-wardens there, and according to the said Custom *B.* and *C.* are elected, but the Surrogate of the Bishop refuses to admit and swear them into the said Office; upon which they bring a *Mandamus*, and he falsly returns a Custom for the Vicar to chuse one Church-warden, and that therefore he cannot admit both the said Parties, but is ready to admit one of them; they may join in an Action for this false Return, for the *Mandamus* and whole Prosecution thereof was joint, and this is no Office of Profit, nor Action brought for that, but for the unjust Return.

3 *Lev.* 363.

So if the Register of the Bishop refuses to Register a Licence of a Chapel for a Conventicle, according to *1 W. & M.* and upon a *Mandamus* to do it makes a false Return, all the Inhabitants may join in one Action against him.

*Dyer* 19.  
*Gouldsb.* 76.  
 S. P.  
*v. o. Car.* 512.  
 S. P. (a) So in False Imprisonment. *Dyer* 19.

But if one Man calls two other Men Thieves, and shews in certain of what, &c. they shall not (a) join in one Action against him, for the Wrong done to one is no Wrong to the other.

*Kelw.* 55.  
*Fitz. Joinder*  
*in Action* 17.  
*Reg.* 105.  
*Owen* 106.

So in Assault and Battery; for the Battery done to one cannot be the same as that done to the other; and one Battery may Hurt more than the other.

*Dyer* 351. Q.

If a Man holds several Lands of several Lords by Heriot Custom, and to defraud them of their Heriots makes a fraudulent Gift of all his Beasts Heriotable, all the Lords may join in one Action upon the 13 *Eliz.*

*Dyer* 370.

If two Joint Owners of a Sum of Money are robbed upon the Highway, they may join in one Action against the Hundred in which, &c. otherwise if the Sums are several, and several Properties.

1 *Bulst.* 68.  
*Hard.* 321.  
 S. P. and  
 there said  
 that they  
 could not both join.

If *A.* delivers Goods to *B.* to deliver over to *C.* and *B.* does not deliver them over accordingly, but converts them to his own Use, either *A.* or *C.* may have an Action against *B.* but both shall not have an Action; but he who first begins his Action shall go on with the same.

3 *Lev.* 209.  
*Biddleford and*  
*Onslow.*

If *A.* is seised in Fee of the Reversion of a Close expectant upon a Term for Years, and *B.* is possessed of another Close adjoining thereto, between which said Closes there runs a Rivulet, and *B.* stops it, *per quod* the Close of *A.* is surrounded, so that the Timber-Trees, &c. become rotten; *A.* in respect of the (b) Prejudice to the Reversion, and the Termor in respect of the Possession, and of the Shade, Shelter, &c. may have an Action, and a Satisfaction given to the one is no Bar to the other.

(b) So if *A.*  
 Leases a  
 House to *B.*  
 for Years,  
 and this is  
 burnt down through the Neglect of a Neighbour, *A.* may have an Action for the Damage to his Inheritance, and *B.* to his Possession. 3 *Lev.* 360. adjudged.

One Action will not lie against several Men for speaking the same Words; for the Words of the one are not the Words of the other, and can no more produce a joint Action, than their Words and Tongues can be said to be one.

*Palm.* 315. Adjudged upon Motion after a Verdict for the Plaintiff;

*Cro. Jac.* 647. S. C. adjudged; 1 *Bull.* 15. S. P. but there said, that it was otherwise in the Spiritual Court; for that one Libel may be against several Persons.

But if two Men procure another to be indicted falsely for a common Barretor, he may have an Action upon the Case against them both; tho' in Strictness the Procurement of one is not the Procurement of the other.

*Lat. b.* 262. So if two conspire to maintain a

Suit, and one only gives Money. *Bro. Joinder in Action* 47. *Fitz. Error* 31. *Fitz. Maintenance* 15. So in Trespass, *Latch* 262. *Vide* Head of *Trespass*. So one *Decies tantum* lies against all the Jurors who take Money, for they all give but one Verdict, and are but one Jury. *Bro. Joinder in Action* 5, 47, 100, 108. *Fitz. Decies tantum* 1, 4, 6.

A Man cannot declare against one Defendant for an Assault and Battery, and against the other for taking away his Goods; because the Trespases are of several Natures, and against several Persons.

*Style* 153. Adjudged.

If *A.* Leases for Years to *B.* and *C.* rendring Rent, and *C.* assigns his Moiety to *D.* and after Rent is arrear, *A.* may bring one Action of Debt for the Rent against *B.* and *D.* for the Reversion remains intire.

*Palm.* 283.

## Actions Local and Transitory.

Originally all Actions were tried in the proper Counties in which they arose, pursuant to *Maxime Vicini Vicinorum facta presumuntur scire*; this created no Inconveniency, for all Men being anciently in *Decenna* they were easily come at, the *Decenna* being responsible for their Appearance; but when the Custom of the *Decennary* began to wear off, Men used to fly from their Creditors, and this begot the Distinction between *Local and Transitory Actions*; the first relating to Lands, which must be tried where the Lands lie; the other a Debt or Duty adhering to the Person where-ever he fled: Hence Men omitted to Date their Contracts from any certain Place, and began their Obligations with a *Noverint Universi*; when this Distinction was established, it began to be abused to a great Degree; for Plaintiffs would lay their Actions far from the Place where the Fact was done; and the Defendants, for fear of being outlawed, were necessitated to carry their Witnesses into that County, how far soever remote from the Place where the Fact was done. To remedy this,

“ The 6 R. 2. *cap.* 2. provides, That to the Intent that Writs of Debt and of Account, and all other such Actions, be from henceforth taken in their Counties, and directed to the Sheriff of the County where the Contracts of the same Actions did arise; it is ordained that from thenceforth on Pleas on such Writs, when it shall be declared that the Contract thereof was made in another County than is contained in the original Writ, that then incontinently the said Writ shall be abated.

2 *Inst.* 230a

This was intended to have confined all Actions to their proper Counties; but as it would have created greater Mischief than it was intended to prevent, if a Creditor could not follow his Debtor into another County; and as the Statute is so worded, that it only prescribes that the Declaration shall agree with the Writ, as to the Place, the Judges construed it so as to empower them to change the Venue, and thereby oblige the Plaintiff to give Evidence of the Fact within the County where the Writ is brought; and this in Effect tends to abate the Writ according to the Statute; and here we shall consider

(A) What Actions are Local and Transitory.

(B) In what Cases the Court will change the Venue.

(a) That all (A) (a) What Actions are Local or Transitory.

All Actions Real or Mix'd, as *Trespasses, Quare Clausum fregit, Ejectment, Waste, &c.* must be laid in the County where the Lands lie. *vide* Actions *Qui tam*, Letter (C.) *Co. Lit.* 282. *6 Mod.* 222.

*Cro. Car.* 183. So an Action of Debt for Rent, against an Assignee of a Term, on the Privity of Estate, is Local, and will lie no where but in that County where the Lands are.

*Hob.* 37. So where *A.* granted a Rent-charge to *B.* and *C.* for their Lives, and the Lands out of which it issued came to the Defendant after the Death of *A.* and the Plaintiff, as Executor of the Survivor of the Grantees, brought Debt for Arrears incur'd in their Life-time, and laid his Action in the County where the Lands lay; and on Application of the Defendants to have it tried elsewhere, suggesting the Plaintiff's Power and Interest in that County, but it was held a Local Action, and not triable elsewhere.

*Carth.* 182. *A.* as Assignee of a Reversion, brought Covenant against the Assignee of the Lessee, on an express Covenant between the Lessor and the Lessee, for Payment of Rent reserved out of Lands which lay in *Ireland*, and which was made payable in *London*; on Plea to the Jurisdiction of the Court, it was held that though such Action may be maintained here by the (a) Lessor against the Lessee, yet that by the Assignment, the Privity of Contract was destroyed; and there being nothing but a Privity of Estate between the two Assignees, it made the Action Local.

*Damer and Barker.* *1 Salk.* 80. good Law, there being no Privity of Estate remaining; and there is no Difference between Debt and Covenant. (a) The Assignee of the Reversion may maintain the Debt or Covenant, upon the Statute 32 *H. 8. cap.* 34. against the Lessee; *per Holt*, Ch. Just. *6 Mod.* 194. for the Privity of Contract is transferred to the Grantee, by the Statute. *Carth.* 183. *1 Sand.* 238. *S. P.* 240. *S. P.* 3 *Lev.* 154.

*6 Mod.* 194. But where the Lessor brought Debt against the Lessee, and declared on a Demise of Lands which lay in *Jamaica*; on Plea to the Jurisdiction of the Court, and Objection, that if the Defendant had any good Local Plea, he was hereby deprived of it; the Court held that this being on the Privity of Contract, was a Transitory Action, and might be laid any where; and that if a foreign Issue arose which was Local, it might be tried where the Action was laid; and for that Purpose there may be a Suggestion entered on the Roll, that such a Place in such a County is next (b) adjacent; and it may be tried here by a Jury from that Place, according to the Laws of that Country; and upon *Nil debet* pleaded, the Laws of that Country may be given in Evidence.

(b) For this *vide* *6 Co.* 48. *7 Co.* 26. *1 Vent.* 59.

If a Declaration contains Matters lying in two Counties that join, it shall be tried by both Counties, on a *Venue* directed to the Sheriffs of both Counties, who are to summon six of each County.

Trial may, by Consent of Parties, be otherwise, and 16 & 17 Car. 2. that after Verdict, Judgment shall not be stayed or reversed, for that there was no right *Venue*; so that the Cause were tried by a Jury of the proper County or Place where the Action is laid. *Vide* 4 & 5 Ann. the Act for Amendment of the Law.

An Action of *Debt* against the Executor of a Lessee, in the *Debtinet* for Arrears in the Testator's Life-time, may be brought any where; but where it is in the *Debt* and *Detinet*, for Rent accrued in the Executor's Time, it must be where the Land lies.

All Personal Actions, as *Debt*, *Detinue*, *Affault*, *Deceit*, *Trover* and *Conversion*, *Account*, &c. may be brought in any County, and laid in any Place; and the Defendant cannot traverse it, or be allowed to say, that the Cause of Action accrued in another County or different Place, except in the Case of an Officer of Justice, who may plead a Special Justification.

An Action may be brought on a Contract or Matter which arose beyond Sea; as if *A.* enters into a Bond to *B.* in any foreign Country, and the Bond bears Date in no Place, *B.* may bring his Action where he pleases, and alledge that the Bond was made in any Place in *England*; but if there be a Place mentioned, as *Bordeaux* in *France*, then shall he alledge that the Bond was made *in quodam loco vocat' Bordeaux* in *France*, in *Islington*, in the County of *Middlesex*, and from thence the Jury shall come.

### (B) In What Cases the Court Will change the Venue.

The Defendant cannot by his Plea oblige the Plaintiff to lay his Action in a different County from that in which he brought it, unless the Matter pleaded be Local; for in Transitory Actions he must move the Court on Affidavit, that if the Plaintiff hath any Cause of Action, such Cause accrued in the County of, &c. and not where the Plaintiff hath laid it, &c. and such Motion must be made before Issue joined; for by joining Issue, he agrees with the Plaintiff, as to the Manner of bringing the Action; and though the Court seldom (*a*) refuses on such Affidavit to change the Venue, yet if before or after the Motion made, the Plaintiff will enter into a Rule to offer no Evidence but what arises in the County where he has laid his Action, the Cause will be tried there.

began in King James the First's Time; per Holt, Ch. Just. 2 Salk. 670

But though the Court, on Application, seldom refuses to change the Venue, yet there are Cases in which the Judges have refused; as where a Peer of the Realm brings an Action of *Scandalum Magnatum*, the Court will not change the Venue; because a Scandal raised on a Peer reflects on him through the whole Kingdom.

my Lord Shaftesbury's Case, who brought *Scandalum Magnatum*, and laid it in *London*, the Venue was changed. 1 Vent. 364. 2 Jones 192. but note, That was by Reason of the great Influence he had in the City; and the established Doctrine is, that the Venue cannot be changed in an Action of *Scandalum Magnatum*. 2 Salk. 668. Carth. 40.

Also a Serjeant at Law, Barrister, Attorney, or other Privileged Person, whose Attendance is necessary at *Westminster-Hall*, may lay his Action

*Cro. Eliz* 646,  
of 741.  
*Vide* Trial  
per Pais 103.

And that the  
Judgment shall not be stayed or reversed,  
for that there was no right *Venue*;  
so that the Cause were  
tried by a Jury of the proper County or Place  
where the Action is laid. *Vide* 4 & 5 Ann. the Act  
for Amendment of the Law.

*De-Latch* 262,  
271.  
3 Co. 24.

*Co. Lit.* 282.  
*Debitum &*  
*contractus*  
*sunt nullius*  
*loci.*  
2 Inst. 231.  
7 Co. 3.

*Co. Lit.* 261.  
*Latch* 4.  
2 Keb. 315.  
6 Mod. 228.

1 Sid. 44;  
2 Salk. 669;  
670.  
2 Show. 170.  
Changing the  
Venue is *Ex*  
*gratia Curie*,  
and not *Ex*  
*debito Justiti-*  
*ae*; *Quare*.

(a) The  
Practice of  
changing  
the Venue

2 Mod. 215.  
1 Lev. 56.  
S. P.  
For the King  
himself is  
Party to the  
Suit; but in

*Vide* Head of  
Privilege,  
2 Salk. 668,  
670.

2 *Shocv. Rep.* tion in *Middlesex*, though the Cause of Action accrued in another County; and the Court, on the usual Affidavit, will not change the Venue. 176, 177.  
242. *S. P.*  
Though the Plaintiff, who was a Barrister, had discontinued his Practice for some Time before.

*Carth.* 126. But if a Privileged Person be sued, and the Action brought against him in the right County, his Privilege (*b*) will not intitle him to have it tried in *Middlesex*.  
*Riffe vers. Harcourt.*

2 *Salk.* 668.

*cont. per Dolben, J.* who remember'd a Cause where the Venue was alter'd, though an Attorney was Plaintiff; because the Matter did arise, and all the Witnesses lived, in remote Parts. *Carth.* 126.

2 *Vent.* 47. So if an Attorney lays his Action in *London*, the Court will change the Venue on the usual Affidavit; for by not laying it in *Middlesex*, he seems regardless of his Privilege, and is to be considered as a Person at large.

1 *Salk.* 669.

*Comb.* 84.

1 *Lutw.* 215.

7 *Co. Bulwer's Catc.*

If material Evidence may be given in two Counties, the Plaintiff may elect to bring his Action in which he pleases; as if *A.* draws a Bill of Exchange in *Bristol*, payable in *London*, the Action accrues by the Refusal to pay the Money in *London*, and therefore the Plaintiff not obliged to change the Venue.

1 *Vent.* 344.

So where an *Assumpsit* was brought for Goods sold and delivered, and the Action laid in *London*, and a Motion was made to change the Venue upon Affidavit that the Sale was in *Kent*, but it appearing that the Delivery was in *London*, the Court held that where the Matter consists of two Parts in several Counties, the Plaintiff shall have his Election.

2 *Salk.* 670.

Not the Course to change the Venue in an Action of Escape; per *Holt, Ch. Just.*

2 *Mod.* 228.

That the Court will not change

the Venue in an Action of Covenant. 1 *Lev.* 307.

So an Action against a Lighterman for not delivering Goods, was laid in *London*, where they were to be carried to, it was moved to change the Venue; because the Damages and Neglect was in *Kent*; *sed non allocatur*; for the Neglect is transitory, and not material where it was; and the Court will never change a Venue for a Carrier; which is the same Case.

If the Action be grounded on a Specialty, the Court will not change the Venue; for not being dated at any particular Place, it may be presumed to be omitted, that it may charge the Defendant at any Place.

## Actions Qui tam.

**A**CTIONS *Qui tam* are (a) such as are given by Acts of Parliament, which give a Penalty, and create a Forfeiture for the Neglect of some Duty or Commission of some Crime, to be recovered by Action, or Information, at the Suit of him who prosecutes as well in the King's Name as in his own. As most Penal Statutes direct, that the Penalty may be recovered by Action or Information, we will consider both Matters together, and therefore will sue for the same. In these Actions or Informations, the Party who prosecutes has, by commencing his Suit, such an Interest in the Penalty, that the King cannot discharge or suspend the Suit, as to the Part he is intitled to. *Vide 2 Hawk. P. C. 275. b. and Head of Prerogative.*

(a) It is sometimes called a Popular Action, when the Penalty, or Part of it is given to any one who

- (A) In what Cases they lie.
- (B) What ought to be the Form of them.
- (C) In what Courts they may be brought, and where laid.
- (D) Of the Proceedings and Pleadings in such Actions or Informations.
- (E) Of the Judgment on such Actions or Informations.
- (F) In what Cases there shall be Costs.
- (G) Whether the Penalty of a Penal Statute may be compounded or granted over.

Within what Time the Prosecution must be on a Penal Statute, *vide Head of Limitation of Actions.*

### (A) In what Cases they lie.

Where-ever a Statute prohibits a Thing, as being an immediate Offence against the publick Good in general, under a certain Penalty, and the Penalty, or Part of it is (b) given to him who will sue for it, any Person may bring such Action or Information, and lay his Demand *Tam pro Domino Rege quam pro seipso.*

(b) But without such Penalty be given, no Person can sue. *2 And. 127. 2 Jones 234. 2 Hawk. P. C. 265.* for the whole Penalty goes to the King.

Also where a Statute prohibits or commands a Thing, the Doing or Omission whereof is both an immediate Damage to the Party, and also highly concerns the Good of the Publick; the Honour of the King, &c. the Party grieved may, and, as some say, ought to bring his Action on such Statute, *Tam pro Domino Rege quam pro seipso*, especially if the King be intitled to a Fine.

L

(B) What

## (B) What ought to be the Form of them.

It is agreed that an Action or Information on a publick Statute, need not recite the Statute on which it is grounded, whether the Offence be such only because prohibited, or be an Evil in its own Nature, and whether it be prohibited by more than one Statute, or by one only; for the Judges are bound *ex officio* to take Notice of all publick Statutes.

*H. 7. 17. b.*  
*2 Rol. Abr.*  
*79.*  
*Plow. 1. 79.*  
*4 Co. 48.*  
*Cro. Eliz. 236.*  
*Cro. Car. 229.*  
*Dyer 155,*  
*159. 6 Mod. 140. Moor 468, 699. 1 Show. 337. 2 Hawk. P. C. 245.*

But if the Profecutor take upon him to recite the Statute, and materially varies from a substantial Part thereof, this is fatal, because it does not judicially appear to the Court that there is such a Foundation for the Profecution as that whereon it is expressly grounded.

*For this vide*  
*2 Hawk. P. C.*  
*246.*

But if an Information contain several Offences against a Statute, and be well laid as to some, and defective as to others, the Informer may have Judgment for what is well laid; as where the Words of the Statute are fully pursued in the Description of some of the Offences, and not of others; or where the Time is in part certain, and in part uncertain.

*Cro. Fac. 104.*  
*1 Sid. 368.*  
*2 Keb. 366,*  
*367.*  
*2 Rol. Abr.*  
*696.*  
*Cro. Fac. 529.*  
*Cro. Eliz. 835.*  
*2 Hawk. P. C.*  
*266.*

Also an Action, or Information *Qui tam*, need not conclude *contra pacem*, or *in contemptum Domini Regis*, as an Indictment must.

He who brings an Action on a Penal Statute, which gives one Moiety of the Forfeiture to the King, and the other to the Informer, may either have a Writ against the Defendant, *Quod reddat Domino Regi & A. B. qui tam, &c. quas eis debet*, or *Quod reddat A. B. qui tam, &c. quas ei debet*, and in either Case the Writ is well pursued by a Declaration in the Name of the Plaintiff only.

*1 Jones 261.*  
*Cro. Car. 256.*  
*Plow. 77.*  
*Dyer 95.*  
*3 Lev. 374.*  
*Dal. 66.*  
*Quare.*

But it seems doubtful whether there be any Necessity that either the Writ or Count in any such Action do express that it is brought by or for the King, as well as the Party.

*Vide 2 Hawk.*  
*P. C. 266.*

But it seems agreed that every Information must be in this Form, *viz.* that the Informer *Tam pro Domino Rege quam pro seipso sequitur*, even where it is brought upon a Statute, which gives one Third Part of the Penalty to a third Person; but there is great Variety in the Form of such Informations in other Respects; for sometimes they say that the Action accrues to the Informer, to demand the Forfeiture for the King and himself, and sometimes that it accrues to the King and to the Informer, and sometimes that it accrues to the King and to the Informer, and to *J. S. viz.* where it is divided into three Parts; and sometimes they have no Clause at all of this Kind, and sometimes a Process is prayed to bring in the Defendant to answer the Informer, and sometimes to answer as well the King as the Informer, and sometimes to answer concerning the Premises, without saying to whom.

*Vide Hawk.*  
*P. C. 266,*  
*267. and the*  
*other Autho-*  
*rities there*  
*cited.*

Such Information may demand what is due to the Informer, without mentioning what is due to the King; also if the *Quantum* depend on what shall be found by the Jury, a Blank may be left for the Sum; but if it demand more or less for the Party than his due, it is insufficient as to him; but even in such Case it may be sufficient as to the King's Share.

*2 Hawk. P. C.*  
*267.*

If the Action be Popular, *i. e.* such as any Person may bring, it may conclude *ad grave damnum*, without adding of the Plaintiff; because every Offence for which such Action is brought, is supposed to be a general Grievance to every Body.

*Bro. Action*  
*Popular 2.*  
*2 Hawk. P. C.*  
*267.*



(a) *1 Jon. 193.* the Offender may be prosecuted in the County, (a) unless such Offence shall be committed in the same County in which such Court shall sit; and as to the Objection, that by this Restraint of Suits on Penal Statutes, to the said Courts, the Offence would become dispunishable by the Offenders removing from the County; it may be (b) answered, that he may be sued to an Outlawry in the same Manner, as in an Action of Trespafs.

*1 Salk. 372.* That where a subsequent Statute gives an Action of Debt, or any other Remedy for the Recovery of a Penalty in any Court of Record generally, it so far impliedly repeals the Restraint of *21 Jac. 1.* and consequently leaves the Informer at his Liberty to sue in the Courts of Equity of the Statute. *Westminster-Hall.*

*Cro. Car. 119.* That the Statute gives no Jurisdiction to the Courts therein mentioned, over any Offences, in relation to which they had none before; and therefore that Suits for such Offences must be brought in the Courts of *Westminster,* in the same Manner as before.

*1 Vent. 8.* That the said Statute hinders not the Removal of any Cause into the King's Bench by *Certiorari,* after which it may be either tried there or in the County by *Nisi Prius.*

*1 And. 127.* Also where a Statute limits Suits by an Informer *qui tam* to other Courts, yet any one may, by Construction of Law, exhibit an Information in the Exchequer for the whole Penalty, for the Use of the King.

*2 Hawk. P. C. 267.* That on the last Clause of the Statute it cannot be assigned for Error, that an Information, &c. was filed without such previous Oath as the Statute requires, for it is only directory to the Officer.

*272.* *2 Inst. 193.* And *Q.* Whether for want of such Oath, the Court will not, on Motion, set aside the Process. *1 Salk. 376.*

*1 Show. 354.* That no Suit by a Party grieved is within the Restraint of the Statute.

## (D) Of the Proceedings and Pleadings in such Actions and Informations.

“ By the 18 Eliz. cap. 5. every Informer on any Penal Statute, shall exhibit his Suit in proper Person, and pursue the same either by himself or by his Attorney in Court, and shall not use any Deputy.

*(c) Co. Lit. 139.* Any (c) Informer *qui tam,* or (d) Plaintiff in a popular Action may be nonsuit, and thereby determine the Suit as to himself at least; and though the King cannot be nonsuit, the Attorney General may enter a *Nolle Prosequi* to an Information by the King only.

*(d) Bro. Nonsuit 35. Vide 1 Sid. 420. 1 Salk. 21.*

“ By the 29 Eliz. cap. 5. and 31 Eliz. cap. 10. If any Natural-born Subject or Denizen, shall be sued on any Penal Law in the King's Bench, Common Pleas, or the Exchequer, where he isailable, or by Form of the Court may appear by Attorney, in every such Case, he may, at the Time contained in the first Process, appear by Attorney, and not be urged to Personal Appearance, or to put in Bail.

*1 Rol. Rep. 49. 134.* If the Defendant plead a Special Plea, he must take Care to set it forth with all convenient Certainty, and to answer the whole Time laid in the Information; and if he plead the General Issue, he must depend upon it, that he cannot wage his for he cannot plead together with it a Special Plea, either to the Whole Law, or take Advantage of a Protection. *2 Hawk. P. C. 274.*

If the Defendant plead *Nil debet*, it is safest to say expressly that he owes nothing to the Informer, nor to the King; for if he only plead that he owes nothing to the Informer, it may be objected that the whole Declaration is not answered.

Co. Ent. 165.  
Hob. 327.  
1 Vent. 122.  
3 Lev. 375.  
Vide Cro. Car.

If there be more than one Defendant, they ought not to plead jointly that they are not guilty, but severally, that neither they nor any of them are guilty, &c.

10, 11.  
2 Hawk. P.C. 276.

If the Suit be grounded on the Breach of a Statute appearing by Matter of Record, *Nil Debet* is no good Plea.

2 Hawk. P.C. 277.

Where-ever a Suit on a Penal Statute may be said to be (a) depending, it may be pleaded in Bar of a subsequent Prosecution, being expressly averred to be for the same Offence, as it may, though it be laid on a Day different from that in the former; and it is said, that a Mistake in such a Plea, of the Day whereon such Prior Suit was commenced, will not be fatal on the Issue of *Nul tiel Record*, if it appears in Truth to have been Prior, &c. and if two Informations be exhibited on the same Day, they may mutually abate one another; because there is no Priority to attach the Right of Suit in one Informer, more than in the other.

Cro. Eliz. 261.  
1 Rol. Rep. 49, 134.  
Hob. 209, 138.  
(a) When the Suit shall be said to be pending.  
Vide 2 Hawk. P. C. 275.  
and Q, whether from the

Time of the Purchase or Return of the Writ. 1 Salk. 89.

If the Defendant be within the *Proviso* of a Penal Statute, he may take Advantage of such *Proviso* on the General Issue, in a Suit on such Statute; but it hath been (b) holden (even since the Statute of 21 Jac. 1.) that if he have Matter in his Discharge depending on a subsequent Statute, he must plead it Specially.

2 Rol. Abr. 683.  
Vide 2 Hawk. P. C. 277.  
Who thinks he may take Advantage of

it by Virtue of the (b) Statute, without Pleading of it Specially; but as to those Matters to which the Statute doth not extend, Q.

As to Replications to Special Pleas to Informations *qui tam* in the Courts of *Westminster-Hall*, they are properly made in the Name of the Attorney General only; and such Replications in Suits at Assizes, are proper in the Name of the Clerk of Assizes only; also Replications to General Issues, on such Informations in the King's Bench or Exchequer, may be in the Name of the Attorney General only; but generally the Plaintiff only replies in Actions *qui tam*; and in the *Common Pleas* a Demurrer to an Information *qui tam* in the Defendant's Name only has been received.

2 Hawk. P.C. 277.

Where-ever a Plaintiff may declare *tam pro Domino Rege quam pro se ipso*, he may continue the same Form of Words both in the joining of Issue and in the *Venire*; but is not bound to do it unless the King be (c) intitled to Part of the Penalty.

(c) Hawkins leaves it a the contrary.

*Quare*, Whether he be bound to do it in this Case; for there are Precedents to

Where several Persons are jointly charged for an Offence against a Statute, which in its own Nature may be committed by a single Person, without the Concurrence of any other, some of them may be acquitted and others found guilty; for though the Words of the Information be joint, yet in Judgment of Law the Charge is several against each Defendant; also if one be Informed against, as having offended oftner, or in a higher Degree than is proved, as for having been absent from Church ten Months, where he has been absent but eight; or for having ingrossed 1000 Quarters of Wheat, where he has ingrossed but 100; he may be found Guilty as to what is proved, and Not guilty as to the Residue, for such Offences are in the Nature of Trespasses, which it is sufficient to prove for any Part; but if the Offence consist in making a Contract contrary to the Purview of a Statute, as in the Case of Usury, it must be proved as it is laid.

2 Rol. Abr. 707.  
Lane 19, 59.

## (E) Of the Judgment on such Actions or Informations.

Where by Statute the Offender is to forfeit such a Sum, to be divided into three Parts, whereof one shall go to the King, one to the Informer, and the other to the Poor, and to be committed if he do not pay within such a Time, the Judgment may be General, that the King and Informer shall recover the Whole, without mentioning how it shall be distributed, or that the Party be committed for Non-payment; but if it mention only that the Informer only shall recover, without saying any Thing of the King, it is erroneous; yet if on such Information, as it is laid, the Informer appear to have no Right to any Part, but the King ought to have the Whole, and the Judgment be, that the Defendant forfeit the Whole, and that the King shall have one Part, and the Informer another, &c. it is erroneous only as to such last Clause, which distributes the Forfeiture, but shall stand for the first Clause, that the Defendant shall forfeit the Whole; (a) also if there be no Clause at all concerning the Forfeiture, in a Conviction on a Penal Statute, but only a Judgment *quod convictus*, it is sufficient, for the Forfeiture is implied.

1 *And.* 139. *Style* 329.  
 2 *Rol. Abr.* 102. 2 *Keb.* 820.  
 2 *And.* 128.  
 (a) 2 *Hawk.* P. C. 279.  
*Adjudged*  
*Mich.* 3 *Geo.* 1.

## (F) In what Cases there shall be Costs.

An Informer on a popular Statute shall in no Case whatsoever have his Costs, unless they be expressly given him by such Statute, for the Common Law gives Costs in no Cases; and the Statute of *Gloucester* gives the Demandant Costs only in Cases wherein he shall recover his Damages, which supposes some Damage to have been done to the Demandant in particular, which cannot be said in any Popular Action. But where-ever a Statute gives a certain Penalty to the Party grieved, he is intitled to his Costs by the Statute of *Gloucester*, which gives the Demandant his Costs in all Cases wherein he shall (b) recover his Damages; for otherwise it would be in vain for him to sue, since in many Cases the Costs would exceed the Penalty.

2 *Keb.* 781.  
 1 *Rol. Abr.* 574.  
 1 *Lutw.* 200.  
 1 *Vent.* 133.  
 1 *Salk.* 206.  
*cont. Moor* 65.  
 3 *Lev.* 374.  
 2 *Inst.* 288.  
 2 *Hawk.* P. C. 274.  
*Vide the Authorities* supra.

(b) Also where a Statute inductive of a new Law, gives a Remedy in a Point not remediable at the Common Law, but no certain Penalty; the Jury may consider of the Costs, so as to give Damages accordingly. 2 *Hawk.* P. C. 214.

By the 18 *Eliz.* cap. 5. made perpetual by 27 *Eliz.* cap. 10. " If (c) any Informer or Plaintiff, on a Penal Statute, shall willingly delay his Suit, or Discontinue, or be Nonsuit, or shall have the Trial or Matter passed against himself therein, by Verdict or Judgment of Law, he (d) shall pay to the Defendant his Costs, Charges and Damages to be assigned by the Court, in which the Suit shall be attempted, &c.

(c) Extends only to a common Informer, and not to a Party grieved; yet if a Party grieved brings his Action, and such Action be for any Offence or Wrong Personal, immediately supposed to be done to the Plaintiff or Plaintiffs, or whatsoever the Nature of the Action may be; if the Plaintiff might have Costs in Case Judgment should be given for him, he shall pay them on a Nonsuit, or Verdict against him, by Virtue of 23 *H. 8.* cap. 15. and 4 *Jac.* 1. cap. 3. *Vide* 2 *Hawk.* P. C. 274. and the Authorities there cited; (d) and it is no Objection against paying the Costs, That the Court had no Jurisdiction of the Cause, or that the Statute on which it is grounded is discontinued. 2 *Keb.* 106. *Vide Hutt.* 35.

(G) Whether the Penalty of a Penal Statute may be compounded or granted over.

By the 18 Eliz. cap. 5. " No (a) Informer or Plaintiff shall compound or agree with any that shall offend, or shall be surmised to offend against (b) any Penal Statute, for an Offence committed, or pretended to be committed, but after Answer made in Court to the Suit, nor after Answer, but by Consent of the Court in which the Suit shall be depending; on Pain, that whoever shall offend contrary to the true Intent of this Statute, or shall by Colour or Pretence of Process, or without Process on Colour of any Offence against any Penal Law, make any Composition, or take any Reward, or Promise of Reward, for himself, or to the Use of any other, without Consent of some of his Majesty's Courts at Westminster, and shall be thereof convicted, shall stand in the Pillory, &c. and shall be disabled to sue on any Popular or Penal Statute, and shall forfeit 10 l. &c.

(a) Extends only to common Informers.

2 Hawk. P. C. 279.

(b) Extends as well to subsequent Penal Statutes, as to those which were in Being when it was made.

Hutt. 35.

Also it extends to the Compounding of Suits commenced in Courts which have no Jurisdiction, as much as if they had a Jurisdiction. 1 Keb. 106. 1 Sid. 311.

By the 21 Jac. 1. cap. 3. " It is declared, That all Commissions, Grants, Licences, Charters, or Letters Patent, of Power, Liberty, or Faculty, to dispense with, or to give Licence or Toleration to do any Thing against the Tenor or Purport of any Law, or to give or make any Warrant for any such Dispensation, &c. or to agree or compound for any Forfeitures limited by any Statute; or of any Grant or Promise of the Benefit of any such Forfeiture, before Judgment thereupon, and all Proclamations, &c. tending to the Furthering of the same, are contrary to Law, and void: And it is enacted, That all such Commissions, &c. shall be examined, heard, tried and determined by, and according to the Common Laws of this Realm, and not otherwise; but it is provided that this Act shall not extend (c) to any Warrant or Privy Seal from the King, to the Justices of either Bench, or the Exchequer, or of Assize, or of Oyer or Terminer, and Gaol-Delivery, or Peace, or other Justices, having Power to hear and determine Offences against any Penal Statute, to compound for the Forfeitures of any Penal Statutes depending in Suit before them, after Plea pleaded. Also it is further provided, That the said Act shall not extend to any Grants, &c. that had been granted concerning the Licensing of Taverns, or selling, uttering, or retailing Wines, to be spent in the House of the Party selling the same; or concerning the making of Compositions for such Licences, so as the Benefit thereof be reserved to the Use of the King, &c.

That this Statute is in Affirmance of the Common Law.

Vide 2 Hawk. P. C. 280.

(c) Such Justices by such Warrant

can make such Composition for the Use of the King only;

per Ld. Coke 3 Inst. 178.

But by the 18 Eliz. supra,

they may give Leave to an Informer to Compound with a Defendant after Plea pleaded. 2 Hawk. P. C. 280.

## Actions on the Case.

*Co. Lit.* 56. a. **I**T has been observed, that for every Right, and for every Injury done a Man in his Person, (*a*) Reputation or Property, the Party hath a Remedy, but this Remedy he must take according to the Methods laid down, and Rules prescribed by the Law; for which Purpose there are Writs framed, and settled Actions, to which he must apply; as Debt upon a Contract, Trespass on a manifest and open Invasion of his Property, &c. but where the Law has made no Provision, or rather, where no General Action could well be framed before-hand, the Ways of Injuring, and Methods of Deceiving being so various, every Person is (*b*) allowed to bring a Special Action on his own Case.

(*a*) For Actions on the Case for Words, *vide* Head of Slander.

(*b*) Nor is it any Objection that such Action was never brought before; as where the Lessor coming to view the Lands, to see if any Waste was committed, being hindered by a Stranger from entering the Premises, brought an Action on the Case against him; and it was held to lie, though such Action had never been brought before. *Cro. Jac.* 478. 1 *Rol. Abr.* 108, 109. 2 *Rol. Rep.* 311. *Vide* 6 *Mod.* 53. and *Lit. Sect.* 108. Where *per Littleton*, no Action having been brought on the Statute of *Merton*, it is to be presumed that no Action will lie: And *Co. Lit.* 81. *b.* *Per* *Ld. Coke*, Non-usage is a good Interpreter of a Law. But *per Holt*, Ch. Just. Where ever an Act of Parliament gives a Right, the Common Law gives a Remedy; so where the Common Law gives a Right, or makes a Thing an Injury, the same Law gives a Remedy or Action. 1 *Salk.* 20, 21. 6 *Mod.* 54.

These Actions are founded on some Fraud or Deceit in Contracts, or some secret Injury to a Man's Right or Property, and are said to rise from a Non-feasance, Male-feasance, or Mis-feasance; but as this Division seems too general, I shall chuse the following, as more proper to include the most material Cases that fall under this Head, referring to others for a more full Discussion of several Particulars relating to them.

(A) What Persons, with respect to the Injury, may bring an Action on the Case.

(B) Against whom such Action lies.

(C) For what Injuries an Action on the Case will lie; and herein of those Cases, where a Man may be said to suffer Damnum absque Injuria.

(D) At what Time the Right of Action shall be said to have accrued.

(E) Of Actions on the Case for Fraud and Deceit in Contracts, on an express or implied Warranty.

(F) Of Actions on the Case for Injuries to a Man's Person, Property, Right or Privilege: And herein,

1. Where an Action on the Case will lie against Officers and Ministers of Justice.

2. Where Case will lie for Torts and Injuries committed by Persons contrary to the Duty of their Trades and Callings.

(G) Where an Action on the Case will lie for a Nusance therein, of the Inconvenience of multiplying of Actions.

(H) Where an Action on the Case will lie for a Conspiracy, and oppressive Proceedings in Prosecutions and Suits at Law.

(I) Where Case will lie, though the Party injured has another Remedy.

(K) Where Case will lie, though the Wrong-doer be punishable Criminally.

**(A) What Persons, with respect to the Injury, may bring an Action on the Case.**

If *A.* delivers Goods to *B.* to deliver over to *C.* and *B.* does not deliver them over accordingly, but converts them to his own Use, either *A.* or *C.* may have an Action against *B.* but both shall not have an Action, but he that first begins his Action shall go on with the same.

1 Bulst. 68.  
Hard. 321.  
S. P.  
And said they could not join.

If *A.* is seised in Fee of the Reversion of a Close, expectant upon a Term for Years, and *B.* is possessed of another Close adjoining thereto; between which said Closes there runs a Rivulet, and *B.* stops it, *quod* the Close of *A.* is surrounded, so that the Timber-Trees, &c. become rotten; *A.* in respect of the Prejudice to the Reversion, and the Termor, in respect of the Possession, and of the Shade, Shelter, &c. may (a) have an Action; and Satisfaction given to one is no Bar to the other.

3 Lev. 209.  
per Vide 2 Rob. Abr. 55.  
(a) So if *A.* leases a House to *B.*

for Years, and this is burnt down through the Neglect of a Neighbour, *A.* may have an Action for the Damage to his Inheritance, and *B.* to his Possession. 3 Lev. 360.

If a Master of a Ship brings an Action on the Case, and declares that the Ship was laden with Corn in such a Harbour, ready to Sail for

1 Salk. 10.  
Pitts and Gaince.

*zick*, and that the Defendant entred and seised the Ship, and detained her, *per quod impeditus & obstructus fuit in viago*; this Action well lies, for the Master has not the Property of the Ship, but the Owners; and he is only a particular Officer, and can only Recover for his particular Loss; yet he might have brought Trespafs, as a Bailiff of Goods may, and then as Bailiff he could only have declared on his Possession, which is sufficient to maintain Trespafs.

1 *Rol. Abr.* 98. If a Servant is cofened of his Master's Money, the Master may have an Action on the Case against the Cofener.

*Cro. Jac.* 223.

So if a Surgeon, in Consideration of a Sum of Money, undertakes to cure my Servant of a Hurt, and he applies unwholesome Medicines thereto, on purpose to make the Wound worse, by which I lose the Service of my Servant for a long Time, I may have an Action on the Case against the Surgeon. 1 *Rol. Abr.* 98. 1 *Rol. Rep.* 124. S. C. *Adjourn.* 2 *Bullst.* 332. S. C. and *quoad* the Point of Law, the Court inclined for the Plaintiff, but for Default in the Pleadings adjourn. And after it was ended by Composition. 1 *Rol. Abr.* 88.

1 *Rol. Abr.* 97, 98. If a Bailiff Errant takes *ŷ. S.* in Execution upon a *Capias ad Satisfaciendum*, at the Suit of *ŷ. D.* and after *ŷ. S.* escapes, by a Rescue of himself, the Sheriff may have an Action upon the Case against him for this Escape, for he is thereby chargeable (a) over for this to *ŷ. D.* and this Escape made to his Bailiff was an Escape to himself.

(a) But if

such a Prisoner, taken by a Bailiff of a Franchise, escape from the Bailiff, the Sheriff shall not have an Action upon the Case against him, because he is not chargeable over; but the Bailiff only is chargeable. For this *vide* 1 *Rol. Abr.* 97, 98, 99. *Cro. Eliz.* 26, 349. *Moor* 432. and Title *Escape*.

8 Co. 84.

*Vide* Head of Master and Servant. If a Man gives Money to his Servant to carry to such a Place, and he is robbed, the Master cannot bring Case against him, for a Servant only undertakes for his Diligence and Fidelity, and not for the Strength and Security of his Defence.

1 *Sid.* 298.

*Hussy* and *Pacey*.

1 *Lev.* 188.

2 *Keb.* 88.

S. C.

1 *Rol. Abr.*

105. S. P.

But if *A.* is employed by *B.* to Sail from *England* to the *Indies*, and *A.* covenants, that he or his Servants will not thence import any *Callicoes*, &c. and *A.* retains *C.* as his Servant in this Voyage, and acquaints him with the Covenants; and notwithstanding, *C.* falsly and fraudulently brings thence certain *Callicoes*, &c. *A.* shall have an Action against *C.* for though no Action lies by a Master for the bare Breach of his Command, yet if a Servant does any Thing falsly and fraudulently, to the Damage of his Master, an Action will lie.

### (B) Against Whom such Action lies.

9 *H. 6.* 53.

1 *Rol. Abr.*

95. S. C.

(b) But no

Action lies against the Servant. 1 *Rol. Abr.* 95. So if an Attorney in an Action of Debt knows of, and was a Witness to a Release of the Debt made before the Action brought for it, yet no Action lies against the Attorney, for he acted only as Servant, and in the Way of his Calling. 1 *Mod.* 209. *per Curiam.* (c) If a Servant sells an unsound Horse, or other Merchandize in a Fair, no Action lies against the Master, unless he commanded him to sell to a particular Person. 9 *Hen. 6.* 53. 1 *Rol. Abr.* 95. S. C. *Fitz. Action sur le Case* S. C. *Popb.* 143. S. C. cited, 2 *Rol. Rep.* 6. S. C. cited. But if by the Command and Covin of the Master he sells to a particular Person, an Action lies against the Master, for it is then his own Sale. 9 *H. 6.* 53. *Fitz. Action sur le Case* 5. S. C. 1 *Rol. Abr.* 95. *Bridg.* 123. S. C. cited.

*Vide* *Cro. Jac.*

471, &

2 *Rol. Rep.* 28.

So if a Goldsmith makes Plate, wherein he mingles Dross, so that it is not according to the Standard, and by his Servant sells it; an Action lies against the Master, because it fails in the Price in Silver.

But if *A.* being possessor of certain artificial and counterfeit Jewels, of the Value of 168 *l.* and knowing them to be such, delivers them to *B.* his Servant, commanding him to transport the said Jewels unto *Barbary*, and them to sell to the King of *Barbary*, or such other Person as would buy them, but gives *B.* no Charge to conceal their being counterfeit; and thereupon *B.* goes into *Barbary*, and knowing these Jewels to be counterfeit, shews them to *C.* for good and true Jewels, and affirming to *C.* that they were worth 810 *l.* desires *C.* to sell them to the said King for 810 *l.* which Money *C.* pays *B.* and *B.* thereupon immediately returns to *England*, and pays the 810 *l.* to *A.* his Master; and after the Jewels being discovered to be counterfeit, *C.* is imprisoned by the said King, till he repays the 810 *l.* out of his own Effects; of all which Matter *C.* gives Notice to *A.* and demands Satisfaction, &c. yet no Action lies against *A.* for Jewels are in themselves of an uncertain Value, and *B.* was not by *A.* particularly directed to *C.* and all that was done *quoad C.* was the voluntary Act of the Servant, for which the Master is not bound to answer.

*Evid.* 125, 126. *Southern and Hew,* adjudged. *2 Rol. Rep.* 5, 26, 27. *S. C.* adjudged. *Popb.* 143. *S. C.* adjudged. *Cro. Jac.* 469. *S. C.* and there said the Court inclined against the Plaintiff, principally because *A.* did not order *B.* to conceal their being counterfeit.

In an Action on the Case for a Deceit, the Plaintiff set forth that he bought several Parcels of Silk for ——— Silk, whereas it was another kind of Silk; and that the Defendant well knowing this Deceit, sold them to him for ——— Silk; on Trial, upon Not guilty, it appeared that there was no actual Deceit in the Defendant, who was the Merchant; but that it was in his Factor beyond Sea: And the Doubt was, If this Deceit could charge the Merchant? And *Holt*, Ch. Just. was of Opinion, That the Merchant was answerable for the Deceit of his Factor, though not *Criminaliter* yet *Civiliter*, for seeing some Body must be a Loser by this Deceit, it was more reasonable that he, that employs and puts a Trust and Confidence in the Deceiver, should be a Loser, than a Stranger; and upon this Opinion the Plaintiff had a Verdict.

*1 Salk.* 289. ruled by *Holt* on Evidence at *Nisi Prius*; but for this *vide Title Merchant and Factor.*

If *A.* brings Case against the Master of a Stage-Coach, on the Custom of the Realm, for a Trunk lost by his Negligence, &c. and on Evidence it appears, that the Trunk was delivered to the Servant who drove the Coach, who promised to take Care of it, and that the Trunk was lost out of his Possession; the Action does not lie against the Master, for a Stage-Coachman is not within the Custom as a (a) Carrier is, unless he take a distinct Price for the Carriage of Goods as well as Persons; and though Money be given the Driver, yet that is a Gratuity, and cannot bring the Master within the Custom; (for no Master is chargeable with the Acts of his Servant, but when he acts in Execution of the Authority given by his Master, and then the Act of the Servant is the Act of the Master.)

*1 Salk.* 282. ruled by *Holt* at *Nisi Prius*, and the Plaintiff nonsuit. (a) That if a Carrier's Porter receives Goods, the Carrier shall be liable. *Comb.* 118. *per Dolben, Justice.*

If two are constituted Post-masters General, by Letters Patents, pursuant to the Statute 12 *Car.* 2. *cap.* 35. and in the Patent there is a Power to make Deputies, and appoint Servants at their Will and Pleasure, and to take Security of them in the Name and Use of the King, and that they the Post-masters General should obey such Orders, as from Time to Time should come from the King; and as to the Revenue, should obey the Orders of the Treasury; and it is farther granted to them, that they should not be chargeable for their Officers, but only for their own voluntary Faults and Misbehaviours, and this is granted with a Fee of 1500 *l.* *per Annum.* and *A.* having Exchequer-Bills, incloses them in a Letter directed to *B.* at *Worcester*, and delivers it at the Post-Office at *London*, into the Hands of *J. S.* who was appointed by the Post-master General to receive Letters, and had a Salary. By three Judges against *Holt*, Ch. Just. the Post-masters General are (b) not liable.

*1 Salk.* 17. *Lane v. Sir Robert Cotton* and *Sir Thomas Frankland.*

(b) *Vide Curth.* 487 *S. C.* with the Arguments *Pro* and *Con* at large; and *1 Salk.* 17, 18. *Holt's* Reasons, who held also, That *J. S.* was chargeable, but not as an Officer, but as a Wrong-doer.

guments *Pro* and *Con* at large; and *1 Salk.* 17, 18. *Holt's* Reasons, who held also, That *J. S.* was chargeable, but not as an Officer, but as a Wrong-doer.

*Allen* 3. If one flanders my Title, whereby I am wrongfully disturbed in my Possession, though I have a Remedy against the Trespasser, yet I may have an Action against him that caused the Disturbance.  
*Per Hale.*

*1 Rol. Abr.* If I deliver my Horfe to a Smith to shoe, and he delivers him to another Smith, who pricks him, I may have an *Action on the Case* against him, though I did not deliver the Horfe to him.  
*90*  
So if I deliver Goods to *A.* who delivers them to *B.* to keep to the Use of *A.* and *B.* wastes them, I may have an *Action upon the Case* against *B.* though I did not deliver them to him. *1 Rol. Abr.* 90.

(C) For What Injuries an Action on the Case Will lie; and herein of those Cases wherein a Man may be said to suffer *Damnum absque injuria.*

Under this Division several Cases may be comprehended; but as several of them fall under others, I shall here only observe, that though in some Cases an Injury happens to a Man in his Property, by the Neglect of another; yet if by Law he was not obliged to be more careful, no Action will lie.

*1 Leon.* 223. As if a Man finds Butter, and by his negligent Keeping it putrifies, yet no Action will lie.  
*Owen* 141.

*Cro. Eliz.* 219. Or if a Man finds Garments, and by negligent Keeping they are Moth-eaten, no Action lies.

*Cro. Eliz.* 219. So if a Man finds Goods, and loses them again; or if he finds a Horfe, and gives him no Sustenance, no Action lies; for in these Cases the Law has laid no Duty on the Finder; for it would be too rigorous to oblige him to be charitable in Behalf of a careless Owner.

But if he makes Gain and Advantage of the Thing he finds; as if he rides a Horfe, or if he abuses them; as by putting Paper into Water, *Cro. Eliz.* 219. or if he kills Sheep, &c. he shall answer for them.  
*Gouls.* 155.  
*Stile* 261. *1 Bulst.* 38.

*2 Lev.* 196. If *A.* hires *B.* to carry a Load of Timber from one Town to another to be unloaded there, at such a Place as *A.* should appoint, and *B.* gives Notice to *A.* that he will bring it such a Day, and requests him to appoint a Place where he shall lay it, and he brings it accordingly, but *1 Vent.* 310. *S. C.* *A.* will not appoint any Place where it shall be laid, so that the Horses of *B.* are kept so long in the Cart, that being hot they catch cold and die, yet *B.* shall have no Action against *A.* for he might have taken his Horses out of the Cart and walked them, or put them in a Stable, or if *A.* would not have appointed a Place, as soon as he came there, he might have unloaded in any convenient Place, so that the Injury the Horses received was through his own Default.

(a) *Damnum absque injuria*, or *vice versa*, will not hear an Action. If it be *Damnum absque injuria*, no *Action on the Case* lies (a) as if a School be set up in the same Town where an ancient School has been Time out of Mind, by which the old School receives Damage, yet no Action upon the Case lies, because it is lawful for a Man to teach where he pleases; and this is for the Ease of the People.

*6 Mod.* 46. *per Goulsd.* Justice. *11 H.* 4. 47. *22 H.* 6. 14. b. *Fitz. Action sur le Case*, 28. *S. C. Bro.* 42. *S. C. Noy* 184. *S. C.* cited. *1 Rol. Abr.* 107. *S. C.* *1 Mod.* 69. *S. P. per Twisslen Arguendo.*

*11 H.* 4. 47. So if I retain a Master in my House to instruct my Children, though *1 Rol. Abr.* this be to the Damage of the common Master, yet no Action lies.  
*107. S. C.*

So if I have a Mill, and my Neighbour builds another Mill upon his own Ground, *per quod* the Profit of my Mill is diminished, yet no Action lies against him; for every one (a) may lawfully erect a Mill on his own Ground.

1 *Rol. Abr.*  
107.  
*Hard.* 162.  
*Brownl.* 57.  
*Noy* 184.

(a) But if I have had a Mill by Prescription in my own Land, if another erects a new Mill upon his own Land, if this draws away the Stream from my Mill, or stops it, or makes too great a Quantity of Water run to my Mill, by which I receive Damage, so that my Mill cannot grind as much as it was used to do, I shall have an *Action on the Case* against him. 22 *H. 6.* 14. *Dyer* 248. 1 *Rol. Abr.* 107.

If a Man hath a House upon his own Ground, by Prescription; yet if I build a House upon my own Ground next adjoining, no Action lies against me.

22 *H. 6.* 14. *L.*  
1 *Rol. Abr.*  
107.

But if I had a House by Prescription upon my Ground, another cannot erect a House, upon his own Ground, so near to it that he stops the Light of my House. 22 *H. 6.* 15. 9 *Co.* 59. *Bland's Case*, 1 *Bullf.* 115. *Hut.* 136. 1 *Rol. Abr.* 107. 2 *Rol. Abr.* 140. 2 *Leon.* 93.

If I have 100 Acres of Pasture in a Town, and before this Time no Man hath ever had any Pasture within the same Town, and those of the Town have used to agist their Cattle in my Pasture, and another, that has Freehold within the Town, converts his Arable Land into Pasture, so that those of the Town agist their Cattle there, *per quod* this is a Damage to me, yet I cannot have any Remedy against him; for it is lawful for him to make the best Advantage he can of his own Land.

22 *H. 6.* 14.  
*Noy* 184.  
1 *Rol. Abr.*  
107.

### (D) At What Time the Right of Action shall be said to have accrued.

If *A.* sells Sheep to *B.* affirming them to be his own, whereas they belong to *C.* *B.* may have an Action against *A.* for this Deceit, before *C.* hath seized the Sheep or interrupted him; because they are Things Transitory, and therefore the Action lies before Interruption; for if he should stay till *C.* interrupted him, he may be dead before, or other Disadvantage may happen.

1 *Rol. Abr.*  
98.  
*Cro. Jac.* 474.  
*S. C.*

If *A.* recovers in Debt against *B.* and thereupon a *Capias ad Satisfaciendum* is directed to *C.* the Sheriff of *N.* to take *B.* in Execution, which is accordingly done, and after *B.* rescues himself, *per quod* *C.* becomes liable to answer for the Debt, now *C.* may have an Action against *B.* before *A.* sues *C.* for the Rescue and Escape was a Wrong to *C.* and he is always chargeable to *A.* for it; and if *C.* must stay till sued by *A.* *B.* may die in the Interim, or fly his Country.

*Cr. Eliz.* 53.  
adjudged.  
*Cro Eliz.* 123.  
*S.P.* adjudg'd.

*A.* brings an Action against *B.* in which *C.* is Attorney for *A.* and after Verdict for *A.* *C.* enters Judgment before the Rules (according to the Course of the Court) are out, *per quod* *B.* is prevented from moving in Arrest of Judgment, and whether *B.* may have an Action against *C.* was doubted; and *Twisden* thought it hard the Attorney should be sued after the Judgment is set aside; but *note*, it does not appear in the Case as reported by *Raymond*, otherwise than from what *Twisden* said, that the Judgment was set aside before the Action brought.

*Raym.* 194.  
*Goodyar and Banks.*  
2 *Ke. 688.*  
*S. C.* adjourn.  
2 *Ke. 716.*  
*S. C.* adjourn.  
it appearing the

Judgment was set aside before *B.* brought his Action.—An Action brought against the Plaintiff's Attorney, for entering Judgment against the Defendant, when the Court ordered a *Non Pross.* *Hut.* 125. and yet it appears the Judgment was set aside before the Action brought.

*Hob. 267.*  
*6 Mod. 46.* If a Man Forges a Bond in my Name, it is possible I may be damaged by it, but till it be put in Suit against me I cannot bring an S. C. cited, Action against the Forger.  
 where by the Plaintiff's own shewing he had no Right of Action at the Time of bringing it. *Vide Carth. 113.* and *Title Error.*

## (F) Of Actions on the Case for Fraud and Deceit in Contracts on an exprefs or implied Warranty.

### I. On an implied Warranty in Law.

*1 Rol. Abr. 90.*  
*Cro. Jac. 474.*  
*S. C.* If there be a Communication between *A.* and *B.* for the buying of certain Sheep, and thereupon *B.* the Vendor (*a*) says they are his own Sheep, when in Truth they are the Sheep of another; but thereupon *A.* buys them of *B.* though *B.* made not any exprefs Warranty of the Sheep, yet an *Action upon the Case*, in Nature of Disceit, lies against *B.* fraudulently Selling to the Plaintiff a Horse that was not the Defendant's own proper Horse, the Plaintiff must prove that the Defendant knew him not to be his own Horse. *Allen 91.* *1 Keb. 523.* but *Quere*; & *vide Carth. 90* and *1 Salk. 210.* that the having Possession of any Personal Chattel, and affirming it to be his, amounts to a Warranty; and an Action lies on the Affirmation. *Per Holt Ch. Just.*

*1 Rol. Abr. 91.* So if the Vendor affirms that the Goods are the Goods of a Stranger, his Friend, and that he had an Authority from him to sell them to him, and thereupon *B.* buys them, when in Truth they are the Goods of another, yet if he sold them fraudulently and falsely, upon this Pretence of Authority, though he did not (*a*) warrant them, and though it is not averred that he sold them, knowing them to be the Goods of a Stranger, yet *B.* shall have an *Action upon the Case* for this Disceit.  
*(a) 1 Salk. 211.* where *per Holt, Ch. Just.* that if the Seller is out of Possession, there is room to Question his Title; and *Caveat Emptor* in such a Case to have either an exprefs Warranty or a good Title.

*1 Rol. Abr. 91.*  
*Stile 310.*  
*S. C.*  
*1 Keb. 523.*  
*S. C. cited.* In an *Action upon the Case* by *A.* against *B.* if the Plaintiff declares that the Defendant craftily intending, &c. and offering to sell a Gelding to the Plaintiff affirmed that he brought up that Gelding from a Colt, and that the said Gelding was then his own, which the Plaintiff believing, afterwards, that is to say, upon the same Day and Year, and at the Place aforesaid, did buy the said Gelding, &c. the Action lies upon this Declaration, though there was no Warranty upon the Sale; for this was an apparent Deceit contrary to his own Knowledge; and though it is not averred that he sold him at the same Time, when he affirmed he bred him up of a Colt, but that he *postea* the same Day and Place bought him, giving Credit thereunto, this shall be intended immediately after the speaking of the Words; for all the Words could not be spoke together.

*Carth. 90.*  
*Crosse and Gardner.*  
*3 Mod. 261.*  
*S. C.*  
*Comb. 142.*  
*S. C.*  
*1 Show. 68.*  
*S. C.* So in *Case* in which the Plaintiff declared that there being a *Colloquium* between him and the Defendant, concerning the buying and selling of two Oxen which the Defendant then had in his Possession, that he (the Defendant) *adunc & ibidem falso & malitiose affirmabat*, that these Oxen were his, to which he giving Credit bought them of the Defendant for so much Money, when in Truth the said Oxen were the proper Goods of *J. S.* and that he the said *J. S. postea, &c.* lawfully recovered the said Oxen from the Plaintiff, &c. and it was held after Verdict, that the Action lay on the bare Affirmation, without an exprefs Warranty; and

and though objected that it was not set forth that he (a) *sciens* that the Oxen were the Oxen of *J. S.* nor that he did it *deceptive*.

(a) *Falso & fraudulentè vendidit, &c.*

after Verdict, imports that it was *scienter*, and supplies the Want thereof. *Stile* 310. 3 *Keb.* 807. vide 1 *Keb.* 309.—So *sciens, &c.* implies that it was *fraudulenter*. 1 *Sid.* 146.—So where the Plaintiff declares *quod improvide & incaute, absque consideratione ineptitudinis loci*, he drove his Horses over the Plaintiff; though not said *sciens* that they were unruly. 2 *Lev.* 172.

So where the Plaintiff declared that the Defendant being possessed of a certain Lottery-Ticket, sold it to him, affirming it to be his own, whereas in Truth it was not his but another's; Defendant pleaded he bought it *bona fide*, and so sold it: On Demurrer, *Holt*, Ch. Just. held, where one having the Possession of any Personal Chattel sells it, the bare Affirming it to be his amounts to a Warranty, and an Action lies on the Affirmation; for his having Possession is a Colour of Title, and perhaps no other Title can be made out, *aliter* where the Seller is out of Possession; for there may be room to Question the Seller's Title, and *Caveat Emptor* in such Case to have either an Express Warranty or a good Title; so it is in the Case of Lands, whether the Seller be in or out of Possession; for the Seller cannot have them without a Title, and the Buyer is at his Peril to see it.

1 *Salk.* 210.  
*Medina veri*  
*Stoughton*,  
for selling  
false Bills of  
Credit.  
*Vide Stile*  
343, 346.  
*Cro. Jac.* 197.

If the Plaintiff declares, That whereas Queen *Elizabeth* was seised in Fee of the Advowson of the *Vicarage* of *S.* whereto the Tithes in *S.* did belong, and that the Defendant upon the Ninth of *June*, did affirm himself to be lawful Incumbent thereof, and that he had Right to the Tithes from the Death of *J. N.* and after upon the Sixteenth of *June*, the Plaintiff having a Communication with the Defendant about his buying of the Defendant the said Tithes till *Michaelmas* following, the Defendant *ad tunc sciens* that he had no Right thereto (the Defendant not having being instituted, &c.) yet *falso & deceptive* sold them to the Plaintiff for 30*l.* and alleges *in factis*, that *J. N.* was after presented, &c. and took the Tithes, &c. the Action does not lie; for there was no Warranty that the Plaintiff should enjoy them, and this Affirmation also was in Time precedent to the Sale.

*Cro. Jac.* 196.  
*Robt* and  
*Vaughan*.  
*Moor* 467.  
*S. C.*

So if the Plaintiff declares that upon a Communication between the Plaintiff and the Defendant, for the Purchase of a certain Term for Years, which the Defendant then had in certain Lands, the Defendant *asseruit* to the Plaintiff, that the said Term was worth 150*l.* to be sold; to which the said Plaintiff *fidem adhibens* did give the Defendant 150*l.* for the same; and that after the Plaintiff, offering the said Term to Sale, could not get so much for the same, the Action does not lie; for here was only a naked Affirmation of the Defendant, that the Term was worth so much; and it was the Plaintiff's Folly to believe him.

*Yelv.* 20.  
*Harvey* and  
*Young*.

But if on a Treaty for the Purchase of a House, the Defendant affirms the Rent to be 30*l. per Ann.* whereas in Truth it is but 20*l.* and thereby the Plaintiff is induced to give so much more than the House is worth, the Action (b) lies; for the Value of the Rent is Matter that lies in the private Knowledge of the Landlord and Tenant; and if they affirm the Rent to be more than it is, the Purchaser is cheated, and (c) ought to have a Remedy for it.

1 *Salk.* 211.  
*Rifney* and  
*Selby*.

(b) 1 *Lev.*  
102.  
1 *Sid.* 146.  
1 *Keb.* 510,  
518, 522.

*S. P.* resolved; (c) But if *A.* possessed of a Term for Years, offers to sell it to *B.* and says that a Stranger would have given him 20*l.* for this Term, by which Means *B.* buys it, though in Truth *A.* was never offered 20*l.* no Action on the Case lies, though *B.* is hereby deceived in the Value. 1 *Roll. Abr.* 91, 101. 1 *Sid.* 146. *S. P.*

## 2. Where Case will lie for a Fraud on an express Warranty.

*Cro. Jac.* 4. If *A.* being a Goldsmith, and having Skill in Jewels and Precious Stones, hath a Stone which he affirms to be a Bezoar-Stone, and sells between *Candler* and *Lopus*, upon a Writ of *Error in Cam'* *Scacc'*, and

the first Judgment reversed accordingly by all the Justices and Barons, *cont. Anderson. Vide Dyer* 75. in *Margin*, *S. C.* cited, as adjudged in *B.R.* and they said that the Opinion of *Popham* was, That if I have any Commodity (be it *Victuals*, &c.) that is corrupt, and knowing it to be so, sell it for good, and affirm it to be so, an Action lies for this Deceit; but though it be corrupted, if I know it not, tho' I affirm it to be good, yet no Action lies, unless I warrant it to be so. *Cro. Jac.* 469. *S. C.* cited as adjudged in *B.R.* 2 *Rol. Rep.* 5. *S. C.* cited, and said that the Judgment was reversed, because it was not pleaded that he knew it to be false at the Time of the Sale. *Vide postea* Letter (*F*) where *Victuallers*, &c. acting contrary to the Duty of their Calling, shall be charged, and Heads of *Inn-keepers* and *Carriers*, &c.

11 *H. 6.* 18. But if a Man (*a*) sells a Tun of Wine, and warrants it to be found  
*F. N. B.* 94. and not corrupted, if it be corrupted an Action upon the Case (*b*) lies.  
*S. P.*

*Poph.* 143. *S. P.* cited 1 *Rol.* *A.* sells Sheep, and warrants that they are found, and shall continue so for a Year after, this is good, and shall bind him. *Vide* 1 *Danv. Abr.* 188. 96. (*a*) This Action lies, though he hath not paid for it; for the other may have Debt for his Money. *Bro. Guarranty* 59. (*b*) In Case the Plaintiff declared upon a Promise to deliver to him ten Pots of good and merchandisable Pot-Ashes, and that the Defendant had delivered ten Pots not merchandisable, but mix'd with Dirt, &c. Further that the Defendant venditit to the Plaintiff ten other Pots of Ashes, warrantizing, &c. that they were good and merchandisable, but had delivered them bad, and not merchandisable, knowing them to be naught; on Demurrer, that Matters of Fraud and Contract could not be joined, the Court inclined for the Plaintiff. 1 *Vent.* 365. *adjernatur.* Note; It seems now settled, that an Action for a Fraud on the Sale of Goods, and on a Warranty of the same Goods may be joined. *Vide* Title *Actions in General.*

(*c*) 11 *H. 6.* 18. So (*c*) if a Man sells a Horse, and (*d*) warrants him to be Sound of his Wind and Limbs, if he be not, an Action upon the Case lies.

1 *Rol. Abr.* 96. *S. C.* (*d*) But without such Warranty no Action lies. 20 *H. 6.* 35. *F. N. B.* 94. *S. P.* *Bridg.* 127. *S. P.* 1 *Rol. Abr.* 90. *S. P.*

1 *Rol. Abr.* 96. If a Man, knowing his Horse to be Lame and Foundred, offers him to me to buy, and warrants him to be found, &c. relying upon which (*e*) But I buy him, by which I am deceived, (*e*) though the Warranty here was before the Sale, yet because this was the Cause of the Sale, an Action upon the Case lies thereupon.

*Quere*, for it is a general Rule that the Warranty must be made at the Time of the Sale. *Vide Cro. Jac.* 4. 196, 197, 630. nor can it be made after; *per Bridg.* 127. *Godb.* 31. *vide* 1 *Salk.* 211.

1 *Rol. Abr.* 99. *adjudg'd.* If *A.* sells a Horse to *B.* and warrants him to be Sound of Wind and Limb, and Clean of Legs, whereas he well knows that he is Shoulder-pitch'd, and has Splints upon his Legs, an Action lies against him upon this Warranty; (*f*) for these Imperfections are not subject to the View of an unskilful Person otherwise.

*Quere* of the Warranty of a Horse that is blind. 2 *Rol. Rep.* 5. *Bridg.* 128. Diversity where he has no Eye, and where a counterfeit false and bright Eye; and *vide Cro. Jac.* 387. 3 *Bulst.* 95. 3 *Keb.* 101. *Bro. Deceit* 29. *Fitz. Deceit* 23.

1 *Salk.* 211. The Plaintiff declared that the Defendant sold him a Horse such a *Lutesfeld v. Day* and Place, & *ad tunc* & *ibidem* warrantizavit equum predict' to be found Wind and Limb, whereupon he paid his Money, and avers the

Horse

Horſe had but one Eye, &c. on Plea *Non warrantizavit*, the Plaintiff had a Verdict; and it was objected in Arrest of Judgment, 1. That the Want of an Eye is a viſible Thing, whereas the Warranty extends only to ſecret Infirmities; but to this it was answered, and reſolved by the Court that this might be ſo, and muſt be found to be ſo, ſince the Jury have found that the Defendant did warrant. 2. As the Warranty is here ſet forth, it might be at a Time after the Sale, whereas it ought to be Part of the very Contract; and therefore it is always alledged *warrantizando vendidit; ſed non allocatur*; for the Payment was afterwards, and it was that complicated the Bargain, which was imperfect without it.

(F) Of Actions on the Case for Injuries to a Man's Person, Property, Right or Privilege.

If *A.* rides an unruly Horſe in *Lincoln's-Inn-Fields*, (being a Place much frequented by the King's Subjects, and unfit for ſuch Purpoſe) to break and tame him, and the Horſe breaks from *A.* and runs over *B.* and grievouſly hurts him, &c. *B.* ſhall have an Action againſt *A.* for though the Miſchief was done againſt the Will of *A.* yet ſince it was his Fault to bring a wild Horſe into ſuch a Place, where Miſchief probably might enſue, *A.* muſt answer for the Conſequence of ſo ill an Act.

1 Vent. 295.  
2 Lev. 172.  
3 Keb. 65.  
S. C. and  
ſeveral Caſes  
cited of  
Actions  
brought for  
Injuries  
done to a  
Man's Per-

ſon by wild and ungovernable Animals. Vide 1 *Lutw.* 90. An Action for keeping a mad Bull which gored the Plaintiff, &c. 2 *Salk.* 638. vide.

So if a Man lays Logs of Wood croſs a Highway, though a Perſon may with Care ride ſafely by, yet if by Means thereof my Horſe ſtumbles, and thereby I am wounded or hurt, I ſhall have an Action on the Caſe.

1 *Rol. Abr.*  
88. and vide  
Head of Nu-  
ſance and Poſt  
Letter (G)

For an Injury accruing to a Man in his (a) Real Eſtate of Freehold or Inheritance, Caſe will lie; as if *A.* levies a Fine, ſuffers a Recovery, acknowledges a Judgment, Recognizance, Statute Merchant or Staple, in my Name, I may have an Action.

1 *Rol. Abr.*  
100.  
(a) If my  
Feoffee in  
Truſt for

me refuses to execute the Truſt, I have no Remedy but in Chancery; but if he infeoffs another, an Action on the Caſe lies. 1 *Rol. Abr.* 108. 2 *Vent.* 27. So if the Officer refuses to Inrol a Bargain and Sale. 1 *Sid.* 209. 2 *Bulſt.* 336.

If a Parſhioner ſets out his Tithes of Hay duly, and requires the Parſon to carry them off his Land, but he does not carry them off in a convenient Time, *per quod* his Graſs where the Hay lies is impaired by the Hay's lying upon the Graſs, an Action upon the Caſe lies againſt the Parſon.

1 *Rol. Abr.*  
109.  
Vide for this  
Head of  
Tithes, and  
for Treſpaſ-  
ſes on Land, Title Treſpaſs.

If a Man that ought to incloſe againſt my Land, does not incloſe, *per quod* the Cattle of his Tenants enter into my Land and do Damage to me, I may have an Action on the Caſe againſt him.

1 *Rol. Abr.*  
105.

If *A.* being a Maſon, and uſing to ſell Stones, is poſſeſſed of a certain Stone Pit, and *B.* intending to diſcredit it and deprive him of the Profit of the ſaid Mine, impoſes ſo great Threats upon his Workmen, and diſturbs all Comers, threatening to mayhem and vex them with Suits, if they bought any Stones, ſo that ſome deſiſt from working, and others from buying, &c. *A.* ſhall have an Action upon the Caſe againſt *B.* for the Profit of his Mine is thereby impaired.

*Cro. Fac.* 567.  
2 *Rol. Rep.*  
162. S. C.

If a Man menaces my Tenants at Will of Life and Member, *per* 1 *Rol. Abr.* 107, 108. *quod* they (a) depart from their Tenures, an *Action upon the Case* lies (a) But the against him. Threatning, without their Departure is no Cause of Action. 1 *Rol. Abr.* 108. where a Copyholder may have Case against his Lord for cutting the Tops of Trees; for not admitting on a Surrender; for not holding a Court. *Vide* Head of Copyhold.

If a Commoner, who hath a Right by Grant or Prescription, be disturbed by the Lord or a Stranger, in the Enjoyment thereof, he may have an *Action on the Case*. But for this *vide* Head of Common, and 1 *Danv.* 174. and 4 *Mod.* 175. 6 *Mod.* 19. *Skin.* 214. 1 *Lutw.* 74, 101.

If *A.* hath a Mill by Prescription which he hath used to repair, and at which all the Tenants of the Manor, Time out of Mind, have ground their Corn and Grain spent in the Houses of the Tenants of the said Manor, if one of the Tenants grinds his Corn elsewhere, *A.* shall have an *Action on the Case* against him. So if *A.* by his Prescription has a Mill on his own Land, and *B.* erects a Mill on his own Land, if by this *A.*'s Mill receives any Prejudice by having the Water stopped or drawn away, or having too great a Quantity of Water run on his Mill, by which it cannot grind as much as it used to do, *A.* shall have an *Action on the Case* against him. For this *vide* Custom and Prescription, and 1 *Rol. Abr.* 107. 1 *Danv. Abr.* 5, 6. and *Carth.* 117. *Comb.* 9. *Skin.* 56, 175, 316, 389.

For Injuries to a Man's House or Habitation, an *Action on the Case* will lie; as if *A.* hath the upper Room, and *B.* the under Room, and *A.* neglects to cover his upper Room, *B.* may have an *Action on the Case* against *A.* and thereby compel him to cover his upper Room for the Preservation of the Timber of the under Room. *Keilw.* 98. *b.* *F. N. B.* 127. 2 *Leon.* 95. So *A.* may enforce *B.* to support his under Room for the Preservation of the upper Room of *A.* *Keilw.* 98.

If the Plaintiff declares that *J. S.* being seised of a Messuage in Fee, 23 *April*, 32 *Eliz.* did demise to the Plaintiff a Cellar from Week to Week, &c. and that after, *viz.* 29 *July*, 32 *Eliz.* *J. S.* did demise to the Defendant a Ware-house, being right over the said Cellar, to hold from Week to Week, &c. and that the Plaintiff being possessed of the Cellar, and the Defendant of the said Ware-house, and the Plaintiff then having in the said Cellar three Buts of Sack, of the Value of 40*l.* &c. the Defendant 30 *July*, 32 *Eliz.* so great a Weight of Goods in the said Ware-house did place, and thereby did so over-burden the Floor of the said Ware-house, that by Force and Weight of the said Burthen, the said Floor, the said 30. *July* broke, and the said Goods did fall upon the said Buts, and broke the same, &c. and the Defendant pleads that a short Time before, the Floor as great Weight as this did sustain, and the Warehouse was let to him to lay in Thirty Tun Weight, and that he had placed there but Fourteen Tun; and that what Damage to the Plaintiff had happened, was by Reason that the Floor at the Time, as also before the Lease to him made, was rotten, and the Wall whereupon the Floor lay so decayed, that the said Floor broke, &c. for Want of Reparations before the Lease to him made; the Plaintiff shall have his Judgment; for it is expressly alledged that the Floor, by the Weight of the said Merchandise did break, and that is not traversed but answered argumentatively only, *viz.* that it did bear more before, *ergo*, &c. and though it was ruinous when the Defendant took it, yet if it fell by Reason of any Weight by the Defendant there placed, he must answer for the Consequence thereof. *Poph.* 46. *Edwards* and *Halinder*, adjudged in the Court of *Exchequer*, and affirm'd in *Cam' Scacc'* 2 *Leon.* 93, 94, *S. C.*

It was formerly held, That if a Fire broke out accidentally in a Man's House, and raged to that Degree as to burn his Neighbour's, that he in whose House the Fire first happened, was liable to an *Action on the Case* on the general Custom of the Realm, *Quod quilibet ignem suum salvo, &c.*

For the Cases on this Head, vide 1 Danv. Abr. 10, 11. and 1 Salk. 13, 19. Carth. 202, 425. 1 Lutw. 33

“ But now by the 6 *Ann. cap. 31.* it is enacted that no Action, Suit or Process whatsoever shall be had, maintained or prosecuted against any Person in whose House or Chamber any Fire shall accidentally begin; or any Recompence be made by such Person, for any Damage suffered or occasioned thereby, &c. *provided* that nothing contained in the Act shall extend to defeat or make void any Contract or Agreement made between Landlord and Tenant.

If the Plaintiff declares that he was and yet is possessed of a Lease for several Years *ad tunc & adhuc ventur'* of and in a House, and that he demised the same to the Defendant for six Months, and that after the six Months expired, the Defendant being permitted to occupy the said House for two Months longer, pulled down the Windows, &c. this Action does well lie, in regard that the Plaintiff is chargeable over in an Action of *Waste*.

Cro. Car. 137. 1 Jones 124. S. C. adjudged.

If a Man hath an ancient House, and another builds a House so near his that his Windows are darkned, he may have an (a) *Action on the Case* against him.

9 Co. 58. Vide for this Title Nuisance, and

1 Danv. 203. Carth. 454. Comb. 480. 6 Mod. 116, 315. (a) So if a Man builds a House so near mine as to cause the Rain to fall upon my House. 1 Rol. Abr. 107. 2 Leon. 93. S. P.

As to the Torts and Injuries affecting a Man's Personal Property, and for which an *Action on the Case* is the proper Remedy, they are so many and so various in their Kinds, that they cannot well be laid together, I shall but set down some of them here, and such as may govern in like Cases.

If a Man razes the Name of the Obligor out of an Obligation, and in the room thereof puts in the Name of *J. S.* and after sues him upon this Obligation, *J. S.* may have an *Action on the Case*.

1 Rol. Abr. 100. For cheating with Dice

vide Cro. Eliz. 90. Co. Ent. 8. F. N. B. 95. Moor 776. For keeping a Dog, knowing him to be accustomed to bite Sheep. 1 Danv. Abr. 19. For using the same Mark which the Plaintiff hath used to set to his Clothes. Poph. 144. Cro. Jac. 471. 2 Rol. Rep. 28.

If *A.* takes my Cattle and drives them into *B.*'s Close, where they do *B.* such a Prejudice as subjects me to *B.*'s Action, I may have an *Action on the Case* against *A.*

1 Rol. Abr. 100. Lane 67.

If a Man lend or hire another's Horse, and for want of safe keeping the Horse dies, the Owner may have an *Action on the Case* to repair the Damage sustained by the Negligence of the Borrower. So if a Man lend another Sheep to Tath his Land, and by the Negligence of the Borrower they are drowned. So if a Man lends another a Horse, who puts him into a ruinous Stable, that tumbles in upon him and kills him, or if he over-rides a Horse lent or hired to him, in all these Cases an Action will lie; but if the Stable had fallen by a violent Tempest, or the Horse died of any Disease, then had the Hirer or Borrower been excused.

Cro. Eliz. 777, 784. Owen 52. 5 Co. 14. Dyer 121. Godb. 72. Doct. & Stud. 128. 1 Lutw. 98.

If *A.* obtains a Judgment in Debt against *B.* as Executor to his Father, and thereupon *A.* takes out a *Fieri facias*, but before the Sheriff can execute it *B.* *secrete & fraudulenter* sells, removes and disposes of all the Testator's Goods, so that the Sheriff is forced to return *nulla bona*, &c. an *Action upon the Case* lies against *B.* for the Sheriff could not

Godb. 285. 2 Rol. Rep. 312. 1 Mod. 286.

not

not return a *Devastavit*; and if this Action does not lie, the Party is without Remedy.

*Carth.* 3, 4. If *A.* declares that he had obtained Judgment against *J. S.* for 100 *l.* and that 100 *l.* more was due to him for Rent arrear, that he intending to take out Execution, and also to bring an Action of Debt for the Rent in arrear (the said *J. S.* being then possessed of Goods and Chattels sufficient to discharge the Whole) which being very well known to *B.* (the Defendant) he, by Covin conspiring with the said *J. S.* to defeat him of his Execution, and of recovering of the Money for Rent arrear, procured the said *J. S.* to confess a Judgment for 160 *l.* (of such a Term) to one *J. N. ubi revera* the said *J. S.* did not owe any Thing to the said *J. N.* and that he sued out Execution on this feigned Judgment, by Virtue whereof he seised all the Goods and Chattels of the said *J. S.* which he esloined to Places unknown, and converted to his own Use, by reason whereof the Plaintiff lost his Debt; the Action well lies.

*Smith* and *Tonstall*, adjudged on Demurrer in *B. R.* and affirmed in the House of Peers.

Also for Injuries done to a Man with respect to his Wife, as by having Criminal Conversation with her; with respect to his Child, as by inticing him away, or by inticing away his Servant; or if my Servant without Cause or Licence departs from my Service, and *J. S.* knowing him to be my Servant, retains him in his Service and so keeps him; an Action lies.

*1 Leon.* 240.  
*Noy* 10, 106.  
*Kelw.* 180.  
*2 Lev.* 63.

So if a Man digs a Ditch in the Highway, into which my Servant falls and breaks his Thigh, by which I lose his Service for a long Time, I shall have an *Action on the Case* against him (*a*) for this Loss of Service.

*1 Rol. Abr.* 88.  
*2 Bulst.* 334.  
*1 Rol. Rep.* 124.

(*a*) So for digging a Pit *per quod J. S.* for whose Life I hold Lands, was drowned. *1 Keb.* 847.

Also *Actions on the Case* are proper for Injuries in disturbing one in the Enjoyment of any Right or Privilege he is intitled to; as if the Beadle of an Hundred ought by Virtue of his Place, to have by Prescription certain Gallons of Beer of every Brewer at a certain Price, if the Brewers will not suffer him to have it accordingly, an Action upon the Case lies.

*Vide Assump- sit.*  
*1 Rol. Abr.* 106.

If a Man ought to have Toll upon the buying of Cattle in a Market, if one buys Cattle and does not pay the Toll, an *Action on the Case* lies against him.

*7 H. 4.* 44. *b.*  
*9 H. 6.* 45. *b.* *Fitz. Action* against him.  
*sur le Case* 26.  
*S. C. Bro.* 37. *S. C.* *1 Rol. Abr.* 106. *S. C.* So if Persons coming to Market are disturbed, by which I lose my Toll, an Action on the Case lies. *11 H. 4.* 47. *b.* *1 Rol. Abr.* 106. *1 Vent.* 26, 28. or if upon a Sale in a Fair a Stranger disturbs the Lord in taking the Toll, an Action upon the Case lies. *9 H. 6.* 45. *1 Rol. Abr.* 106.

If my Tenants within a certain Seignory, ought Time out of Mind to go free to every Market and Fair, to sell and buy Goods without Payment of Toll, and one takes Toll of my Tenants in his Fair or Market, an *Action on the Case* lies against him.

If a Man disturbs my Steward in holding my Leet, an *Action on the Case* lies against him.

So if the Lord's Servants are disturbed in collecting his Tithes. *19 R. 2.* 52. *1 Rol. Abr.* 107. So if a Stranger who has no Right, holds a Court in my Manor, and by Distresses, &c. so impoverishes my Tenants that they cannot pay their Rents, an Action on the Case lies. *13 H. 4.* 11. *1 Rol. Abr.* 106.

If a Man hath the Affize of Bread and Beer, Fines, Amerciaments, and other Matters of Frankpledge, by the King's Grant, and he distrains

*38 H. 6.* 9. *b.*  
*1 Rol. Abr.* 106. If in an Action on the Case the Plaintiff declares that *Q. Eliz.* did grant to him the Office of Steward of the Manor of *D.* and that the Defendants *eindem* the Plaintiff *ad exercend' dictum officium & vadia, feoda, commoda & proficua* thereto belonging, *habere & percipere vi & armis impediaverunt, &c.* this is a good Declaration, notwithstanding the *Causa Causans*, *viz.* the Interruption of the Plaintiff to exercise the Office, is laid to be done *Vi & Armis*, for the *Causa Causata*, *viz.* the Loss of the Fees is the Point of the Action. *9 Co.* 50. *4 Leon.* 243 *Hob.* 180. *Palm.* 46. *2 Brownl.* 332. *Cro. Car.* 377. *2 Rol. Rep.* 139.

for an Amerciament, and a Stranger makes a Rescue, an *Action upon the Case* lies against him.

If the Sheriff of the County, or his Bailiff, executes a Writ in a Fran-<sup>9 Co. 28.</sup>chise or Liberty of one, who by Grant or Prescription hath the Execu-<sup>1 Vent. 399.</sup>tion and Return of Writs, an *Action on the Case* lies. <sup>1 Show. 17.</sup>

We are next to inquire for what Wrongs and Injuries committed by Officers and Ministers of Justice, and others, acting contrary to the Duty the Law lays on them, with respect to their Trades and Callings, an *Action on the Case* will lie. And therefore,

Comb. 198.

1. *Where an Action on the Case will lie against Officers and Ministers of Justice.*

It seems agreed, that (a) no Action on the Case lies against a Judge of a Court of Record for a wrong Judgment, and that if it appears to have been an (b) Error of his Judgment, he is subject to no Prosecution whatsoever.

9 H. 6 60. b.  
1 Rol. Abr. 92.  
Palm. 243.  
Vide 1 Hawk.  
P. C. 192.  
2 Hawk. P.

C. 4. 85. (a) Not against a Judge of an Inferior Court for taking insufficient Bail. *Hutt.* 120. An Action lies against a Judge of the Stannary Court, for refusing a Plea which by Law he ought to have accepted. 2 *Rol. Rep.* 498. per *Jones* Just. *ceteris absentibus*; but for this vide Title *Bills of Exceptions*; (b) but for Corruption they are punishable, the Judges in *Westminster-Hall*, properly by Impeachment in Parliament. 1 *Hawk. P. C.* 192. Inferior Judges by Information, Attachment, &c. for which vide the Heads, also the Head of *Officers*; and 1 *Salk.* where per *Holt*, the Mayor of *Hereford*, for giving Judgment for his own Lessee in Ejectment, was laid by the Heels.

If the Plaintiff declares that he affirmed a Plaint of Debt in the Court of B. against C. and thereupon caused C. to be arrested, and that the Defendant (being the Mayor, Town-Clerk and Gaoler of B.) did conspire to delay the Plaintiff in his Suit; and in Peril of his said Debt had let C. go at large, without taking any Bail; this Action does lie, for the not taking of Bail is not the Cause of the Action, but the Conspiracy.

1 Leon. 189.

If the Bailiffs in *ancient Demesne* hold Plea after the Record is removed in *Bank*, by which the Tenant loses his Land; there by Recovery he may have an Action upon the Case against him.

14 E. 3. 39.  
F. N. B. 93.  
Like Point.  
1 Rol. Abr.

92. S. P. Action against the Under-Steward of a Court-Baron, for Proceeding after a *Corpus cum Causa* delivered. 3 *Leon.* 99. adjudged. Against a Clerk that had the Custody of a Record, and suffered it to be altered. *Raym.* 53. 1 *Sid.* 77. 1 *Keb.* 28, 346. Vide 1 *Lev.* 64.

If an Escheator returns a false Office, contrary to what was found by the Jury, in Prejudice of the Party, an Action upon the Case lies against him; for in this he is barely an Officer and not a Judge.

4 Inst. 226.  
9 H. 6. 60.  
1 Rol. Abr. 92.

If my Servant is robbed, and he goes to a Justice of Peace and prays to be examined touching the Robbery, and the Justice refuses to examine him, so that I am thereby damnified, and cannot proceed against the Hundred, I shall have an Action against the Justice; for the Examination by him in this Case is not as a Judge, but as a particular Minister by the \* Act appointed for this Purpose.

1 Leon. 323.

\* Viz. Stat.  
27 Eliz. c. 13.  
of the Peace.

But for this vide Title *Justices of the Peace.*

(c) If a Sumner of the Ecclesiastical Court falsely and maliciously *colore Officii sui* of a Sumner, to the Intent to scandalize *J. S.* with the Fame of Incontinency with *A.* and to put him to Expence in the Ecclesiastical Court, cites *J. S.* to appear for Incontinency with *A.* upon which *J. S.* appears, and is there charged by the Judge with it, and upon his Answer discharged, by which he is put to Expence; *J. S.* may have an Action upon the Case against the Sumner upon such a Declaration, though he be an Officer of the Ecclesiastical Court, in as much as it is alledged

1 Rol. Abr. 94.  
Carliam and Mill.  
Cro. Car. 291.  
S. C.  
1 Jones 312.  
S. C.  
(c) Like Point in an Action against

Churchwardens for such a Presentment. *Cro. Car.* 285. 1 *Jones* 305. S. P. 1 *Rol. Abr.* 112. pl. 9. Like Point against Churchwardens. 2 *Mod.* 52. Like Point. 1 *Vent.* 86. 1 *Sid.* 463. 1 *Lev.* 92. Like Point adjudged.

Churchwardens for such a Presentment. *Cro. Car.* 285. 1 *Jones* 305. S. P. 1 *Rol. Abr.* 112. pl. 9. Like Point against Churchwardens. 2 *Mod.* 52. Like Point. 1 *Vent.* 86. 1 *Sid.* 463. 1 *Lev.* 92. Like Point adjudged. that

that he cited him falsely and maliciously *& colore Officii*, it shall be intended that he did it without Process.

(x) 3 Bullst.  
212. per Coke  
Ch. Jult.

Moor 432.

Like Point *per Curiam*. (b) So if I shew *J. S.* to the Sheriff, and give him a Writ to arrest him, and he does not. *Cro. Eliz.* 873. *Per Walmsly*. (c) But if upon a *Capias Utlagatam* before Judgment, the Sheriff neglects to extend or seize Goods, *&c.* this is the King's Loss, and the Party shall have no Action, though it was objected, the Sheriff extending, *&c.* would have been a Means to force the Defendant to appear; but it was said, That if it had been shewn that the Sheriff might have taken his Body, *&c.* there would have been more reason to support the Action. 1 *Vent.* 90.

For this *vide*  
Head of She-  
riff and Bail  
in Civil Ac-  
tions.

If a Sheriff makes a false Return, as if he return a *Cepi Corpus* and *Paratum habeo*, or *Languidus*, when the Party is at large without Bail, an Action on the Case lies against him for the false Return; but if he had taken Bail, though the Party does not appear at the Return of the Writ, yet no Action lies against the Sheriff; for by the 23 *H. 6.* the Sheriff is obliged to take Bail.

26. *Aff.* 48.  
1 *Rol. Abr.* 92.

But to what  
Actions the

Sheriff is liable,

*vide* Head of Sheriff; (d) for the Judgment should stand, and the Party is put to his Remedy against the Sheriff. *Moor* 349. *Bro. Action sur Case* 5. *Goulds.* 128.

1 *Rol. Rep.* 47.  
But for this  
*vide* Head of  
Bankrupts and  
Gaoler.

1 *Rol. Rep.* 78.  
1 *Rol. Abr.* 94.  
*Vide* Head of  
Attachment  
and Bailiff.

Latch 159.  
Adjudged  
upon a Writ  
of Error up-  
on a Judg-  
ment in  
Cheynny  
Court.

1 *Rol. Abr.* 93.  
2 Bullst. 266.  
*Moor* 835.  
12 *Co.* 127.  
1 *Rol. Rep.* 63.  
S. C. adjudg  
ed between  
Powle and  
Godfrey.

1 *Sid.* 276.  
1 *Keb.* 947.

11 *Co.* 99.  
*James Baggs*  
*Case per Cu-  
riam.* So an  
Action lies against the Mayor and Commonalty of *L.* for making a false Certificate of a Custom. *Hob.* 87. So against the Surrogate of a Bishop, who makes a false Return as to the Custom of chusing Church wardens. 3 *Lev.* 362. *Vide Carth.* 227. 1 *Salk.* 428, 430. *Vide Title Mandamus.* And Note; That regularly an Action on the Case is the proper Remedy for all false Returns.

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2

If at the Petition of *A.* and the rest of the Creditors of *B.* a Commission upon the Statute against Bankrupts is issued out against *B.* and thereupon the Commissioners sit, and offer Interrogatories to *C.* and he refuses to be examined, and by them is thereupon committed to Prison, and the Gaoler suffers him to escape, *A.* may have an Action against the Gaoler for this Escape.

If a Warrant upon a *Fieri Facias* to levy a Debt at the Suit of *J. S.* be directed to an Under-Bailiff of a Liberty, and he by Virtue thereof levies the Debt, and after conceals the Writ and makes not any Certificate thereof, an Action on the Case lies against the Under-Bailiff, because he has done a Personal Tort.

So if a Distress at the Suit of *A.* issues out of the Court of *C.* directed to *J. S.* (who is not the usual Officer) to distrain the Cattle of *B.* *&c.* or that *B.* should find Pledges to appear the next Court; and thereupon *J. S.* distrains the Cattle of *B.* and after re-delivers them to *B.* without taking sufficient Security, *&c.* and *B.* does not appear, *&c.* an Action lies against *J. S.* notwithstanding he is no known Officer, but *hac vice* only.

If a Sumner of the Ecclesiastical Court, upon a Premonition directed to him by the Ecclesiastical Court, to warn *J. S.* to pay certain Costs awarded against him by the Court, returns to the Court, That he hath warned the said *J. S.* by which the said *J. S.* is excommunicated, where in Truth he never warned him; *J. S.* may have an Action upon the Case against him for this false Return, though he be an Ecclesiastical Officer; for the Excommunication is a Temporal as well as a Spiritual Disadvantage, for during its Continuance he cannot bring an Action, and is liable to an *Excommunicato Capiendo*.

If a *Fieri Facias de bonis Ecclesiasticis* of *J. S.* be directed to the Bishop of *E.* and he returns *quod nulla habet bona Ecclesiastica*, which is false, an Action on the Case lies against the Bishop for this false Return.

If upon a *Mandamus* to restore *J. S.* to his Place of a Burgefs of *P.* *vel causam nobis signif.* the Mayor, *&c.* return a good Cause, the Matter of which is false, an Action lies for the false Return.

Action lies against the Mayor and Commonalty of *L.* for making a false Certificate of a Custom. *Hob.* 87. So against the Surrogate of a Bishop, who makes a false Return as to the Custom of chusing Church wardens. 3 *Lev.* 362. *Vide Carth.* 227. 1 *Salk.* 428, 430. *Vide Title Mandamus.* And Note; That regularly an Action on the Case is the proper Remedy for all false Returns.

If the Plaintiff declares, that within the City of London there is an ancient Bridge, and that by Custom of the said City two Officers to look after it, called *Bridge-Masters*, by the Citizens at a Common Hall assembled have been yearly chosen or continued; and that if one of them within the Year hath died, another for the Remainder of the Year hath always been chosen as aforesaid, and that there are certain Fees and Profits belonging to the said Office; and that *A.* and *B.* were elected to this Office, that *A.* during his said Year died, and upon a Hall, by the Defendant (being then Lord Mayor) called for the Election of a Bridge-master in the Place of *A.* then and there the Plaintiff, and one *J. S.* as Competitors, stood for the said Office; and thereupon a Question did arise, Who had the greater Number of Electors? And the Plaintiff did aver his Number to be the greater; and thereupon did request the Defendant, that according to the Custom they might go to the Poll, but the Defendant did refuse to number the Polls, and made Proclamation that the Electors should depart, and discharged the Court, and *J. S.* was sworn; *per quod* the Plaintiff lost the Profit of the Place, &c. this Action lies as well for this (*a*) injurious Prevention of him in obtaining the Office, as for an Hindrance of him in the Execution thereof; for *qui destruit medium destruit finem.*

1 Vent. 25, 26. Between Turner and Sir Samuel Sterling, adjudged *per totam Curiam*, cont' Vaughan, and 1 Vent. 206. S. C. upon a Writ of Error in B. R. affirmed *per totam Curiam* 2 Lev. 50. S. C. And there the Custom was laid, that if the Electors were so divided, that the Plurality could not be known by

the View, the Mayor ought to grant the Poll, and that the Electors were so divided, &c. And adjudged *per Cur' prater Vaughan*, that the Action lay; though it was not averred that he had been elected if the Poll had been granted; for the Mayor did not his Duty, and the *per quod* he lost the Profits of his Place is sufficient after Verdict. (*a*) If upon a Writ *de Coronatore eligend'* the Sheriff will not return him Coroner that is chosen by the major Part, an Action lies. 2 Vent. 26. Vide 2 Sid. 168, 169, &c. 3 Keb. 664, 859. Diversity between an Office of Government and an Office of Profit.

*A.* declares that the King's Writ issued and was delivered to the Sheriff of *Bucks*, for Election of Members of Parliament in his County; that the Sheriff made out his Precept to the Defendants, being Constables of the Borough of *Aylesbury*, for the Election of two Burgesses for that Borough, which was delivered, and the Burgesses duly assembled to chuse, &c. and that the Plaintiff being duly Qualified, &c. and ready to give his Voice for *L.* and *M.* to be Burgesses, &c. the Defendants knowing the Premises, maliciously obstructed him, and would not allow or receive it, and that without his Voice two Burgesses were chosen; it was adjudged after a Verdict for the Plaintiff in *B. R.* by three Judges against *Holt*, Ch. Just. That the Action did not lie; their chief Reasons were, That this was a Parliamentary Offense, and properly (*b*) inquirable there; that to determine it here, might occasion a Clashing of Jurisdictions; that it did not appear that the Party had suffered any Injury; that to allow of such Actions would create a Multiplicity of Actions, to the great Prejudice of Officers: And *per Gould*, Justice, the Officer is a Judge, and therefore not liable to an Action; and *per Powis*, Justice, he is *Quasi* a Judge, and therefore has a distinguishing Power who to admit and who to refuse.

1 Salk. 20, 21, &c. 6 Mod. 45, &c. *Abby v. White & al'*, adjudged by three Judges contra *Holt*, Ch. Just. who held, That for every Injury an Action lay; that this was an Injury done the Plaintiff, as it deprived him of the greatest Privilege a Subject has, which is that of consenting to those

Laws by which he is to be bound; that the Parliament's having a Jurisdiction is no Objection, especially in this Case, where the Grievance is, that the Party is not represented; that the Officer is neither a Judge, nor *Quasi* a Judge, that the Multiplicity of Actions is no Objection; for if a Man will multiply Wrongs, it is but reasonable that Actions should be multiplied, &c. And note; The Judgment was reversed in the House of Lords, according to *Holt's* Opinion: *Trevor*, Ch. Just. and *Price* and 16 Lords concurred with the Judges of *B. R.* the rest of the Judges and 50 Lords concurred with *Holt*. (*b*) Vide *Lutw.* 88. *Farest.* 15. 2 Salk. 502, 504, 505. That no Action on the Case will lie for a false Return of a Member of Parliament; but for this *vide* Court of Parliament.

2. Where Case will lie for Torts and Injuries committed by Persons contrary to the Duty of their Trades and Callings.

If a Man (a) delivers Goods to a (b) common Carrier, to carry them to a certain Place, if he loses them an Action upon the Case lies against Title Carrier, him; for by the common Custom of the Realm he ought to carry them and Head of safely.

Trover and

Conversion. (a) An Action lies against a Ferryman that refuses to carry Passengers. *Hard.* 163. Vid. a Special Declaration against a Letter-Carrier, for the Non-delivery of a Letter delivered out to him at the General Post-Office. *Rol. Ent.* 103. (b) So against a Lighterman, Master of a Ship, or Owners. 1 *Rol. Abr.* 2. 2 *Lev.* 69. *Hob.* 25. That the Undertaking makes him a common Carrier. *Cro. Jac.* 262. 1 *Sid.* 245. Vide Head of Bailment. So if they are damaged. *Palm.* 523. So if he be robbed of them. 4 *Co.* 84. 2 *Sand.* 380.

So if an Inn-keeper refuses to entertain a Guest, on Pretence that his House is already full, an Action on the Case lies against him; so if the Goods of his Guest are stolen or lost in his House, &c.

But for this vide Head of

Inns and Inn keepers.

(c) *Kelw.* 50. If a Smith (c) refuses to Shoe my Horse, or if he Pricks him, an Action on the Case lies against him.

1 *Rol. Abr.* 91.

1 *Sand.* 312.

So if a Farrier kills my Horse with bad Medicines, or in curing of him so negligently takes no Care of him, an Action on the Case lies, without any expresse Promise.

1 *Rol. Abr.*

10, 92.

19 *H.* 6. 49.

That an Action lies against a Barber for Barbing the Plaintiff negligenter & inartificialiter. 2 *Bulst.* 333. Vide *Hob.* 211. 11 *Co.* 54. 1 *Sand.* 312. That before 5 *Eliz. cap.* 4. no Man was restrained to exercise any Trade, but he that performed it fully and insufficiently was answerable in an Action.

Vide Title

Attorney.

(d) *Winch.* 90.

(e) 1 *Rol.*

*Abr.* 95.

(f) *F. N. B.*

96. *Cro. Jac.*

695.

*Dyer* 362.

*Style* 426.

2 *Sid.* 171.

*Comb.* 2.

1 *Keb.* 89.

2 *Rol. Abr.* 724.

Where Case will lie against a Counsellor, vide 1 *Rol. Abr.* 10, 91.

*Cro. Jac.* 344, 695. 3 *Inst.* 122.

1 *Rol. Abr.* 10, 91.

(G) Where an Action on the Case will lie for a Nuisance, and therein of the Inconvenience of multiplying of Actions.

Vide Head of Nuisances. If it is clearly agreed, that for a common Nuisance, which is an Offence against the Publick, either by doing a Thing which tends to the Annoyance of all the King's Subjects, or by neglecting to do a Thing which the common Good requires, no Action on the Case will lie; for this would create a Multiplicity of Actions, one Man being as well intitled to bring an Action as another; and therefore in such Cases the Remedy must be by Indictment at the Suit of the King.

4 *Co.* 18. 9 *Co.* 113. 2 *Erownl.* 147. *Vaugb.* 341. *Cro. Eliz.* 664. 3 *Mod.* 294. *Carth.* 191, 451. 1 *Salk.* 15.

But if by such a Nufance I fuffer a particular Damage, as if by ftopping up a Highway with Logs, &c. my Horfe throws me, by which I am wounded or hurt, an Action lies.

*Co. Lit.* 56.  
*Cro. Jac.* 446.  
1 *Keb.* 847.  
2 *Jones* 157.

*Vide* the Authorities *supra*. *Vide Carth.* 191, 451. 1 *Salk.* 15. What fhall be fuch a Special Damage as will maintain the Action.

Alfo an Action lies for continuing a Nufance, as where for erecting a Nufance 2 *Die Febr.* the Defendant pleaded a Prior Action brought for erecting a Nufance 20 *Die Martii*, and a Recovery thereupon, and averred thefe to be the fame Nufance and Erection; and on Demurrer the Plaintiff had Judgment; for though he cannot have a new Action for the fame Erection, yet he may for the continuing the fame Nufance.

1 *Salk.* 102.

(H) Where an Action on the Case Will lie for a Conspiracy, and oppreffive Proceedings in Prosecutions and Suits at Law.

It feems agreed, that for (a) a falfe and malicious Profecution for any Crime, whether Capital or not, by which the Party may be put in Peril of his Life, fuffer in his Liberty, Reputation or (b) Property, an Action on the Cafe in the Nature of a Writ of Conspiracy lies; whether the Profecutor proceeded fo far as actually to exhibit an Indictment, on which the Party was acquitted or not.

*Vide Title*  
*Conspiracy.*  
1 *Roll. Abr.*  
112. feveral  
Cases  
to this Pur-  
pofe. (a) How  
far the Pro-

secution must be falfe and malicious, and without probable Cause of Suspicion, *vide Cro. Eliz.* 70, 134. 1 *Leon.* 107. *Kelw.* 81. *Mo.* 600. 1 *Danv.* 212. and 1 *Salk.* 15. where *per Holt*, Ch. Jutt. That this Action is not to be favoured, becaufe it deters Men from Profecuting; and therefore if the Grand Jury find the Bill, the Defendant fhall not be obliged to fhew a probable Cause, but it fhall lie on the Plaintiff's Side to prove an exprefs Rancour and Malice. *Quere*, How far the modern Practice of granting a Copy of the Indictment upon an Acquittal makes it neceffary that fuch Copy fhould be produced, in order to prove it a falfe and malicious Profecution. And *vide Carth.* 416. 5 *Med.* 394, 408. (b) It has been held, that for exhibiting an Indictment, which only affected a Man's Property, no Action lay; if the Indictment were insufficient, or the Bill found *Ignoramus* by the Grand Jury. *Vide* 1 *Danv.* 208, 209. Several Cases put *Pro* and *Con*. And 1 *Salk.* 15. *in Margine*, that in an Action on the Cafe for maliciously procuring H. to be indicted for exercising the Trade of a Badger without Licence, *per quod* he was put to great Expence, in which it was agreed that the Indictment was insufficient: It was refolved by *Parker*, Ch. Jutt. and the whole Court, upon great Consideration, That there was no reafon for this Diversity between a malicious Profecution upon a good Indictment and upon a bad one; and that this Action will lie as well for Damage by Expence, as by Scandal or Imprifonment, though the Indictment be insufficient. *Hill.* 12 *Ann.* *Jones* and *Gwin*.

If a Juftice of Peace *malitiofe* & *invidie machinans* *J. S. de bonis, nomine, fama* & *vita deprivare*, directs his Warrant to feveral Conftables to apprehend *J. S.* alledging in his faid Warrant, that *J. S.* was accused before him for ftealing of an Horfe; whereupon he is arrested and detained till he enters into Bond for his Appearance, whereas he was not accused, nor ftole fuch Horfe, an Action will lie; for though the (c) Juftice is excused when upon a falfe Accufation he fends out his Warrant, yet it is otherwife where he makes it out without any Accufation at all.

1 *Leon.* 187.  
*Cro. Eliz.* 150.  
S. C.  
(c) If a Ju-  
ftice of Peace  
procures  
fome Witnes-

ses to appear and give Evidence upon an Indictment, this is but his Duty; and though his Name was indorfed upon the Indictment to give Evidence, yet this made him no Profecutor, and fo no Action lies againft him for a malicious Profecution. 1 *Vent.* 47. 2 *Keb.* 572.

An Action on the Cafe lies againft Church-wardens, for that they falfly and maliciously, to the Intent to draw the Plaintiff within the Cenfures of the Ecclefiaftical Court for Adultery, prefented him there upon a Fame of living in Adultery with *A. S.*

*Vide* 1 *Roll.*  
*Abr.* 112.  
and 2 *Bull.*  
343. where  
Case will not

lie for an Ecclefiaftical Scandal.

Raym. 418. If *A.* was Church-warden of *B.* and at the End of the Year gave up  
 2 Jones 132. his Accounts to his Successor, and yet *A.* is falsely and maliciously cited  
 S. C. ad- by *D.* into the Ecclesiastical Court, to render an Account, and at the  
 judged; the Request of *D.* he is excommunicated for not rendering up his Account, an  
 Plaintiff de- Action lies against *D.* notwithstanding this Sentence was given by the  
 claring that Action Judge.  
 the Defen-  
 dant know-  
 ing the Plaintiff had before made up his Accounts, which were approved by the Parish, &c.  
 Vide Hard. 194, 195. S. C. and a long Argument.

1 Salk. 14. But it must be observed, that there is a great Difference between a  
 3 Lev. 200. false and malicious Prosecution by way of Indictment, and bringing a  
 Hob. 266. Civil Action; for in the latter the Plaintiff asserts a Right, and shall be  
 3 Leon. 138. amerced *pro falso clamore*, also the Defendant is intitled to his Costs; and  
 Cro. Jac. 432. therefore for commencing such an Action, though without sufficient  
 Grounds, no Action on the Case lies.

1 Sid. 424. But if the Plaintiff declares, that he being arrested in *Middlesex* at the  
 2 Keb. 546. Suit of the Defendant, and the Defendant intending to detain him in  
 1 Mod. 4. Prison, *falso & malitiose dixit* to the Sheriff of *Middlesex*, that the Plain-  
 1 Lev. 275. tiff owed him 500 *l.* requiring him to take Bail accordingly, *per quod* he  
 3 Lev. S. C. was detained in Gaol several Days; this Action lies, because of the Spe-  
 cited. cial Damage sustained by the Party on this false Affirmation.

1 Salk. 14. and agreed; but it is not enough to declare generally that he brought an Action against him *ex ma-*  
 S. C. cited, *litia & sine causa, per quod* he put him to great Charge, &c. but he must shew the Grievance Specially;  
 for this vide *Style* 379. 1 *Sand.* 228. 1 *Vent.* 12, 19, 86. 1 *Danv.* 196. In Case for maliciously hold-  
 ing to Bail, Declaration ought to set forth the Sum due and the Process Specially, and that the first  
 Action is determined. 1 *Salk.* 15. 2 *Salk.* 456, 767. 6 *Mod.* 26. 1 *Sand.* 228. 1 *Lev.* 275. That it lies  
 not for commencing two Suits for the same Cause of Action. 1 *Rol. Abr.* 101, 102.

7 H. 6. 45. If a Stranger brings an Action against *A.* in the Name of *J. S.* with-  
 1 *Rol. Abr.* out the Consent of *J. S.* an Action on the Case lies (a) against him.  
 101. S. C.

*March* 47. S. P. *Cro. Eliz.* 629. (a) Or there may be Remedy upon the 8 *Eliz. cap.* 2. But *Q.* where  
 there are several Plaintiffs, and one of them gives his Consent. *Cro. Eliz.* 236. 2 *Sid.* 162. If upon an  
 Issue between *A.* and *B.* a Stranger, that was not returned of the Jury, causes himself to be sworn  
 in the Name of one that was returned of the Jury, and a Verdict is given for *B.* *A.* may have an  
 Action upon the Case against the Stranger. *March* 81. *Palm.* 315.

1 *Sand.* 131. If *A.* exhibits a Petition to a Committee of Parliament, appointed for  
 Lake and the Examination of Publick Grievances, and therein charges *B.* being a  
 King. Doctor of Law, and Vicar General to the Bishop of *L.* with several  
 1 *Mod.* 58. great Offences, as Extortion, &c. in his Office; and for the better Mani-  
 2 *Keb.* 361, festation of these Grievances, causes the said Petition to be printed, and  
 162, 496, to be delivered to several of the Members of the said Committee; yet  
 659, 664, no Action upon the Case lies; for this Printing and Delivering of the  
 801, 832. Case as aforesaid, is according to the Order and Course of Proceeding in  
 1 *Lev.* 340. Parliament.  
 1 *Sid.* 414.  
 S. C.

Vide *Godb.*  
 405. If a Man brings a Writ of Forgery against a Peer, &c. and the Defendant by the Jury is found  
 Not guilty, yet shall he not have *Scandalum Magnatum*, and lay the Charge contained in the Charge to  
 be a Scandal. 1 *Rol. Abr.* 34. *Moor* 38. *Heth.* 55. *Hob.* 266. No Action lies against a Witness for  
 Perjury, in giving his Evidence in a Cause. Vide 1 *Danv.* 195.

*Carth.* 189. In Case the Plaintiff declared that the Defendant maliciously levied a  
 Temple v. Plaintiff in *London*, and prosecuted the Plaintiff thereon, *ubi revera* the  
 Killingworth. Cause of Action did arise in *D.* in *Kent*, out of the Jurisdiction of the  
 Show. 234. Court of *London*; after Verdict for the Plaintiff, the Court inclined that  
 S. C. But the Action would not lie; for the Plaintiff might have pleaded to the Ju-  
 no Resolu- tion, and  
 tion, and there said, that it was fit to have the Opinion of all the Judges; for that such Action was never held  
 to lie till *North's* Time. Vide 1 *Vent.* 369. 2 *Jones* 214. *Hob.* 205. *Cro. Jac.* 667. 1 *Sid.* 463. 1 *Sand.*  
 224. 4 *Co.* 14. No Action lies for suing an Attorney in an Inferior Court; for who knows whether  
 he will insult on his Privilege, and if he does he may plead it. 1 *Mod.* 209, 210. *per Cur'.*

risdiction; and if they had refused his Plea, he might apply for a Prohibition.

**(I) Where Case Will lie though the Party injured has another Remedy.**

If one slanders my Title, whereby I am wrongfully disturbed in my Possession, though I have Remedy against the Trespasser, yet I may have an Action against him that caused the Disturbance. *Allen 3.*

If a Man stops a Water-course, *per quod* his Neighbour's Ground is surrounded, he may have an Assise or Action on the Case at his Election. *Dyer 250. in Margine.*

So if he diverts *totum Cursum aqua* from my Watercourse to my Mill, though I may have an Assise for this, yet I may have an Action on the Case at my Election. *1 Leon. 247.*  
*1 Rol. Abr. 104.*

If a Copyholder in Fee surrenders a Messuage to the Use of one for Life, the Remainder to another in Fee, and the Defendant (the Husband of the Tenant for Life) pulls down Part of the Messuage, &c. he in the Remainder may have an Action on the Case against him. *3 Lev. 130.*  
*by Pemberton and Levinz cont' Windham and*

*per Pemberton and Levinz*, Where *Coke* says, That before the Statute of Gloucester, the Lessor was without Remedy for Waste done by his Tenant; that must be intended according to the Subject Matter of which he was speaking, *scilicet*, that he had no Remedy by Action of Waste: And *Pemberton* said, That without Doubt at this Day the Lessor may waive his Remedy by Action of Waste, and bring an Action on the Case. *Chalton. And*

If *Cestui que use* at Common Law had requested his Feoffees to make a Feoffment to *J. S.* and they had refused, no Action on the Case lay against them, but his Remedy was in Chancery only. *1 Rol. Abr. 108.*  
*2 Bulst. 356.*

If a Parson is guilty of Dilapidations, and after takes another Benefice, by which his former becomes void, his Successor may have an Action on the Case against him; though it was objected, that his proper Remedy was in the Spiritual Court. *1 Rol. Rep. 125.*  
*2 Vent. 27.*  
*Carth. 224.*  
*3 Lev. 268.*  
*S. C.*

*1 Lutw. 116.* where an Action on the Case lay for a Legacy in *Cromwell's* Time. *Raym. 23. 2 Sid. 21, 85.* *1 Keb. 116.*

If *A.* and his Predecessors have used Time out of Mind to find a Chaplain to sing Divine Service, and to perform the Sacrament and Sacramentals in the Chapel of *B.* within his Manor of *D.* for *B.* his Servants and Family; and he does not find a Chaplain according to the Custom, *B.* may have an Action on the Case against him. *1 Rol. Abr. 110.*  
*Secus* if it were a publick Chapel.  
*1 Rol. Abr. 110.*

*Cro. Eliz. 664.* *1 Sid. 34.* An Action on the Case lies against a Parson for refusing to give *J. S.* the Sacrament, because a Man is bound to receive upon a Penalty. *Per 1 Keb. 947.* *1 Sid. 34. dubitatur.* Against a Bishop for not taking Caution of a Party excommunicated. *Raym. 226.* *2 Inst. 623.* Against an Ordinary for refusing to grant Administration. *Cart. 126.*

**(K) Where**

(K) **Where Case Will lie though the Wrongdoer be punishable Criminally.**

*Style 346.* It seems by the better Opinion of the Books, That a Person guilty of Felony, and Pardoned, or Burnt on the Hand, may be proceeded against in a Civil Action at the Suit of the Party injured; for when the Party is prosecuted there can be no (a) Inconvenience in allowing the Action, and the Criminal Prosecution ought to be no Bar to it; for why should he not answer in Damages to the Party whom he hath injured, as well as be made an Example of for the Sake of the Publick, whom he hath offended.

*Yelv. 99.*  
*1 Jones 147.*  
*Latch 144.*  
 (a) But no Action can be brought whilst the Party is under Indictment for the same Crime, for if that were allowed it might hinder all exemplary Punishment. *Style 346.*

*1 Sid. 275.* In Case against Husband and Wife, the Plaintiff declared that the Wife *malitiose*, &c. affirmed her self to be unmarried, & *strenue requisivit* Cooper and Witham. him to marry her; to which Affirmation he giving Credit, married her, *1 Lev. 247.* being then the Defendant's Wife, by which he was put to great Charge, S. C. injured in his Reputation, and greatly troubled in his Conscience: And *2 Keb. 399.* the Court held, That the Ground of this Action being the Conversation And *note, per Twifden,* this and Contract of the Wife, could not bind the Husband. Action does not lie; because the marrying the second Husband is Felony. But *Q.*

*Skin. 119.* But where the Plaintiff declared that she was a Virgin of good Name and Fame, and sought to for Marriage by *J. S.* that the Defendant, pretending himself to be a single Person, made Love to her and married her, when in Truth he was married to another Woman, &c. whereby she became of less Credit, and lost, &c. And the Court held that the Action lay.

## Affidavit.

**A**N Affidavit is an Oath in Writing, signed by the Party deposing, sworn before, and attested by him who has Authority to administer the same. As most Motions and Orders of Court are grounded on Affidavits, it seems impracticable, and indeed unnecessary to Instance in what Cases they are to be made use of, or when they may be said to be defective, short or evasive; this being a Matter of Practice, and few Things relating thereto being thought worth reporting,

We shall, however, under this Head, set down what we find relating to

(A) The Taking and filing of Affidavits.

(B) Where an Affidavit is necessary.

(C) Where it may be said to be short and defective.

## (A) The Taking and Filing of Affidavits.

Affidavits were only to be taken by some Judge of that Court in which they were to be made use of! But now, Style Pract. Reg. 78.

“ By the 29 *Car. 2. cap. 5.* the Chief Justice, and other the Justices of the Court of King’s Bench, or any two of them, whereof the Chief Justice to be one for that Court; the Chief Justice of the Common Pleas, and the rest of the Justices there, or two of them, whereof the Chief Justice to be one for that Court; and the Lord Treasurer, Chancellor, and Barons of the Exchequer, or two of them, whereof the Lord Treasurer, Chancellor, or Chief Baron, to be one for that Court; may by Commission or Commissions under the Seal of the said respective Courts, from Time to Time, as need shall require, empower Persons in the several Counties to take Affidavits concerning any Thing depending or concerning any Proceedings in the said Courts, as Masters of Chancery in Extraordinary do use to do; and any Judge of Assize, in his Circuit, may take Affidavits concerning any Thing depending, &c. as aforesaid; which Affidavits shall be filed in the several Offices of the said Courts, and be made use of as other Affidavits taken in the said Courts: And all Persons forswearing themselves in such Affidavits shall incur the same Penalties as if they had been taken in open Court; the Persons taking such Affidavits shall receive only 1 s. for so doing, besides the King’s Duty, which Duty shall be paid to the proper Officers in the said Courts, before such Affidavit be there filed or made use of. By the 16 & 17 Car. 2. the Chancellor of the Duchy of Lancaster may empower Persons to take Affidavits.

If Affidavits taken before Commissioners in the Country, according to the above Statute, be expressed to be in a Cause depending between *A.* and *B.* and there is no such Cause in Court, they cannot be read, because the Commissioners have no Authority to take them, and there can be no Perjury, otherwise, if there be a Cause in Court, and this concerns some collateral Matter. 2 Salk. 461.

## (B) Where an Affidavit is necessary.

The Law and Practice of the Courts require, that on all Motions for an Information, Attachment, Complaint against any Officer for an Offence not committed in the Face of the Court, for a new Trial, relating to the serving and returning of Writs or Processes, &c. Oath or Affidavit be made of what is affirmed, that the Judges may be satisfied, as well of the Truth thereof, as of the Reasonableness of granting Relief when made out. Vide the several Heads.

Also by Acts of Parliament Affidavits are made necessary, as 4 & 5 *Ann.* enacts, “ That no dilatory Plea shall be received unless on Oath, and probable Cause shewn to the Court; by the 12 *Geo. 2. cap. 29.* Affidavit must be made of the Cause of Action, and that the Sum exceeds 10 *l.* otherwise the Defendant is not to be held to Special Bail.

If a Person exhibits a Bill for the Discovery of a Deed, and prays Relief thereupon, he must annex an Affidavit to his Bill, that he has not such Deed in his Possession, or that it is not in his Power to come at it; for otherwise he takes away the Jurisdiction of the Common Law Courts, without shewing any probable Cause why he should sue in Equity. 1 Chan. C. 11, 231. 1 Vern. 59. 180, 247.

But if he seeks above Discovery of the Deed only, or that it may be produced at a Trial at Law, he need not annex such Affidavit to his Bill; for it is not to be presumed that in either of these Cases he would

do so absurd a Thing, as exhibit a Bill, if he had the Deed in his Possession.

*Abr. in Eq.*

14.

*Preced. in Eq.*  
536.

Also, if he sets forth the whole Circumstances of his Case, and prays General Relief, the Prayer of Relief shall be applied to the Discovery only.

In Interpleading Bills, the Party who prefers it must make Affidavit that he does not collude with either of the other Parties.

He, who moves for a *Ne Exeat Regnum* against another, must make Affidavit of the Loss he is like to sustain by the Party's going out of the Kingdom, and that thereby the Debt may be lost, and that the Party is actually going out of the Kingdom.

*Preced. in*

*Eq.* 93.

Duke Hamil-

ton and Lady

Gerrard; but

*Q.* Whether

an Order that

a Peer or Peeres

should produce

Writings on

Affidavit, or

be examined

on Oath, as

to any Thing

in his Answer,

is not good.

A Peeres by her Answer owned that she had several Deeds in her Power, but did not set them forth; and on Motion she was ordered to produce them on Oath, but that Order was changed, and she to produce them on Honour only, being in Supplement to her Answer, which was on Honour.

Whether a Peer or Peeres should produce Writings on Affidavit, or be examined on Oath, as to any Thing in his Answer, is not good.

### (C) Where it may be said to be short and defective.

An Affidavit must set forth the Matter positively, and all material Circumstances attending it, that the Court may judge whether the Deponents Conclusions be just or not.

*Farell.* 121.

*Comb.* 421,

422.

And therefore, on Motion to put off a Trial for want of a material Witness, it must appear that sufficient Endeavours were made use of to have him at the Time appointed, and that he cannot possibly be present, though he may on further Time given.

1 *Salk.* 461.

Upon a Rule to shew Cause, the Plaintiff offered several new Affidavits, and this Diversity was taken, *viz.* where they contain new Matter, and where they tend only to confirm what was alledged and sworn when the Rule was made; in the latter Case they may be read, not in the former.

*Comb.* 399.

But this is

Matter Dis-

cretionary in

the Court. *Vide*

3 *Mod.* 108.

where an

Action on

the Case was

brought for

scandalous

Matter in-

serted in an

Affidavit; that

the Party is

to put nothing

in the

Affidavit but

what is material

to the Point,

and therefore

not to set forth

the Merits of

his Cause on

Motion. *Style*

*Prac. Reg.* 79.

where the

Affidavit of

one who stood

in the Pilloxy

was read. 1

*Salk.* 461.

But for this

*vide Tit.*

*Evidence.*

If there be Affidavit against Affidavit, the proper Method is to have it tried by an Issue at Law.

*Vide* 3 *Mod.* 108. where an Action on the Case was brought for scandalous Matter inserted in an Affidavit; that the Party is to put nothing in the Affidavit but what is material to the Point, and therefore not to set forth the Merits of his Cause on Motion. *Style Prac. Reg.* 79. where the Affidavit of one who stood in the Pilloxy was read. 1 *Salk.* 461. But for this *vide Tit. Evidence.*

Agree

## Agreements.

**A**N (*a*) *Agreement* is the Consent of two or more Persons concurring, the one in parting with, and the other in receiving some Property, Right or Benefit; the Notion of contracting or entering into Agreements arose from the Increase of Commerce, and the Necessity Men were under of Bartering their Superfluities for Things of real Use, and which lay out of the Way of their acquiring; that Men should execute their Agreements and perform their Promises, though made without Writing or Consideration, is enjoined by the Law of Nature; but in Civil Societies, and in ours in particular, Circumstances are required which protect the Weak, and those who are under the Power of others; also Provision is made against Fraud and Circumvention, and that no Man should be injured in his Property by the Turn of an unwary Expression.

(a) An Agreement is defined *aggregatio mentium in re aliqua facta vel facienda.* *Plowd. 17. a.* though a Contract executed with all the Solemnity required by Law, may properly be called an Agreement, yet, in the more common Acceptation of the Word, Articles, Minutes, and Escrow, &c. containing something Preparatory to a more solemn and formal Execution, are called *Agreements*.

Under this Head we will consider,

- (A) Who are capable of contracting and binding themselves or others by their Agreements.
- (B) Of Agreements which are good in Law, and will be Decreed in Specie in Equity. And herein,
1. Of unreasonable Agreements, and such as may be said to be obtained by Fraud or Circumvention.
  2. Of voluntary Agreements.
  3. Of the Manner in which they are to be performed.
- (C) Of Parol Agreements, or such as may be said to be within the Statute of Frauds and Perjuries.

(A) Who are capable of contracting or binding themselves or others by their Agreements.

A Person *Non Compos* is not capable of entering into any Agreement, But for this For an Agreement is an Act of the Understanding which they are incapable of, and therefore are to be under the Care of their Curators or Guardians, by a Commission from the Publick.

Also an Infant for the same Reason is incapable of contracting.

*vide* Head of *Ideots* and *Lunaticks.*  
*Vide* also Head of *Infants.*

*Vide Tit. Baron and Feme.* A Wife during the Intermarriage is (a) incapable of entering into any Agreement in *Pais*, being under the Power of her Husband.

(a) But it is said, That if a Feme Covert, by Agreement made with her Husband, is to surrender a Copyhold or levy a Fine, though the Husband die before it be done, Equity will compel her to perform the Agreement. 2 *Vern.* 61. *per Cur.*

2 *Vern.* 215. *Abr. Eq.* 265. The Ancestor seised in Fee may by his Agreement bind his Heir; therefore if *A.* agrees to sell Lands, and receives Part of the Purchase Money, but dies before a Conveyance is executed, and a Bill is brought against the Heir, he will be decreed to Convey, and the Money shall go to the Executor, especially if there are more Debts due than the Testator's Personal Estate is sufficient to pay.

*Vide infra* of voluntary Agreements. So if a Father conveys to a younger Son by a defective Conveyance, and dies, the Heir at Law in two Cases shall be compelled to make it good. 1. Where there is a (b) Covenant for further Assurance, binding the Heir, because the Heir is bound by the Covenant. 2. Where there is a Provision made by the Father in his Life-time for the Heir, or he hath such a Provision by Descent from the Father.

500*l.* as a Jointure, in Consideration of a Marriage Portion; *J. S.* was intrusted with the Drawing of the Settlement, which was never read by the Wife; the Jointure settled was but 400*l.* *per Annum*, of which the Husband took Notice, and talked of making it up so much, but dying before, his Heir was decreed to make it up, although there was no Covenant, by which he bound his Heir to make it up so much. 1 *Vern.* 16.

*Hob.* 203. *1 Chan. Ca.* 171. *1 Lev.* 239. *2 Vent.* 350. If Tenant in Tail agrees to convey, or bargains and sells the Lands for valuable Consideration, without Fine or Recovery, and dies before the Fine or Recovery be levied or suffered, the Issue is not (c) bound either in Law or Equity, for Equity cannot set aside the Statute *de donis*; which says, That *voluntas donatoris observatur*; nor can the Court set up a new Manner of Conveyancing, and thereby supersede Fines and Recoveries; for thereby the King would lose the Perquisites by Fines, or the Writs of Entry and Fines for Alienation. (c) So tho' there be a Decree against the Tenant in Tail to levy a Fine and suffer a Recovery, and he dies in Contempt and in Prison for not executing of it, yet the Issue shall not be bound. *Vide Eq. Abr.* 25, 265. 2 *Vern.* 306.

1 *Chan. Ca.* 171. *Refs and Refs.* *A.* seised of Lands in Tail, agrees with *B.* that he and his Heirs shall enjoy the intailed Lands, if *A.* and his Heirs may enjoy his Fee-simple Lands; this Agreement is executed accordingly, and *B.* had a Decree against *A.* to levy a Fine and settle it, pursuant to the Agreement; but *A.* died without doing it, though it was Decreed that *A.* himself was bound by this Agreement to Convey, yet since he died before he executed the Fine, his Issue was not bound by the Agreement; but if the Issue in Tail had approved of his Ancestor's Agreement, as he did in this Case by entering on the Land of *B.* then it becomes his own Agreement, and consequently in Equity he shall be (d) obliged to perform it.

(d) So if the Issue in Tail had recovered Part of the Purchase Money in his Father's Life time, or after his Death, or if he had joined in the Deed with the Father, or covenanted for further Assurance, &c. 1 *Chan. Ca.* 171. 1 *Lev.* 238.

1 *Chan. Ca.* 234. *2 Chan. Ca.* 64. *2 Vent.* 350. *1 Vern.* 13. If there be Tenant in Tail in Equity as of a Trust, or under an equitable Agreement, and he for valuable Consideration Bargains and Sells the Land without Fine or Recovery, this shall bind his Issue, because the Statute *de donis* doth not extend to it, being an Intail in Equity and a Creature of the Court.

1 *Vern.* 13, 440. 2 *Vern.* 133, 583, 702.

As Tenant in Tail is restrained from alienating the Estate without Fine or Recovery, so he is from charging of it, or disposing of the lasting Improvements after his Death; therefore if Tenant in Tail sells the Trees growing on the Inheritance, the Vendee must sever them during the Life of Tenant in Tail, for if he dies before they are cut down, his Issue shall have them as Part of the Inheritance, and the Vendee, though (a) obliged to pay the whole Sum contracted for, yet shall not be allowed to cut down one Tree after the Death of Tenant in Tail; for as the Tenant in Tail has Power over the Inheritance but during his own Life, so he cannot delegate that Power to another but for the same Time, and consequently whatever remains Part of the Inheritance at the Death of the Tenant in Tail, at which Time his Power over it ceases, must necessarily go to the Heir to whom the Inheritance belongs.

*Ero. Contract*  
26  
11 Co. 50.  
Pop. 124.  
(a) Q. Whether he may not have Relief in Equity.

**(B) Of Agreements which are good in Law; and Will be decreed in Specie in Equity: And herein,**

1. *Of unreasonable Agreements, and such as may be said to be obtained by Fraud or Circumvention.*

In many Cases the Party injured by Breach of an Agreement, may have a Remedy either by Action at (b) Common Law, or by Recourſe to a Court of Equity; but here a general Rule must be observed, that where-ever the Matter of the Bill is meerly in Damages, there the Remedy is at Law, because the Damages cannot be ascertained by the Conscience of the Chancellor, and therefore must be settled by a Jury.

(b) *Vide Tit. Actions, Assumpsit and Covenant. Vide Abr. Eq. 16.*

But if there be Matter of Fraud mixt with the Damages, as if *A.* sues *B.* on a Covenant at Law for Damages, and *B.* files a Bill for an Injunction upon this equitable Suggestion, That the Covenant was obtained by Fraud, if *A.* files his Cross-Bill for Relief upon that Covenant, the Court will retain it, because the Validity of the Covenant is disputed in that Court, and on a Head properly Conizable there; and therefore if the Validity of the Deed be established, the Courts will direct an Issue for the *Quantum* of the Damages.

1 Chan. Rep. 158.  
Abr. Eq. 17.

So where the Agreement is to do something in *Specie*, as to convey Lands, execute a Deed, &c. there it will be proper to apply to a Court of Equity for a specifick Execution, to which the Party is intitled, if the Agreement be good and sufficiently proved, when otherwise he could only recover Damages at Law.

1 Chan. Ca. 42. An Agreement in Nature of a Wager decreed in *Specie*.

The Plaintiff assigned some Shares of the Excise to the Defendant, who thereupon covenanted to save him harmless, and to stand in his Place touching all Payments to the King; the Plaintiff being sued by the King, brought his Bill to have the Agreement performed in *Specie*, and although it was insisted that the Plaintiff might recover Damages at Law, and that this was not a Covenant for any Thing certain, and by this Means a Master in Chancery was to tax Damages instead of a Jury; yet it was decreed that the Defendant should perform his Covenants; and it was directed to a Master, that, as often as any Breach should happen, he should report it Specially, that the Court, if Occasion should be, might direct a Trial in a *Quantum Damificat*.

1 Verr. 189.  
Lord Ranelagh v. Hays,  
2 Chan. Ca. 146. S. C.

So if a Jointress brings her Bill to have an Account of the Real and Personal Estate of her late Husband, and to have Satisfaction thereof for a Defect of Value of her Jointure Lands, which he had covenanted to be and to continue of such Value; and the Defendant insists, that this is a Covenant which sounds only in Damages, and properly determinable at

Abr. Eq. 12.

Law, though it be admitted that a Court of Equity cannot regularly assess Damages; yet in this Case, a Master in Chancery may properly enquire into the Value and Defect of the Lands, and report it to the Court, which may decree such Defect to be made good, or send it to be tried at Law, upon a *Quantum Damificat*'.

*Abv. Eq.* 18. The Condition of a Bond was to settle certain Lands in such a Manor, by such a Day; the Obligor died before the Day; so that the Bond was saved at Law, yet the Court decreed a specifick Execution.

*Abv. Eq.* 17. But here it must be observed, that Agreements out of which an Equity can be raised for a Decree in Specie, ought to be obtained with all imaginable Fairness, and without any Mixture tending to Surprize or Circumvention; and that they be not unreasonable in themselves.

*2 Chan. Ca.* 17. As where by a Marriage Agreement the Son's intended Wife was to have more than would have been left for the Father (though indebted), his Wife and two Daughters unpreferred, the Court would not decree it, principally, by Reason of the Extremity of it, but left the Party to his Remedy at Law.

*1 Vern.* 227. So where *A.* articed for the Purchase of *B.*'s Estate, pretending he bought it for one whom *B.* was willing to oblige, and thereby got it somewhat cheaper, when in Truth he bought it for another, Equity would not decree an Execution of this Agreement.

*Bromley and Jafferries.* So where *A.* on a Marriage of his Daughter to *B.* covenanted that *B.* should have his Lands at his Death cheaper than any other Person, and he lived twenty Years after, and devised to *B.* 1000*l.* and to his Daughter, *B.*'s Wife, 500*l.* and he devised the Lands to his Grandson, the Court refused to decree an Execution of the Agreement, because of the Uncertainty of it; and it not being mutual, *B.* not being bound to take it at any Price.

*2 Vern.* 632. *Green and Wood.* An Agreement for a Purchase being obtained by an Attorney from an old Woman of Ninety, and several suspicious Circumstances appearing, the Court would neither decree it to be carried into Execution against the Heir at Law, nor to be delivered up upon a Cross Bill exhibited for that Purpose, but left the Parties to their Remedies at Law.

But as these Cases, and all others on this Head, depend so much upon (a) Circumstances, and are to stand or fall according to the Degrees of Fraud and Circumvention attending them, and proved in the Cause, or by what appears unreasonable on the Face of them, I shall only observe that a Court of Equity will much easier be prevailed on to dismiss a Bill which prays a specifick Execution of an unreasonable Agreement, than set aside an Agreement, though not strictly fair, on a Bill for that Purpose; for this deprives the Party of what he had a Right to by Law; and that where such Agreements are set aside, it must be on refunding what was *bona fide* paid, making Allowances for Improvements, &c.

(a) As where Bargains are obtained from Heirs at Law, in the Lifetime of their Ancestors. *2 Chan. Ca.* 136. *1 Vern.* 271. *2 Vern.* 15, 27. Where in the Year 1720. Land was sold at Forty Year's Purchase. *Rep. in Equ.* 155. Where a Bill was brought for a specifick Execution of an Agreement, after a great Length of Time. *2 Vern.* 127. where the Party was imposed upon, and knew nothing of the Value of the Lands, but what he had heard from the Purchaser. *Preced. in Chan.* 538. where Lands are sold too dear, and the Seller who seeks a specifick Performance, cannot strictly execute his Part of the Agreement. *Preced. in Chan.* 555. *2 Vern.* 394, 558.

## 2. Of Voluntary Agreements.

*6 Co.* 18. *b.* As Men have a Right in their Acquisitions, so may they dispose of them at their Pleasure, and without valuable Consideration; but if a Man promises to convey Lands, or to give Goods without valuable Consideration, or without delivering Possession of them, this alters no Property, nor has the Party any Remedy in Law or Equity, being *Nudum pactum unde non oritur actio.*

But if it be done by Deed duly executed, under Seal, this is good in Law, though there be no Consideration or no Delivery of Possession; because a Man is estopped to deny his own Deed, or affirm any thing contrary to the manifest Solemnity of Contracting.

Yelv. 196.  
Cro. Jac. 270.  
1 Erownl. 1111.  
6 Co. 18. b.

Also in Equity voluntary Conveyances are good against the Parties, and cannot be revoked, nor will the Court interpose in Behalf of one Volunteer against another; but if they affect Creditors, Purchasers or younger Children, the Court will set them aside.

1 Chan. Reps.  
173.  
1 Vern. 100,  
464.  
Who is to be  
esteemed a

Volunteer, vide Head of Purchaser.

If there be a defective Conveyance, without an equitable Consideration, a Court of Equity will not oblige the Party to make it good, though there be a Covenant for further Assurances; as if a Man makes a Feoffment to a Stranger without Livery, the Feoffor or Heir shall not be obliged to make good that Feoffment, but it shall be construed in Equity to be an Estate at Will, as it is in Law.

2 Vent. 365.  
2 Vern. 40.  
2 Vern. 475.

If an Annuity is granted by one to his House-keeper, with a Bond for Payment of it, and the Bond is lost, Equity will decree Payment of the Annuity; for Service is a Consideration, and no *Turpis contractus* shall be presumed unless proved.

Abr. Eq. 24.

3. Of the Manner in which they are to be performed.

If an Agreement be to quit the Possession of Lands, the Court will not decree a Conveyance of the Lands themselves; but if the Agreement was to convey the Lands, it is said that the Court would have decreed the Agreement, though the Party was not apprized what Estate he had in the Lands.

1 Vern. 127.  
How Agree-  
ments and  
Promises are  
to be exe-  
cuted at  
Law, vide

Heads of Assumpsit and Covenant.

If one is bound to transfer 300*l.* East India Stock, before such a Time, which he neglects to do, and the Stock is much risen, he shall be obliged to transfer the Stock in *Specie*, and account for all Dividends from the Time that it ought to have been transferred.

2 Vern. 394.  
Vide Preced.  
in Chan. 533.

If a Creditor agrees with his Debtor to take less than his Debt, so that it be paid precisely at such a Day, and the Creditor fails of Payment, he cannot be relieved, for *Cujus est dare ejus est disponere*.

1 Vern. 210.  
1 Chan. Ca.  
110.

If Money be lent on a Mortgage, at 5 per Cent. and the Mortgagor covenants to pay 6 per Cent. if he made Default for the Space of Sixty Days after the Time of Payment, if he makes Default, the Court will not relieve, this being the Agreement of the Parties.

2 Vern. 134.

If a Lessee for a long Term of Years covenants to lay out 200*l.* upon the Premises, within the first ten Years, and lays out but 30*l.* and after the Expiration of thirty Years of the Lease, the Lessor brings an Action of *Covenant*, and recovers 150*l.* Damages, Equity will neither relieve against the Damage, nor decree the Money to be now laid out in Improvements; for though the Damages seem excessive, yet the Jury were proper Judges; and to decree it to be laid out now the Lease is almost expired, is not proper; for it is probable the Lessee would not be so careful in laying it out in lasting Improvements, as he would be were it laid out at first.

1 Vern. 316.

(C) Of Parol Agreements, or such as may be said to be Within the Statute of Frauds and Perjuries.

Co. Lit. 48.  
Spelm. Gloss.  
510.  
9 Co. 137.  
2 Rol. Abr.  
7.

The Common Law required no other Solemnity in passing Lands or Tenements, but that of Livery and Seisin, which being a Translation of the Feud *coram paribus curtis*, and testified by them, was held an Act of sufficient Notoriety to direct the Lord of whom to demand his Services, and Strangers against whom to commence their Actions; but now

“ By the 29 Car. 2. c. 3. pt. 1. it is enacted, That all Leases, Estates, Interests of Freehold, or Terms of Years, or any uncertain Interest of, in or out of any Messuages, Manors, Lands, Tenements or Hereditaments made or created by Livery and Seisin only, or by Parol, and not put in Writing, and signed by the Parties so making or creating the same, or their Agents thereunto lawfully authorized by Writing, shall have the Force and Effect of Leases or Estates at Will only, and shall not either in Law or Equity be deemed or taken to have any other or greater Force or Effect, any Consideration for making any such Parol Leases or Estates, or any former Usage to the contrary notwithstanding.

“ Except Leases not exceeding the Term of three Years from the making thereof, whereupon the Rent reserved to the Landlord, during such Term, shall amount unto two Third Parts, at the least, of the full improved Value of the Thing demised.

“ Also it is enacted, That no Leases, Estates or Interests, either of Freehold or Terms of Years, or any uncertain Interest, not being Copyhold or Customary Interest of, in, to or out of any Messuages, Manors, Lands, Tenements or Hereditaments shall be assigned, granted or surrendred, unless it be by Deed or Note in writing, signed by the Party so assigning, granting or surrendring the same, or their Agents thereunto lawfully authorized by Writing, or by Act or Operation of Law.

“ And it is further enacted, That no Action shall be brought whereby to charge any Executor or Administrator, upon any special Promise to answer Damages out of his own Estate, or whereby to charge the Defendant upon any special Promise to answer for the Debt, Default or Miscarriages of another Person, or to charge any Person upon any Agreement made upon Consideration of Marriage, or upon any Contract or Sale of Lands, Tenements or Hereditaments, or any Interest in or concerning them, or upon any Agreement that is not to be performed within the Space of one Year from the making thereof, unless the Agreement upon which such Action shall be brought, or some Memorandum or Note thereof shall be in Writing, signed by the Party to be charged therewith, or some other Person by him thereunto lawfully authorized.

“ Part 7. it is enacted, That all Declarations or Creations of Trusts, or Confidences of any Lands, Tenements or Hereditaments, shall be manifested and proved by some Writing signed by the Party who is by Law enabled to declare such Trust.

“ Provided that where any Conveyance shall be made of any Lands or Tenements, by which a Trust or Confidence shall or may arise, or result by the Implication or Construction of Law, or be transferred or extinguished by an Act or Operation of Law, then, and in every such Case, such Trust or Confidence shall be of the like Force and Effect as the same would have been if this Statute had not been made.



those preparatory Heads might have received several Alterations or Additions, or the Agreement might have intirely broke off upon some further Enquiry of the Party's Circumstances; and this Decree was thought very just by the Bar, who all agreed with my Lord Chancellor, that if the Marriage had been on the Foot of this Writing, and the Father had been privy and consenting to it, that he should afterwards have been obliged to execute his Part thereof.

25 Jan. 1724.  
On Plea and  
Demurrers,  
adjudged  
between  
Sanfum and  
Butter.

On the Marriage of the Plaintiff with the Defendant's Daughter, the Defendant promised to give her 450*l.* Portion, and accordingly paid the Plaintiff 200*l.* in Part, but took a Bond from him for it till a suitable Settlement should be made, and the Defendant himself gave particular Directions concerning the Settlement, which was drawn accordingly and engrossed; but before it was executed the Plaintiff's Wife died, and the Bill was brought to have the 200*l.* Bond delivered up, and the remaining 250*l.* paid, the Defendant pleaded the Statute of *Frauds* and *Perjuries*, the Agreement not being reduced into Writing and signed by the Parties; and by Way of Answer denied that the 200*l.* was paid in Part of the Portion, but said it was lent the Plaintiff, and the Bond given for it; and the Plea was allowed; for if the Marriage should be looked upon as an Execution of the Agreement on one Side, so as to take it out of the Statute, it would intirely evade it; for all Promises of this Kind suppose a Marriage either already had or to be had.

1 Vern. 151,  
159.  
1 Vern. 363.  
2 Vern. 455.  
1 Vern. 210,  
220, 472.  
2 Vern. 627.  
1 Vern. 240.  
2 Chan. Ca.  
135.

There are several Cases in which it has been held, that a Parol Agreement in Part executed shall be performed in the Whole; but as those Cases are not exactly stated or well reported, it will be sufficient to mention what seems to be the Sense of them, and what with any Justness can be collected from them, That if an Agreement be made concerning Lands, though not in writing, and the Party by whom it was made receives All or Part of the Money, Equity will compel a specifick Performance of the whole Agreement; because this is out of the Statute, which designed to defeat such Agreements only, no Part whereof was carried into Execution, and set up meerly by Parol; for that was the Occasion of *Frauds* and *Perjuries*, that Persons used to impose verbal Agreements upon others, and by such false Oaths charge the Parties in Equity to perform such Agreements, though they had never been made; and therefore the meer Parol Proof of such Agreements concerning Lands cannot be admitted in a Court of Equity; but where the Price is paid, there it doth not stand upon the Parol Proof of the Agreement only, but upon the Execution of Part of the Agreement, which is Evidence that the Agreement was really made; and therefore there is the same Reason that the Plaintiff in Equity should have the Land for his (a) Money, as it is that he should deliver the Goods where he hath received the Money; but the Doubt in these Cases is, what shall be a Proof of the Receipt of the Money. Thus far it seems certain, that if the Defendant in his Answer confesseth the Receipt of the Money for that Purpose in the Bill; or if he denies the Money, and it be proved upon him by Writing, as by Letter under his Hand, or other written Evidence, he shall be obliged specifically to perform the whole Agreement; because he hath carried Part into Execution; but if the Defendant confesses the Receipt of the Money, but says that he borrowed it from the Plaintiff, and that he had it not in Execution of that Agreement, there he turns the Proof of the Agreement upon the Plaintiff, and then the Plaintiff must prove the Receipt of the Money by the Defendant, for the Purpose in the Bill, by some (b) written Agreement.

(a) That giving a Guinea, &c. will not bind a Bargain of Lands, tho' it will of Goods. Preced. in Chan. 560.

(b) For a Parol Evi-

dence, as to the Receipt of the Money, seems to be as much excluded by the Statute, as Parol Evidence relating to the Agreement; *tamen Quare* whether Parol Evidence may not properly be applied to the Act of *Receiving*, though not to the Act of *Contracting*.

If a Man, on a Promise of a Lease to be made to him, lays out Money on Improvements, he shall oblige the Lessor afterwards to execute the Lease, being executed on the Part of the Lessee, and the Lessor shall not be allowed to take Advantage of his own Fraud, and run away with the Improvements made by another; but if no such Expence had been on the Lessee's Part, a bare Promise of a Lease, though accompanied with Possession, would be within the Statute of *Frauds*.

*Preced. in Chan. 561.*  
*1 Vern. 159.*  
*vide Pre. ed. in Chan. 519.*

One that could read made an Agreement for a Lease of Twenty-one Years, the Lessor himself drew the Lease but for one Year, and yet read it for Twenty-one Years, and after the Expiration of the Year ejected the Lessee; on a Bill brought to be relieved upon this Matter, which was proved, the Court held it to be within the Statute of *Frauds* and *Perjuries*, and dismiss'd the Bill with Costs, it being the Plaintiff's own Folly, being able to read; *secus*, if he had been unlettered.

*Skin. 159.*

If a Man purchases Lands in another's Name, and pays the Money, it will be a Trust for him that paid the Money, though there be no Deed executed, declaring the Trust thereof; for the Statute of *Frauds* and *Perjuries* extends not to Trusts raised by Operation of Law.

*2 Vent. 361.*  
*1 Vern. 366.*  
*S. P. where it is said that the*

Proof must be very clear that he paid the Purchase-Money; but for this *vide Head of Evidence.*

Also the following Points have been resolved in the Common Law Courts, on the several Branches of the above-mentioned Statute.

1. That the Clause which enacts that no Action shall be brought, &c. to charge an Executor, &c. that this extends not to Promises made before, though to be performed after the making of the Statute; for it would be against natural Justice, that a Promise made upon good Consideration should be destroyed by the Retrospect of a Law which none could divine would be made.

*2 Jones 102.*  
*Gilmore and Shutter.*  
*1 Vent. 330.*  
*2 Med. 310.*  
*2 Lev. 227.*  
*2 Show. Rep. 56. S. C.*

2. That the Plaintiff in his Declaration need not shew any Note in Writing, but it will be sufficient for him to produce it on the Trial; but if such Promise is pleaded in Bar of another Action, it must be shewn to be in Writing; so that it may appear to the Court to be such a Promise upon which an Action will lie.

*Raym. 450,*  
*451.*  
*2 Jones 153,*  
*S. C.*

3. That the Clause relating to Marriage extends as well to a Promise to marry, as to the Payment of Marriage-Portions, &c.

*3 Lev. 65.*  
*vide Skin. 196. which seems cont.*

4. That the Clause which says *That no Action shall be brought upon any Agreement that is not to be performed within the Space of one Year from the making thereof, unless it be in Writing*, extends not to a Parol Promise made to pay so much Money upon the Return of such a Ship, which Ship happened not to return within two Years after the Promise made; for the Ship by Possibility might have returned within the Year; and the Clause extends only to such Promises where, by the express Appointment of the Party, the Thing itself is not to be performed within a Year.

*1 Salk. 280.*  
*Agreed by all the Judges, on a Case put by Treby, Ch. Just. Skin. 326, 353. S. P.*

5. On the Clause *That no Action shall be brought on a Special Promise, to answer for the Debt, Default, &c. of another*, it has been resolved that if *A.* is about hiring a Horse from *B.* and *C.* to encourage him to lend the Horse, promises that *A.* should deliver him safe, this is a collateral Promise, and an Undertaking within the Statute; for *C.* subjects himself to an Action, on the Breach of the Original Contract by *A.* against whom *Detinue* lies on the Bailment. So if two come to a Shop, and one of them contracts for Goods, and the Seller does not care for trusting him, whereupon the other says, Let him have them, and I will undertake he shall pay you; but if the Promise be, I will see you paid, or I will be your Paymaster, it is otherwise. So if *A.* comes to *B.* and tells

*1 Salk. 27,*  
*28.*  
*6 Mod. 243,*  
*249.*

tells him, hire your Horse to *J. S.* and I will see you paid the Hire, there the Hiring is to *A.* and not to *J. S.* who is considered as Servant to *A.* So in all Cases where the whole Credit is given to the Undertaker, or he alone liable to an Action.

## Aliens.

**A**N *Alien* is one born in a strange Country and different Society, to which he is presumed to have a natural and necessary Allegiance; and therefore the Policy of our Constitution has established several Laws relating to such a one; the Reasons whereof are that every Man is presumed to bear Faith and Love to that Prince and Country where first he received Protection during his Infancy; and that one Prince might not settle Spies in another's Country; but chiefly that the Rents and Revenues of one Country might not be drawn to the Subjects of another.

7 Co. 18.  
1 Vent. 427.  
Molloy 363.  
Some have thought that the Laws against Aliens were introduced in the Time of H. 2.

when a Law was made at the Parliament of *Wallingford*, for the Expulsion of Strangers, in order to draw away the *Flemings* and *Picards*, introduced into the Kingdom by the Wars of King *Stephen*. *Daniel* 67. Others have thought that the Original of this Law was far more ancient; and that it is an original Branch of the Feudal Law; for by that Law no Man can purchase any Lands, but he must be obliged to Fealty to the Lords of whom the Lands are holden; so that an Alien, that owed a previous Faith to another Prince, could not take an Oath of Fidelity in another Sovereign's Dominions. *Spelm.* Tit. *Legeant* 368. *Customs*, cap. 43. We find it used among the *Romans*, and only the *Cives Romani* were esteemed Freemen among them. Afterwards, when their Territories increased, all the *Italians* were made free, under the Name of *Latines*, only they had not the Privilege of wearing Gold Rings, which was alter'd by *Justinian*; and as the Empire increased, so all born within the Pale of the Empire were Citizens, *in orbe Romano qui sunt ex constitutione Imperatoris Antonini cives Romani effecti sunt Vicinius*, 27. *Dig. Lib. 1. Tit. 5. Fo. 16.* my Lord Chief Justice *Hale* says, That the Law of *England* rather contracts than extends the Disability of Aliens, because the shutting out of Aliens tends to the Loss of People, which laboriously employed are the true Riches of any Country.  
1 Vent. 427.

We shall under this Head consider

- (A) Who are Aliens, and this either by the Common Law or by Statute.
- (B) Of Naturalization and Denization, the Difference and Effect of them.
- (C) Of the Disadvantage that Aliens lie under by our Law; and herein of their Incapacity to purchase or inherit, and of the King's Title to such Purchases.
- (D) What Actions Aliens may maintain; and therein of the Difference between an Alien Friend and one whose King is at Enmity with ours.
- (E) Of Pleading Alienage.

(A) Who

(A) Who are Aliens, and this either by the Common Law or by Statute.

All those are natural-born Subjects whose Parents, at the Time of their Birth, were under the actual Obedience of our King, and whose Place of Birth was within his Dominions.

7 Co. 18. a.  
In *Calvins's*  
Case, those  
which were

born in *Normandy, Gascoign*, while under actual Obedience to the Kings of *England*, were Subjects born. 7 Co. 20. b. *Vaugh.* 270. S. P. And this by the Statute 42 Ed. 3. cap. 10. is declared to have been the Common Law; but those born there now are Aliens, those Places not being in the actual Possession of our King. 7 Co. 18. a.

If one of the King's Ambassadors in a foreign Country, hath Issue there by his Wife, being an *English* Woman, by the Common Law they are natural-born Subjects.

7 Co. 18. a.

If the King of *England* makes a new Conquest, the Persons there born are his Subjects; but if it be re-taken from him again, the Persons there born afterwards are Aliens.

*Dyer* 224.  
*Vaugh.* 281,  
282.

One born in *Ireland*, (a) *Scotland, Wales*, or any of the King's Plantations, is a natural Subject of *England*, because his natural Allegiance is due to the King of *England* at his Birth; and that Faith and Allegiance is every where due within the King's Dominions.

*Vaugh.* 279,  
301.  
7 Co. 1. to  
28.

(a) The *Antenati*, or those born in *Scotland* before the Descent of the *English* Crown to King *James I.* are Aliens; for the Uniting the Kingdoms by a subsequent Descent cannot make them Subjects of that Crown to which they were born Aliens; but the *Postnati*, or such which were born after, are not Aliens; for being born within the Allegiance, and under the Protection of the King of *England*, they are his natural Subjects, and not Aliens. 7 Co. 1. to 28. *Calvins's* Case adjudged, with the Reasons at Large.

*Molloy* 375.

If Aliens come as Enemies into the Realm, and possess themselves of a Town or Fort, and one of them has Issue born here, this Issue is an Alien; for it is not *Cælum* nor *Solum* that makes a Subject, but the being born within the Allegiance, and under the Protection of the King.

7 Co. 18. a.

Those born on the *English* Seas are not Aliens.

*Molloy* 370.

“ By a Statute 25 Ed. 3. *De natis ultra mare*, it is declared, That the King's Children, where-ever born, ought to inherit; and that all Children Inheritors, which from henceforth shall be born without the Ligeance of the King, whose Fathers and Mothers, at the Time of their Birth be and shall be of the Faith and Allegiance of the King of *England*, shall have and enjoy the same Benefits and Advantages to have and bear the Inheritance within the same Ligeance as other Inheritors aforesaid, in Time to come, so always that the Mothers of such Children do pass the Sea by the Licence and Wills of their Husband's.

25 Ed. 3.

If an *English* Merchant goes beyond Sea, and takes an Alien Wife, the Issue shall inherit him; so it is if an *English* Woman goes beyond Sea and takes an Alien Husband, the Children there born shall inherit her; for though the Statute be in the Conjunctive, yet it hath been construed in the Disjunctive to hinder this Disability; and the Word *and* being taken instead of *or*, as sometimes it is, it being not reasonable that the Child should not inherit the Parent that is of Ability, for the Defect of the other that is not.

*Cro. Car.* 601,  
602.  
*Bacon* vers.  
*Bacon*, ad-  
judged.  
*Lit. Rep.* 22,  
24. S. C.  
1 *Sid.* 198.  
S. C. cited.  
1 *Vent.* 427.  
S. C. cited;

but it was held that if Baron and Feme *English*, go beyond Sea without Licence, or stay there beyond the Time limited by the Licence, and have Issue, that such Issue is an Alien, and not inheritable. *Cro. Eliz.* 3. *Hyde* versus *Hill*; tamen *Quere*, & vide *Lit. Rep.* 27. and *Bro. Tit. Denizen* 6.

Dyer 224. in  
Margine.

Husband and Wife dwelling in *Calais*, when it was taken by the *French*, fled into *Flanders*, where the Wife was delivered of a Son, the Issue adjudged a *Denizen*, because his Parents were born in *Calais*, then reckoned Part of the King's Dominions, and because he himself was begotten there, though to avoid the Rage of Enemies born in another Prince's Territories.

5 Ann.

“ By the 7 *Ann.* it is enacted, That the Children of all natural-born Subjects, born out of the Ligeance of her Majesty, her Heirs and Successors, shall be deemed, adjudged and taken to be natural-born Subjects of this Kingdom, to all Intents, Constructions and Purposes whatsoever.

4 Geo. 2.  
cap. 21.

“ By the 4 *Geo. 2.* the above Clause is confirmed with the following Proviso, That it shall not extend to any Children, so as to make them natural-born Subjects of *Great Britain*, whose Father, at the Time of the Birth of such Children, respectively were or shall be attainted of High Treason, by Judgment, Outlawry or otherwise, either in this Kingdom or in *Ireland*, or whose Fathers at the Time of the Birth of such Children respectively, by any Law or Laws made in this Kingdom, or in *Ireland*, were or shall be liable to the Penalties of High Treason or Felony, in Case of their returning into this Kingdom or into *Ireland*, without the Licence of his Majesty, his Heirs or Successors, or any of his Majesty's Royal Predecessors, or whose Fathers, at the Time of the Birth of such Children respectively, were or shall be in the actual Service of any foreign Prince or State, then in Enmity with the Crown of *England*; but that all such Children are, were and shall be and remain in the same State, Flight and Condition, to all Intents, Constructions and Purposes whatsoever, as they would have been in, if the said Act of the Seventh Year of her said late Majesty's Reign, or this present Act had never been made; but out of this Proviso are excepted (other than the Children of such Persons who went out of *Ireland* in Pursuance of the Articles of *Limerick*) the Child of every such Person before described, who at any Time between the Sixteenth Day of *November 1708.* and the Twenty-fifth Day of *March 1731.* hath come into *Great Britain* or *Ireland*, &c. and hath continued to reside in any of those Places for the Space of two Years, and during such Residence hath professed the Protestant Religion; also every Child whose Father came into *Great Britain* or *Ireland*, &c. and professed the Protestant Religion, and died there between the Times aforesaid; also every Child whose Father continued in the actual Possession of or Receipt of the Rents and Profits of any Lands, &c. for the Space of one whole Year, at any Time between the aforesaid Times, or hath *bona fide*, and for valuable Consideration, sold, conveyed or settled any Lands, &c. in *Great Britain* or *Ireland*; and any Person claiming Title thereto under such Sale, &c. hath been or continued in the actual Possession or Receipt of the Rents and Profits thereof, for the Space of six Months, between the Times aforesaid, then, &c.

“ By the 5 *Geo. 1.* it is enacted, That if Manufacturer or Artificer of or in Wool, Iron, Steel, Brass, or any other Metal, Clock-maker, Watch-maker, or any other Artificer or Manufacturer of *Great Britain*, shall at any Time after the First Day of *May, 1719.* go into any Country out his Majesty's Dominions, there to use or exercise, or teach any of the said Trades or Manufactories to Foreigners; or in Case any of his Majesty's Subjects now being, or who hereafter shall be in any such foreign Country out of his Majesty's Dominions, as aforesaid, and there using or exercising any of the said Trades or Manufactories herein before-mentioned, shall not return into this Realm within six Months next after Warning shall be given to him by

“ the

“ the Ambassador, Envoy, Resident, Minister or Consul of the Crown of  
 “ *Great Britain*, in the Country in which such Artificer shall be, or by  
 “ any Person authorized by such Ambassador, &c. or by one of his Ma-  
 “ jesty’s Secretaries of State for the Time being, and from thenceforth  
 “ continually inhabit and dwell within this Realm; then and in such  
 “ Case every such Person shall be deemed an Alien.

(B) Of Naturalization and Denization, the  
 Difference and Effect of them.

Alien born may become a Subject of *England* two Ways, by Deniza-  
 tion and by Naturalization; Denization is the King’s Letters Patents,  
 which receives him into the Society as a new Man, and makes him ca-  
 pable to Purchase, and to (a) transmit Lands by Descent, but it doth  
 not make him inheritable to any other Relation; for though the King  
 by his Charter may admit him into the Society, yet it cannot alter the  
 Law, which denied him to inherit any Relations; but if he be naturalized  
 by Act of Parliament, then he in all Things inherits like a natural-born  
 Subject, because in an Act of Parliament every Man’s Consent is in-  
 volved.

1 *Inst.* 8. a.  
 129. a  
*Palm.* 13.  
*Godfrey and*  
*Dixon. Cro.*  
*Fac.* 539.  
 (a) His Chil-  
 dren born af-  
 ter such De-  
 nization  
 shall inherit,  
 but not those  
 born before,

but all the Children of one Naturalized shall inherit, as well those born before as after. *Co. Lit.* 8.  
*Style’s Rep.* 139.

A Man may be made a Denizen in Tail for Life, Years, or upon Con-  
 dition; also the King may make a particular Denization, as if he grants  
 to an Alien *quod in Quibusdam curiis suis Angliæ Audiatur ut Anglus, &*  
*quod non repellatur per illam exceptionem quod est alienigena.*

2 *Jones* 12.  
*Cro. Fac.* 539.  
*Co. Lit.* 129. a.

But one cannot be naturalized, either with Limitation for Years, Life  
 or in Tail, or upon Condition, for it is against the Absoluteness, Purity  
 and Indebility of Natural Allegiance.

*Co. Lit.* 129. a.  
 2 *Rol. Rep.*  
 95.

If a Man is naturalized in *Ireland* by the Parliament there, this is no  
 Naturalization as to *England*, for the Parliament of *Ireland* hath no di-  
 rect or consequential Power of binding *England*; and Naturalization is  
 but a Fiction, which can only bind those that consent to it.

*Charter* 185.  
 2 *Keb.* 601.  
 2 *Jones* 12.  
 2 *Vent.* 12.  
 But a Natu-  
 ralization in *England* makes a Man a Natural-born Subject of *Ireland.* *Vaugh.* 291.

ralization in *England* makes a Man a Natural-born Subject of *Ireland.*

If an Alien be made a Denizen, and the Letters of Denization have  
 a *Proviso* (usual in such Charters) that the Denizen shall do his Liege  
 Homage, and that he shall be obedient, and observe the Laws of this  
 Realm; this *Proviso* is not any Condition, for though he never doth his  
 Liege Homage, nor be obedient to all the Laws of this Realm, yet this  
 will not make the Denization void; for if he doth not observe the Laws,  
 he shall forfeit the Penalties appointed by them.

1 *Rol. Abr.*  
 195.  
*Manning’s*  
*Case.*  
*Lane* 58.  
*S. C.*

“ By the 7 *Ja.* 1. cap. 2. it is enacted, That no Person or Persons  
 “ of what Quality, Condition or Place soever, being of the Age of  
 “ eighteen Years or above, shall be naturalized or restored in Blood, un-  
 “ less the said Person or Persons have received the Sacrament of the  
 “ Lord’s Supper within one Month before any Bill exhibited for the  
 “ Purpose; and also shall take the Oath of Supremacy and the Oath of  
 “ Allegiance in the Parliament House, before his or her Bill be twice  
 “ read; which Oath the Lord Chancellor, or Lord Keeper, and the  
 “ Speaker of the House of Commons, have Authority to administer.

7 *Ja.* 1. c. 2.

A Denizen is not capable of Nobility, nor to sit in Parliament, for  
 that to have a Power of making Laws, ’tis necessary he should be totally  
 received into the Society, which he cannot be without the Consent of  
 Parliament.

*Melloy* 382.

“ By

“ By the 12 & 13 *H.* 3. it is enacted, That no Person born out of these Kingdoms, (although he be naturalized or made a Denizen) except such as are born of *English* Parents, shall be capable to be of the Privy Council, or a Member of either House of Parliament, or to enjoy any Office or Place of Trust, either Civil or Military; or to have any Grant of Lands, Tenements or Hereditaments from the Crown to himself, or to any other or others in Trust for him.

“ *But this Statute by the 1 Geo. 1. is explained*, So as not to extend to disable or incapacitate any Person, who at or before his Majesty's Accession to the Crown was naturalized, to be of the Privy Council, or a Member of either House of Parliament, &c. *and by this Statute it is enacted*, That no Person shall hereafter be naturalized, unless in the Bill exhibited for that Purpose there be a Clause, or particular Words inserted, to declare that such Person shall not thereby be enabled to be of the Privy Council, or a Member of either House of Parliament; or to take any Office or Place of Trust either Civil or Military, or to have any Grant of Lands, Tenements or Hereditaments from the Crown, to himself, or any other in Trust for him; and that no Bill of Naturalization shall hereafter be received in either House of Parliament, unless such Clause or Words be first inserted or contained therein.

### (C) Of the Disadvantages that Aliens lie under, and herein of their Incapacity to Purchase or Inherit, and of the King's Title to such Purchases.

*Vaugh.* 227, 291. An Alien cannot Purchase or Inherit any Lands in *England*, and the Reason is, because every Person is presumed to have a natural and necessary Allegiance to that Society that first protected and preserved him, and therefore he cannot pay any Allegiance to any other Society, unless he be afterwards received into it. *7 Co.* 16. *Dyer* 2. *Pl.* 8. He shall take nothing by Descent, Curtesy, Dower, or Guardianship. *1 Vent.* 417. *Molloy* 464. But he may take the Estate though he is not capable of holding of it; therefore if in Tail, he may suffer a Recovery and Dock the Remainders. *Co. Lit.* 2. b. 2 *Rol. Rep.* 321. *Goldsb.* 102. 4 *Leon.* 82. *Bro. Tit. Denizen and Alien* 17.

*1 Sid.* 193, 198. And as an Alien cannot inherit himself, so he cannot be inherited; the Grandfather born in *England*, the Son an Alien, the Grandson born in *England*, the Grandson shall not inherit the Grandfather, because he must then represent the Father, who cannot be represented; but if the Father be an Alien, and two Brothers born in *England*, they may inherit each other, because the Descent is immediate, and they don't take by Representation of the Father. *1 Vent.* 413, 10 429. *Collingwood v. Pace.* *Hard.* 224. *Co. Lit.* 8. cont.

If the eldest Son be an Alien, the younger Brother born in *England* shall inherit the Father; otherwise it were if the eldest Son were attainted, because the eldest Son and all his Descendants are before the younger Brother, and the younger Brother cannot inherit before that Line is extinct; and it is a Foreign Presumption, to suppose that any of that Line should come over and have Children in *England*; but the Person attainted is supposed to have all his Children residing in the Kingdom under the King's Allegiance; therefore there is a Line continuing before that of the younger Brother.

*Hard.* 224. For the same Reason, if an Alien hath four Sons, the two eldest Aliens, and the two younger naturalized, and one of the younger Sons purchase Lands and dies, the eldest Brother having Issue born within the

Realm, the younger Brother, and not the Issue of the Eldest, shall inherit.

If an Alien hath a Son Alien, and afterwards is made a Denizen, and hath a second Son, the second Son shall inherit though the eldest Son be alive. Cro. Jac. 559. and is 1 Inst. 8. a. to be understood.

If an Alien hath Issue two Sons, *A.* born beyond Seas, and *B.* born in England, and *A.* is naturalized, he shall inherit *B.* Palm. 3

“ And now by the 11 & 12 W. 3. it is enacted, That all and every Person or Persons, being the King’s Natural-born Subject or Subjects, within any of the King’s Realms or Dominions, shall and may hereafter lawfully inherit and be inheritable, as Heir or Heirs to any Honours, Manors, Lands, Tenements or Hereditaments, and make their Pedigrees and Titles by Descent from any of their Ancestors Lineal or Collateral, although the Father and Mother, or Fathers or Mothers, or other Ancestor of such Person or Persons, by, from, through or under whom he, she or they shall or may make or derive their Title or Pedigree, were or was, or is or are, or shall be born out of the King’s Allegiance, and out of his Majesty’s Realms and Dominions, as freely, fully and effectually to all Intents and Purposes, as if such Father or Mother, or Fathers or Mothers, or other Ancestor or Ancestors, by, from, through or under whom he, she or they shall or may make or derive their Title or Pedigree, had been naturalized or Natural-born Subjects. Cro. Jac. 559. G. dfrey and Dixon.

If an Alien purchases Lands, the King shall have it upon Office found, for since the Freehold is in the Alien, and he is Tenant to the Lord of whom the Lands are holden, it cannot be devested out of him but by some notorious Act, by which it may appear that the Freehold is in another; but if an Alien purchases Lands and dies, then the Freehold is in the King without Office found, because no Man can take it as Heir to the Alien, therefore the Freehold is cast upon the King; but if an Alien purchase, and afterwards is made a Denizen, and then hath Issue and dies, the Issue shall inherit till Office found, because there is a Person in Being to take as Heir to the Denizen, upon whom the Law casts the Freehold, which is not to be devested out of him without the Solemnity of an Office. Co. Lit. 2. 1 Leon. pl. 61.

If an Alien and a Subject purchase Lands to them and their Heirs, the Survivorship shall take Place till Office found, but the Office found intitles the King and severs the Jointenancy; for the Freehold is in the Alien by the Solemnity of Livery, ’till ’tis devested out of him by solemn Office found; and every Person is supposed a Natural-born Subject that is resident in the Kingdom, and that owes a local Allegiance to the King till the contrary be found by Office. Cro. Eliz. 125. Cross and Gayer. Dyer 283. pl. 31. Note; There are two Sorts of Offices, an Office of In-

titling, which is under the Great Seal; and an Office of Instruction, which is under the Seal of the Exchequer; the Office of Intitling is an Inquest, which gives the King a Title, as here in the Case of Aliens, &c. 5 Co. 52. Page’s Case.

If an Alien purchases a Copyhold in Fee in the Name of *J. S.* in Trust for him and his Heirs, though it be found that the Copyhold was in Trust for the Alien, and that *J. S.* had the legal Estate, yet the King must sue in Chancery to have the Trust executed for his Benefit. 1 Rol. Abr. 194. Allen 14. Style 20, 21, 41, 75.

An Alien cannot purchase a Lease for Years of Lands, but he may if he be (a) a Merchant, take a Lease of a House for his Habitation for Years only, and this is for the Encouragement of Commerce; for if an Alien Trade he must have an Abode amongst us, but if he (b) depart the Kingdom or die, it goes to the King, not to his Executors or Administrators; because it was only a Personal Privilege annexed to the Alien, as a Merchant, for the Encouragement of Commerce, and con- (a) Popb. 35. Co. Lit. 2. b. 1 Rol. Abr. 194. must be a Merchant. (b) Not if he goes beyond

Sea, and leaves Servants in his House during his Absence. Dyer 2. b. frequently

frequently must expire with him, without going to his Executors or Administrators.

“ But by the 32 H. 8. cap. 16. Paragr. 13. it is enacted, That all Leases  
 “ of any Dwelling-house or Shop within this Realm, or any the King’s  
 “ Dominions, made to any Stranger Artificer, or Handicraftsman born  
 “ out of the King’s Obeifance, not being Denizen, shall be void and of  
 “ no Effect; and the Person so taking such Lease forfeits 100 l. and the  
 “ Person letting 100 l. more, one Moiety to the King, and the other to  
 “ him that will sue for the same.

Upon this Statute the Case was, An Action of Debt was brought upon an Obligation, and upon *Oyer* demanded of the Condition it was recited, and it referred to Indentures, which Indentures were likewise recited *in hæc verba*; the Indentures were upon a Lease of a House in *Westminster*, reserving Rents with Covenants, &c. the Defendant pleaded 32 H. 8. cap. 16. and that he was an Alien, &c. and so would avoid the Lease and the Rent, and all the Security; divers Exceptions were taken to this Plea.  
 1. He has not said where he was an Artificer, but this was over-ruled; for it is a Personal Quality, and shall follow the Person, and is universal. 2. The Defendant ought to have set forth and pleaded the Indenture, but *per Cur’*, Since the Plaintiff has brought it into Court, as must be intended, and set it forth, the Defendant may plead upon it without setting of it forth again. 3. The Plea is, that *Indentura prædicta vacua existit*, and this was likewise over-ruled; for the Law is, that the Indenture and Bond make but one Security, and if the Covenant be released before Breach, the Bond will signify nothing. 4. This appears to be a Messuage or Tenement, but he has not averred it to be a Mansion-house or Shop, according to the Statute; and upon this Point the Court at first were divided. *Keyling* held, that *Messuagium* is *Mansum*, & *quod clare constat non debet verificare*. *Moreton*, though *Messuagium* be a Word of Art, and may be applied to other Things by a large Sense, as to a Barn or Chapel; yet in Propriety it is a Mansion-house, and shall be intended so. *Twisden* and *Wyndham*, that it ought to have been averred; for he must bring himself precisely within the Statute, especially in such a Case as this, where he would avoid his own Contract; but afterwards the Defendant had Judgment.\*

A Special Verdict found, that the Plaintiff made a Lease of a House to the Defendant, who was found to be an Alien Artificer, and that this Lease was made by Indenture between the Plaintiff and Defendant, and that there was no other Security or Promise made by the Defendant, and that the Defendant entred and enjoyed so long, for which the Plaintiff brought a *Quantum meruit*; to which the Defendant pleaded *Non assumpsit*, and the Matter being found *ut supra*, the Court held, that an *Assumpsit* would not lie. 1. Because this (a) would evade the Statute. 2. A Promise in Law never takes Place where there is an actual Agreement.

(a) But *per Cur’*, there are other

Ways to evade it, as to make an Agreement for as long as you and I please, at the Rate of 20 l. *per Arn.* for an *Assumpsit* will lie thereon; or you shall have my House for so long as you and I please, for so much as its worth.

Debt upon an Obligation for Performance of Covenants in a Lease of a House, &c. the Defendant pleaded the Statute 32 H. 8. cap. 16. and sets forth that he was a *Vintner*, and Alien Artificer; and upon Demurrer it was insisted upon for him, that a *Vintner* is as much an Artificer, and within the Meaning of the Statute, as a *Mercer*, *Draper* or *Grocer*: Ch. Just. This Statute refers to another made 1 R. 3. cap. 9. which prohibits Alien Artificers to exercise any Handicraft in England, unless as Servant to a Subject skilful in the same Art, upon Pain of Forfeiture of his Goods; now the Mystery of a *Vintner* chiefly consists in mingling of Wines, and that is not properly an Art but a Cheat; so the Plaintiff had Judgment.

1 *Sand.* 1,  
to 10.  
1 *Sid.* 308.  
S. C.  
2 *Keb.* 102,  
116. S. C.  
2 *Show. Rep.*  
135. S. C.  
cited, and  
agreed to be  
good Law.

+ but not upon the plea, here mentioned. *ut supra*: 8.

2 *Show. Rep.*  
135. *Pilking-*  
*ton v. Peach*,  
but no Judgment.

3 *Mod.* 94.  
*Hill.* 1 *Fac.* 2.  
*Bridgham* and  
*Frontec.*

If a Woman Alien, be the Friend or Enemy, marry a Subject, she shall not be endowed, because by the Policy of the Common Law, all Aliens are disabled from acquiring any Freehold amongst us; also Dower is an Estate created by Act of Law, and therefore the Law, which *nil frustra agit*, shall not transfer an Estate to one who cannot keep it, but must immediately, in respect of her legal Disability, give Title to another; and there is a Diversity between such Acts of Law and the Acts of the Party himself; as if an Alien makes an actual Purchase, &c. so Aliens shall not be Tenants by the Courtesy by the same Reason.

7 Co. 25.

Co. Lit. 31. a.

1 Vent. 417.

But by the

Law of the

Crown, if the

King marry

an Alien she shall be endowed, because Princes cannot marry according to their Dignity, unless to Persons abroad; and now by a Special Act of Parliament not printed, 8. H. 5. 12, 15. Women Aliens, who marry with the King's Licence to *Englismen*, shall be endowed; so of *English* Women who marry Aliens by the same Licence: But this latter Part can only be meant where the Alien Husbands are after made Denizens, that their Wives shall have Dower of Lands purchased before; for otherwise they, having no Capacity at all to hold any Lands of any Estate of Freehold, can derive no Title of Freehold to their Wives, and this Act never intended to put them in a better Condition for that Purpose than they were before; but it must be intended of Land Purchased before their Denization; since as to Land Purchased after, they would not want the Assistance of an Act of Parliament, being by the Common Law Dowable of these. 1 *Rol. Abr.* 675. If one marries a Woman Alien without such Licence, and then sells his Lands, and after the Wife is made a Denizen, she shall not be endowed, because her Capacity began by the Denization, and she was before absolutely disabled to hold any Land; but if this Marriage were by the King's Licence, then it should seem the Wife may be endowed, because being married conformable to that Act, her Title to Dower began presently, and cannot be defeated by any After-Act of the Husband's. *Co. Lit.* 33. a. 13 Co. 23.

Aliens seem not incapable of Ecclesiastical Benefices, and though this Practice, says *Watson*, has always prevailed, yet, says he, it proceeded rather from the Pope's Usurpation, and a Submission to his pretended Authority in Church Matters, than for any nice Distinctions made use of between Spiritual and Laymen; that the former would less discover the Secrets of the Realm, or transport the Treasure thereof to nourish the King's Enemies, than the latter.

Com. Incumb.

213, 214.

Parson's Law

C. 10.

2 *Rol. Abr.*

348.

4 *Inst.* 338.

Cotton. 41.

### (D) What Actions Aliens may maintain, and therein of the Difference between an Alien Friend, and one whose King is at Enmity with ours.

An Alien Friend may have Personal Actions but not Real; an Alien Enemy shall have neither Real, Personal, or Mixt Actions. The Reason why an Alien Friend is allowed to maintain Personal Actions is, because he would otherwise be incapacitated to Merchandize, which may be as much to our Prejudice as his; but as to the allowing of him to maintain Real Actions, there is no Reason for it, because there is no Necessity that he should settle amongst us; an (a) Alien Enemy is disabled from the Prejudice that may accrue to the King and Kingdom, if he were allowed to maintain any Action.

Co. Lit. 129. b.

1 *And.* 29.

Dyer 2. b.

(a) But who

shall be said

an Alien E-

nemy, and

how it shall be tried, *vide* 9 Co. 31. a. That it shall be tried by the Record in Chancery, whether his Prince is at Peace or at Enmity with ours, for every League is of Record; and *Cro. Eliz.* 142. *Owen* 45. That open Acts done by his Prince is sufficient, and that it is not necessary that a War be proclaimed: *Turks* and *Infidels* are not *Perpetui Inimici*, nor is there a particular Enmity between them and us; for the Difference between their Religion and ours does not oblige us to be Enemies to their Persons. 1 *Salk.* 46. said to be the Words of L. K. *Littleton.* *Vide* *Skin.* 167, 204.

A Merchant Stranger shall have an Action for saying he is a Bankrupt, for by Law he may have Personal Actions, and these Words tend to impair his Credit in his Trade.

Yelo. 198.

Tuerloote and

Morsion.

1 *Bull.* 136.

S. C.

An

11 Ed. 3.  
Rot. 87.  
Dyer 2. b.  
in Margine.

An Alien Friend, Merchant, may upon a Statute extend Lands, and upon Office the King shall not have them, and upon Ouster he shall have an Assize; for the main End and Design of both the Statute-Staple and Merchant, was to promote and encourage Trade, by providing a sure and speedy Remedy for Merchant Strangers as well as Natives, to recover their Debts at the Day assigned for Payment.

Co. Lit. 129.  
a. b.  
Palm. 13. S. P.  
Molloy 270.  
S. P.

An Abbot Prior or Priores Alien shall have Actions Real, Personal or Mixt, for any Thing concerning the Possessions or Goods of his Monastery here in *England*, because he sues in his Corporal Capacity, and not in his own Right, to carry the Effects out of the Kingdom.

Cro. Car. 8.  
Sir Upwell  
Caroon's Case.

So an Alien Friend may be an Administrator, and shall have Administration of Leases, as well as Personal Things, because he hath them in another's Right, and not to his own Use.

1 Vent. 417.  
S. C. cited.

But it has been long doubted whether an Alien Enemy should maintain an Action as Executor; for on the one Hand it is said, that by the

Cro. Eliz. 142.  
Owen 45.  
Wentworth,  
Executor 22.

Policy of the Law Alien Enemies shall not be admitted to Actions to recover Effects which may be carried out of the Kingdom, to weaken our selves and enrich the Enemy; and therefore publick Utility must be preferred to private Convenience; but on the other Hand it is said, that these Effects of the Testator are not forfeited to the King by way of Reprisal, because that they are not the Alien Enemy's, for he is to recover them for others; and if the Law allows such Alien Enemies to possess the Effects as well as an Alien Friend, it must allow them Power to recover, since in that there is no Difference, and by consequence he must not be disabled to sue for them; if it were otherwise it would be a Prejudice to the King's Subjects, who could not recover their Debts from the Alien Executor, by his not being able to get in the Assets of the Testator.

Molloy 870.  
Cro. Eliz. 683.  
Mo. 431.  
Carter 49,  
191.  
Skin. 370.

If an Alien Enemy comes here *sub salvo conductu*, he may maintain an Action; so if an Alien Army comes hither in Time of Peace *per Licentiam Domini Regis*, as the *French* Protestants did, and lives here *sub protectione*, and a War afterwards happens between the two Nations, he may maintain an Action, for suing is but a consequential Right of (a) Protection; and therefore an Alien Enemy, that is here in Peace under Protection, may sue a Bond; *aliter* of one commorant in his own Country.

1 Salk. 46.  
Wells and  
Williams.

(a) But an Alien Enemy who has such Protection, must plead it. *Farell. 150. Sylvester's Case.*

## (E) Of Pleading Alienage.

Co. Lit. 161.  
7 Co. 26.  
6 Co. 47.  
2 Keb. 98.  
1 Leon. 78, 79.  
Carter 50.  
Rast. Ent. 605.  
quod vid.

If one born in *Jersey*, or elsewhere within the King's Obedience, brings a Real Action, and the Tenant Pleads that the Demandant is an Alien born under the Obedience of the *French* King, and out of the Ligeance of, &c. the Demandant may reply, That he was born at such a Place in *England*, within the King's Allegiance, &c. and such hath ever been the Manner of Pleading in such Case.

7 Co. 1, 9.  
Lit. Rep. 26.

In an Assise *Tempore Jac. 1.* the Defendant pleaded that the Plaintiff was born *apud E. infra regnum Scotie ac intra Ligeantiam dicti Domini Regis Regni sui Scotie, ac extra Ligeantiam dicti Domini Regis Regni sui Anglie*; and this was held no good Plea, because it referred Ligeance and Faith to *England*, and not to the King.

1 Sid. 357.  
Freeman v.  
King.

In Debt on an Obligation, which was for Payment of Rent reserved by Lease for Years; the Defendant pleaded the 32 H. 8. and that he was an Alien Artificer, &c. the Plaintiff replied, That he was no Alien Artificer; but having laid no Place where he was born, the Replication was held naught.

The Defendant pleaded in Abatement, that the Plaintiff was an Alien Enemy, born in such a Place in France; the Plaintiff replied that he is *indigena*, and born at such a Place in the Kingdom of England, & *non alienigena modo & forma prout*, &c. & *hoc Petit quod inquiratur per Patriam*, and upon Demurrer to this Replication it was held to be ill; for that the Plaintiff did not rely upon the first Part of it, that he was born in England, and so conclude with an Averment, that an Issue might be taken by the other Side, *viz.* that he was born in England, and that this Matter might be triable by a proper *Visue*; but here he hath put *Alien* or *not Alien* in Issue, *viz.* *non alienigena modo & forma*, which cannot be tried for want of a *Visue*; and therefore Judgment was given that the Bill should abate.

*Carth.* 302.  
*Nichols v. Pasquet.* *Vide* *Raft. Ent.* 252.  
*Hern.* 361.  
But if the Plaintiff had concluded his Replication with an Averment only, the Negative Clause *non Alienigena*; had been

only Surplufage, and helped upon a general Demurrer; so resolved, *Carth.* 265. *Breddack v. Briggs.* *Vide Comb.* 212.

Where Alienee is pleaded in Abatement, and the Plaintiff replies *Indigena*, he may either take Issue, or conclude & *hoc paratus est verificare*; but if in Bar, he must take Issue, and this is the Reason of the Difference in the two *Præcedents* in *Raftal.*

*Comb.* 394.  
*per Holt, Ch. Just.*

If Alienage be pleaded to an Alien in League, it must be pleaded in Abatement or Disability of the Plaintiff; but if it be to an Alien Enemy it may be pleaded either in Abatement or in Bar to the Action, because it is forfeited to the King as a Reprisal for the Damages committed by the Dominion in Enmity with him.

*Bro. Tit. Denizen,* 3, 16.  
*Co. Litt.* 128.  
*Raft. Ent.* 252, 605.  
*Cart.* 49.

## Ambassadors.

**A**N (*a*) Ambassador is a Person sent by one (*b*) Sovereign Prince to another, to transact in the Place of his Sovereign such Matters as relate to both States. As to the Manner of appointing and receiving Publick Ministers, their Duty, Power and Privileges, &c. being chiefly regulated by the Civil Law, or Law of Nations, I must refer to other Books for those Matters, and shall here only insert what seems most worthy of Notice in our Law Books; observing that our Law herein pays the greatest Regard to Rules prescribed by the Civil Law and the Law of Nations.

(*a*) Difference between Ambassador Ordinary and Extraordinary. *Molloy* 128. An Agent represents the Affairs only, but an Am-

bassador the Grandeur of his Master. *Molloy* 128. (*b*) By the Law of Nations, none under the Quality of a Sovereign Prince can send Ambassadors. *Molloy* 129. And it is said by my Lord Coke, That there can be no Ambassador without Letters of Credence from his Sovereign to another that hath Sovereign Authority. 4 *Inst.* 153. But the Electors and Princes of the Empire send or receive Ambassadors touching Matters which concern their own Territories. *Molloy* 129. And so the *Hans Towns*, being free Imperial Cities, have the same *Regalia* by Prescription or Grant. *Molloy* 129. But a King, deprived of his Kingdom and Royalty, hath lost his Right of Legation. *Molloy* 130. in *Margine.* If sent from a King or absolute Potentate, though in his Letters of Credence he is termed an Agent or *Nuncius*, yet he is an Ambassador or Legate. 4 *Inst.* 153. That Ambassadors were sent to the Pope, being a Temporal Prince, and also his Ambassadors received here, who were sworn not to attempt any Thing prejudicial to the King or Kingdom. 4 *Inst.* 156.

*Hob.* 78, 113, 114. An Ambassador cannot, as Procurator, exhibit a Bill in our Courts for a certain Number of his Fellow Subjects, without an Authority from them; for every Procurator must sue in the Name of the Principal, and cannot be such without his Allowance; nay, the King cannot make a Procurator for all his Subjects, without their Consent, nor would a Release, Sentence or Discharge against such a one be a Discharge against the Principal: Also the Office of an Ambassador doth not imply a private Procuration, but for the Publick, and not for a particular Subject, otherwise than it concerns the King and his Ministers to protect them in Foreign Kingdoms in Nature of a Negotiation of State; and therefore, though he may Prosecute and Defend for a private Subject at the Council-Table, which is a Court of State, yet when he comes to settled Courts he must observe the essential Parts of their Proceedings.

In the Bishop of *Ross's* Case, *Ann.* 13 *Eliz.* the Question being, *an Legatus, qui Rebellionem contra Principem ad quem Legatus concitat, Legati Privilegiis gaudeat, & non ut Hostis Pœnis Subjaceat*, it was resolved he had lost the Privilege of an Ambassador, and was subject to Punishment. *4 Inst.* 152. *Molloy* 33. S. C. cited, that Ambassadors cannot by the Law of Nations be defended when they act against the State or Person of the King with whom they reside; and *vide* 3 *Bulst.* 28. and 1 *Rol. Rep.* 185. In which last Book the King's Attorney makes a Difference between a Conspiracy to kill the King and other Treasons committed by an Ambassador.

If *A.* is sent as Ambassador of the King of *Morocco* to the States, and by them accepted as an Agent, and there being War between the King of *Morocco* and the King of *Spain*, the King of *Morocco* makes a Commission to *A.* to take *Spaniards*, and their Goods; and the King of *England* grants him Letters of Safe Conduct as a Publick Minister, and the States Licence him to levy Men, to furnish Ships, &c. and there being a League between *England* and *Spain*, and *England* and the States, and War between *Spain* and the States, *A.* takes at the *Canaries* a *Spanish* Ship laden with Goods, and by Strefs of Weather is driven to *Plymouth*, he shall not be tried as a (*a*) Pirate here; for by the Law of Nations an Ambassador ought to be safe and sure in every Place. *4 Inst.* 152. Resolved in *Palache's* Case by the Ch. Just. Matter of the Rolls, and the Judge of the Admiralty, upon a Reference to them by the Lords of the Council, upon the Prayer of the *Spanish* Ambassador, to proceed against him as a Pirate upon the Statute 28 *H. 8.* cap. 15. 1 *Rol. Rep.* 175. S. C. cited. 3 *Bulst.* 27, 28. S. C. cited. (*a*) But 1 *Rol. Rep.* it was agreed by the Civilians, that he ought to proceed *Civiliter* for the Goods, because *in solo Amici*; and 3 *Bulst.* 29. A Suit being in the Court of Admiralty against several Merchants that had bought Goods, the Civilians held, because they were bought *in Solo Amici*, Proceeding might be for them in the Court of Admiralty; and it is said, that accordingly the Court denied a Prohibition: But *per* 4 *Inst.* 154. tho' this was the Opinion of some of the Civilians in *Palache's* Case, yet the contrary had been resolved, 2 *Jac.* 1.

*4 Inst.* 153. If a Man that is banished is sent Ambassador to the Place from which he is banished, he cannot be detained or offended there.

A Bill was exhibited in Chancery against one, then Ambassador at the Court of *Spain*; an Order was obtained, that all Proceedings should cease until his Return from his Embassy; and on Motion to discharge the Order, it was agreed on Debate, that a Protection lies for an Ambassador, *quia Profecturus*, or *quia moraturus*, and that at Law he may cast an *Essoin* for a Year and a Day, and may afterwards renew it if Occasion continues; and the Court ordered the Proceedings to stay for a Year and a Day, unless the Defendant should sooner return into *England*.

If a Foreign Ambassador (being *Pro-Rex*) committeth a Crime which is *contra jus Gentium*, as Treason, Felony, Adultery, &c. he loses the Privilege and Dignity of an Ambassador, and may be punished here as any other private Alien, and is not to be remanded to his Sovereign but of Courtesy.

*4 Inst.* 153. *Molloy* 139. Same Rule cited. 1 *Rol. Rep.* 175. Same Rule agreed by the Civilians. So 3 *Bulst.* 28. 1 *Hawk. P. C.* 35. S. P.

So upon Contracts which are good *Jure Gentium*, he must answer.

4 Inst. 153.  
But Molloy

141. it is said, that most certainly by the Civil Law, his Moveables, which are accounted an Accession to his Person, cannot be seized on as a Pledge, or for Payment of Debt, though by Leave of the King or State where he resides, for all Coaction ought to be far from an Ambassador, as well that which touches his Necessaries as his Person; if therefore he hath contracted a Debt, he is to be called upon kindly; and if he refuses Payment, Letters of Request are to go to his Master, so that the same Course may be taken with him as with Debtors in another Territory, and takes Notice of the Opinion of my Lord Coke, which seems to the contrary; and 3 Balf. 28. it is agreed by the Civilians, that the Person of an Ambassador cannot be arrested.

But if a Thing be only *malum prohibitum* by Act of Parliament, private Law or Custom of the Realm, and is not *malum in se jure Gentium*, *nec contra jus Gentium*, an Ambassador residing here shall not be bound by it.

4 Inst. 155.  
Molloy 139.  
Same Rule cited.

175. Same Rule agreed by the Civilians.

And now by the 7 Ann. it is declared, " That all Writs and Processess that shall at any Time be sued forth or prosecuted, whereby the Person of any Ambassador, or other publick Minister of any Foreign Prince or State, authorized and received as such by her Majesty, her Heirs or Successors, or the Domestick (a) Servant of any such Ambassador, or other Publick Minister, may be arrested or imprisoned, or his or their Goods or Chattels may be distrained, seized or attached, shall be deemed and adjudged to be utterly null and void.

(a) On Motion to supersede a Process on this Statute, the Court held, That it was

not necessary to shew that he actually lived in the House, but that he must shew the Nature of his Office, that the Court may Judge of it; also that he is not such a one as comes within the Description of any of the Statutes against Bankrupts. Hill. 4 Geo. 2.

" Provided, That no Merchant or other Trader whatsoever, within the Description of any of the Statutes against Bankrupts, who hath or shall put himself into the Service of any such Ambassador or Publick Minister, shall have or take any Manner of Benefit; and that no Person shall be proceeded against as having arrested the Servant of an Ambassador or Publick Minister, by Virtue of this Act, unless the Name of such Servant be first registred in the Office of one of the Principal Secretaries of State, and by such Secretary transmitted to the Sheriffs of London and Middlesex, for the Time being, or their Under-Sheriffs or Deputies, who shall upon the Receipt thereof hang up the same in some publick Place in their Offices whereto all Persons may resort and take Copies thereof without Fee or Reward.

" The Persons who by suing out Writs, &c. violate this Law, which is declared a Publick Act, to be punished at the Discretion of the two Chief Justices and Lord Chancellor, or any two of them.

One Protected by the *Genoese* Ambassador brought a Bill in Chancery, and was ordered, though after Answer put in, to give Security to answer the Costs, in the same Manner as if he were a Foreigner; because by the above Statute all Processes against Ambassadors and their Servants are made void; so that if the Bill should be dismissed, no Process could issue against him.

Abr. Eq. 350.  
Godwin and Archer.  
Pasch. 1729.  
And a like Order said to be made by my Lord

Cowper, after Answer put in, Trin. 1709. between Barrett and Buck.

## Amendment and Jeofail.

- (A) Of Amendments at Common Law.
- (B) The several Statutes of Amendment and Jeofail.
- (C) Whether the Statutes of Amendment extend to the King, or to any Criminal Proceedings.
- (D) In what Cases the Proceedings in Civil Causes are amendable, and the Manner thereof, as by amending one Part of the Record by another : And herein,
1. Of the Original Writ and Process.
  2. Of the Imparlance Roll.
  3. Of the Plea Roll.
  4. Of the Jury, Process and *Nisi Prius* Roll.
  5. Of the Verdict.
- (E) What Defects may be amended, or are aided after Verdict : And herein,
1. Of the want of sufficient Certainty in the Plaintiff's Declaration in not setting forth his Cause.
  2. Of Repugnancy and Surplusage.
  3. Of Insufficiency in the Defendant's Bar.
  4. Of Immaterial and Informal Issues.
- (F) Of amending the Judgment.
- (G) At what Time the Amendment must be made, and therein of Records removed out of Inferior Courts, and paying of Costs.
- (H) Where Records defaced by Design or Accident will be set right and amended.

## (A) Of Amendments at Common Law.

**A**T Common Law there was but little Room for Amendments, *Britt. 2.* which appears by the several Statutes of *Amendments and Feofails*, *8 Co. 156.* and likewise by the Constitution of the Courts; for says *Britton*, the Judges are to Record the Parols deduced before them in Judgments; also, says he, *E. 1. (a)* granted to his Justices to Record the Pleas Plead before them, but are not to erase their Records, nor amend them, nor Record against their Inrolment, nor any way suffer their Records to be a Warrant to justify their own Misdoings. *(a) This Ordinance of E. 1. was so strictly observed, that*

when *Ch. Just. Ingham*, in his Reign, moved with Compassion for the Circumstances of a poor Man who was fined *13 s. 4 d.* erased the Record, and made it *6 s. 8 d.* he was fined *800 Marks*, *4 Inst. 255.*

Hence it appears, that regularly at Common Law, neither false *Latin*, *9 H. 7. 16.* the Omission of a Word, Syllable, or Letter, or other Defect or Variance from the approved and legal Forms, were amendable. *4 H. 6. 16. 8 Co. 157.*

But out of this General Rule there are the following Exceptions. *2 Hawk. P. C. 192.*

1. All Mistakes are amendable the same Term, because it is a Roll of that Term, and so in the Breast of the Court during the whole Term, and when a new Roll might be brought in the Cause, and consequently the same Roll may be amended. *8 Co. 157. Blackmore's Case. 1 Salk. 49. 6 Mod. 274.*

That Part of the Count which records the Writ was amendable at Common Law, though of a subsequent Term; because the Recording the Writ was Surplufage, and the Judges were not to Record against a former Record. *8 Co. 156 b. 7 H. 6. 45. Vide Cro. Car. 144.*

An Effoin, if the Plaintiff's Name were mistaken, or an Effoin was made as Guardian, when there was no Guardian in the Writ, this was amendable at Common Law, because such an Effoin was contrary to the Writ, and consequently an Inrollment of it would contradict a former Writ. *1 Sand. 317. 2 H. 4. 4. Fitz. Amendment 7, 61. 7. Ero. Amendment 26.*

Continuances could be amended at Common Law; as where *A* brought a Bill against *B.* who vouched *C.* who entred into Warranty, and pleaded to Issue, a *Venire Facias*, and a *Jurat' inter A. and B.* was put in, which *Jurat'* ought to have been between *A.* and *C.* and because it appeared by the Record of the Issue, and the Award of the *Venire Facias*, and the *Venire* it self, that the *Jurat'* ought to have been between *A.* and *C.* this was amended, otherwise it would be an Inrollment against a former Record. *8 Co. 156. b. 1 Rol. Abr. 199. vide for this Cro. Eliz. 619. Style 339. Yelv. 155. 2 Mod. 316.*

In the Case of the King the Writ was amendable, where the Fault was in the Form, as in a *Quare Impedit* brought by the King, the Writ was *Presentere* instead of *Presantare*; and it was amended; for it could not be intended that the original Institution of the Court was to destroy or lessen the Prerogative of the King. *8 Co. 156. 42 E. 3. 6. Vide infra Letter (C.)*

## (B) The several Statutes of Amendment and Jeofail.

The tying down the Courts so strictly not to alter their Records after the first Term, was found very inconvenient, and many Judgments were reversed by the Misprision of Clerks, &c. Wherefore it was enacted,

“ By 14 Ed. 3. cap. 6. That by the Misprision of a Clerk in any Place wheresoever it be, no Process shall be annulled or discontinued by mistaking in Writing (a) one Syllable, or one Letter too much or too little, but as soon as the Thing is perceived by Challenge of the Party, or in other Manner, it shall be hastily amended in due Form, without giving Advantage to the Party that challengeth the same because of such Misprision.

(a) The Judges construed this Statute so favourably for the Suitors, that

they extended it to a Word. 8 Co. 158. a. But they were not agreed whether they could make these Amendments as well after Judgment as before. 8 Co. 157. b. which occasioned the 9 H. 5. cap. 4. by which it is declared, That the Judges shall have the same Power as well after as before Judgment, as long as the Record or Process is before them; and this Statute is confirmed by 4 H. 6. c. 3. with an Exception, that it shall not extend to Process on Outlawry, or to Records or Processes in Wales. But by 2 Sand. 40. this last Exception, and the like Exception in 8 H. 6. cap. 15. seem to be annulled by the Statute of 27 H. 8. cap. 26. by which it is enacted, That the Laws of England shall be used, practised and executed in Wales.

8 Co. 157. a. Though these Statutes gave the Judges a greater Power than they had before, yet it was found that they were too much cramped, having Authority to amend nothing but Processes, which they did not construe in a large Signification, so as to comprehend the whole Proceedings, but confined it to the Mesne Process and Jury Process: Wherefore to enlarge the Authority of the Courts,

“ By the 8 H. 6. cap. 12. it is enacted, That for Error assigned in any Record, Process, or Warrant of Attorney, Original Writ or Judicial Panel or Return, by Razing or Interlining, or by Addition, Subtraction, or Diminution of Words, Letters, Titles, &c. no Judgment or Record shall be reversed or annulled, but the Judges, in any Record, Process, Word, Plea, Warrant of Attorney, Writ, Panel or Return, in Affirmance of Judgment, may amend all that which to them seems to be the Misprision of the Clerk (except Appeals, Indictments of Treason, Felony and Outlawries of the same) and the Substance of the proper Names, Surnames, and Additions left out in Originals and Exigents, contrary to the 1 H. 5. and other Writs containing Proclamation, and if certified defective, the Parties in Affirmance of Judgment may alledge the Variance between the Record and Certificate, and if found and certified it shall be amended.

“ By the 8 H. 6. cap. 15. The Judges, in any Records or Processes before them, by Error or otherways, or in Returns of Sheriffs, Coroners, Bailiffs of Franchises, or others, may amend the Misprision of the Clerks of the Courts, or of the Sheriffs, Coroners, their Clerks and other Officers whatsoever, in writing a Letter or Syllable too much or too little.

As these Statutes extended only to what the Justices should interpret the Misprision of their Clerks and other Officers, it was found by Experience, that many just Causes were overthrown for want of Form, not aided by any of these Statutes, though they were good in Substance: Wherefore for further Relief of Suitors,

“ The 32 H. 8. cap. 30. enacts, That if (a) any Issue be (b) tried On this Sta-  
 “ (c) by the Oath of twelve Men, for the (d) Party Plaintiff or De- tute a care-  
 “ mandant, or for the Party Tenant or Defendant, in any Courts of ful and exact  
 “ Record, Judgment shall be given, any Mifpleading, Lack of Colour, Collector  
 “ insufficient Pleading or Jeofail, any Miscontinuance or (e) (f) (g) has the fol-  
 “ (h) Discontinuance or (i) Misconveying of (k) (l) Procefs, Mis- Notes, vide  
 “ joining of the Issue, (m) Lack of Warrant of Attorney of the Party 1 Danv. Abr.  
 “ (n) against whom the Issue shall be tried, or other Negligence of the 372.  
 “ Parties, their Counsellors or Attornies, and the Judgment shall stand (a) But yet  
 “ according to the said Verdict, without Reversal. upon the vi et  
 armis is not

within the Act; but it must be one joined upon the Special Matter alledged. Cro. Jac. 599. and  
 vide 1 Sand. 81, 82. (b) But if in Replevin the Plaintiff is Nonsuit after Evidence, and the  
 Jury assess Damages for the Avowant, this is no Trial within the Act; for the Enquiry of the  
 Jury is only in Nature of an Office of Inquest. Cro. Eliz. 339. adjudged, 412. adjudged, and vide  
 Gouff. 49. Hob. 69. (c) So that an Issue upon *Nul tiel Record* is not within the Act. 11 Co. 8. a. Cro.  
 Jac. 304. (d) In Trespass against A. and B. A. pleads Not guilty, and B. confesses the Action  
 and a Writ of Enquiry is awarded upon the Roll, but after *quoad B.* there is no Continuance en-  
 tred, and after the Issue is found for the Plaintiff, admitting there is a Discontinuance *quoad B.* yet  
 it is aided by the Statute; for B. was Party to the Original, and is privy to the Verdict, being liable  
 to the Damages. Sir John Haydon's Case, 11 Co. 6. b. adjudged, 1 Rol. Rep. 31. adjudged, and vide  
 Cro. Jac. 304. and vide Cro. Car. 313.—But an Issue between the Demandant and Vouchee, is not  
 within the Act. 1 And. 26. Kelw. 207. b. 5 Co. 37. b. 11 Co. 6. b. but per Hob. 281. this Opinion  
 is Questioned, it not being said Party to the Original. (e) If as to Part, the Defendant joins Issue,  
 but says nothing as to the rest, and this Issue is found for the Plaintiff, he shall have Judgment. Go-  
 merfal and Gomerfal, 11 Co. 6. b. 2 Leon. 194. Godb. 55. so 1 Rol. Rep. 161. Cro. Jac. 353. Hob. 187.  
 3 Lev. 39. and vide Gouff. 109. 1 Bulst. 25. Cart. 51.—But if the Matter is pleaded to the whole,  
 though in Fact but an Answer to Part, this is a bad Plea, and not help'd by the Statute. Harv.  
 331. (f) This extends as well to those on the Part of the Plaintiff as of the Part of the Defen-  
 dant. 1 Rol. Rep. 161 (g) Discontinuances after, as well as those before Verdict, are within this Act.  
 Cro. Eliz. 489. Cro. Jac. 528. and vide Cro. Car. 236. Cro. Jac. 211. Cro. Eliz. 320. (h) Discontinuances  
 are helped by the Statute, but not imperfect Verdicts. 2 Leon. 196. Cro. Eliz. 133. Godb. 57.  
 3 Lev. 55. (i) But if upon an Information of Perjury, the Court awards a *Subjæna* against the De-  
 fendant, this is not a Misconveying but a disorderly Procefs, and not aided by the Statute. Topliff  
 and Waller. 1 And. 48. adjudged. Kelw. 214. adjudged, and there said this is no more help'd by the  
 Statute, than if in *Ejectment* the Court should award a *Petit Cape*, or in a Real Action a Distress or  
 Attachment; for such Disorders were never intended to be redressed by the Statute, and vide Cro. Jac.  
 89. where one Procefs does not warrant the other.—So when a *Venire* is awarded to a wrong Offi-  
 cer, and he returns it, and thereupon a Trial is had, this is a Mis-trial, and not helped. 1 Brownl.  
 134. Cro. Eliz. 574, 586. Moor 356. Pl. 482. Yelv. 15. 5 Co. 36. b.—But that Mis-trials, as where  
 the *Venue* was awarded of a wrong Place, &c. were not aided by this Statute, vide Cro. Eliz. 468.  
 Gouff. 58. Winb 69. 4 Leon. 85. Cro. Jac. 647. Lit. Rep. 365. Moor 91. Pl. 212. Kelw. 212. 5 Co. 36. b.  
 (k) But if there be any Defect in an Original, or in the Return thereof, it is not helped by this  
 Act. Kelw. 207. 1 And. 27. (l) As if a *Disstringas* is awarded where it should be a *Habeas Corpora*.  
*Savil* 37. (m) Vide 1 Leon. 175. Cro. Eliz. 145, 153. where the Entry was, that the Defendant *obtu-  
 lit se per Higgens Attor' suum*, without shewing his Christian Name; and it was argued that it was  
 helped by this Statute; and in Cro. Eliz. 153. it was said that if there were any Warrant of Attor-  
 ney, and his Name appears, then it may be amended by it; but for this vide 1 Rol. Abr. 289.  
 1 Leon. 175. and vide 18 Eliz. cap. 14. by which a Provision is made against the Want of any War-  
 rant of Attorney. (n) But if the Judgment is not given upon the Verdict, it is not within the Act;  
 as in Debt against an Heir upon the Bond of his Ancestor, he pleads *Riens per descent*, except twenty  
 Acres in D. and the Plaintiff replies he hath more in S. upon which they are at Issue; and it is  
 found for the Defendant; but the Plaintiff takes Judgment upon the Confession of the Assets. Mo-  
 lineux and Molineux, Yelv. 169. reversed by Reason of a Discontinuance, Cro. Jac. 236. reversed ac-  
 cordingly, and said the Statute must be intended where the Verdict is the Occasion of the Judgment,  
 and vide Cro. Jac. 211. Cro. Eliz. 339, 412.

This Statute, tho' much more extensive than the others, and tho' it  
 very much enlarged the Authority of the Judges in Amendments in Mis-  
 takes, yet it remedied no Omission, but one, which was the Party's own  
 Neglect, in not filing his Warrant, which should not after Verdict pre-  
 judice the Right of the Party that had prevailed; therefore to Remedy  
 the Omissions which the prevailing Party might have been Guilty of, as  
 well as the other Side.

“ By

(a) But if in Trespass against A. B. and C. A. pleads Not guilty, and it is found for him, but against the other two, there is Judgment by Default, the Want of an Original may be assigned for Error; for the Verdict being found for A. he is out of the Case, and it is as if the Action had been brought against the other two only; but if the Verdict had been for the Plaintiff, the Want of the Original *quoad* the other had been cured. 1 Lev. 210. (b) But the Omission of *vi & armis* in a Declaration of Trespass is Substantive, because that is the Inducement for the King's Fine. Cro. Car. 407. March 140. Cro. Fac. 443, 526, 536. but *vide* Cro. Fac. 130. 2 Rol. Rep. 285.—So is the Assignment of a Breach upon a Recognizance for Good Behaviour. Cro. Fac. 412. (c) 1 Leon. 30, 31. *vide* where the Original was determined and not revived. (d) An ill Writ in Substance, or a good Writ which warrants not the Declaration, is not aided by the Statute. Cro. Eliz. 722. Gouls. 126. Yelv. 108, 109. 1 Sid. 84. 5 Co. 37. b. 3 Bulst. 224. 1 Rol. Rep. 432.—When the Variance is such that it shall be taken as no Original. Cro. Eliz. 204. Hob. 251. Cro. Fac. 654, 655. Cro. Car. 327. Cro. Eliz. 286. 3 Mod. 136. 2 Rol. Rep. 382. 5 Co. 37. b.—But not so where the Vicious Writ is certified to be the Writ upon which the Proceedings were, and that there is no other. Cro. Fac. 185, 479, 664, 675. Palm. 428. 1 Brownl. 96, 97. Cro. Car. 272, 281. 1 Jones 304. Lat. h 116. Yelv. 109.—But where it appears there was a good Original, no Averment shall be taken that the Proceedings were on the vicious One. Cro. Fa. 597. Palm. 428.—And in Ejectment, where the Declaration recited the Original to be *Summonitus est*, there being none upon the File, the Court would not intend a vicious one; but that there was a good one, which is lost; and that the Plaintiff's Clerk mistook in the Recital thereof. Redman and Edclph. 1 Sand. 317. 1 Mod. 3.—So the Want of a *Venire*, *Disfringas*, &c. is aided, but not a vicious one; and where a vicious one shall be taken as none, *vide* Cro. Eliz. 483. Owen 59. Moor 465. Noy 57. Moor 684. Pl. 944. and *vide* Cro. Eliz. 215, 257, 259, 422, 433, 781. Cro. Fac. 65, 162, 396. Cro. Car. 90. Mo. 402. Pl. 535, 623. Pl. 852, 696. Pl. 967. Gadb. 194. 1 Leon. 329. 1 Bulst. 130, 131. 3 Bulst. 180. 1 Brownl. 78, 97. Yelv. 69. 1 Rol. Rep. 22. Stile 8, 483. March 26. 2 Rol. Rep. 285. (e) The Want of a Bill on the File, which is in Nature of an Original is aided by the Equity of the Act. Hob. 130, 134, 264, 282. 1 Jones 304. Cro. Car. 282. Stile 91.—and Cro. Fac. 91. to the contrary is not Law.—*Quare* of the Want of a Plaintiff in inferior Courts; but however an erroneous Plaintiff is not help'd. Cro. Fac. 108, 109. Stile 115. 1 Rol. Rep. 338. (f) But if there be no Return; as if the Writ be *Album breve*, or the Name of the Sheriff not indorsed, this is not help'd. 1 Rol. Rep. 295. 5 Co. 41. Cro. Eliz. 310, 509. Yelv. 110. Cro. Fac. 188, 189. (g) *Vide* Stile 91. 2 Rol. Rep. 247. In the Return of the *Venire*, the Words *Quilibet Juratorum per Plegiat'* were wanting, and Cro. Fac. 534. *per curiam*, it was held not as a Blank or no Return, but as an insufficient one, and help'd. 2 Rol. Rep. 87. adjudged, because by the Appearance of the Jurors it was saved, and said it was not like Dr. Hussy's Case, where Pledges were wanting upon an Original, which *vide* 3 Bulst. 275, 276. &c. 1 Rol. Rep. 445, 446, 447. Cro. Fac. 414. where it is said, that not finding Pledges upon an Original is merely the Neglect of the Party, and so not helped.—If a *Venire* is awarded to the Coroners, and returned by two of them only, whereas at the Time of the Award and Return thereof, there were two more, this is only a Mis-return, and aided. Lamb and Wiseman, Cro. Fac. 383. adjudg'd. Hob. 70. adjudg'd; and yet if one Sheriff of London makes a Return without the other, this is not helped, being no Return at all; for they make but one Officer; and the Court knows that one Sheriff there is two Persons. Hob. 70. (h) Upon the Return of a *Venire de medietate Linguae*, it did not appear which were Denizens, and which Aliens. Cro. Eliz. 841. *per curiam*. It is an insufficient Return, and aided by the Statute.—Upon the *Venire* Twenty-three only were returned, but the *Habeas Corpora* was awarded, against the Twenty-three and A. and Eleven of the other, and A. were sworn and tried the Cause. Fines and North, 1 Jones 302. adjudged, it was not help'd; for A. was not returned by the Sheriff. Cro. Fac. 278. 5 Co. 36. b. 37. a. Cro. Eliz. 194. 1 Brownl. 274. 1 Jones 357. and *vide* 1 Sid. 66.—So if the Trial had been by Eleven of the Twenty-three, and one of the *Tales de Circumstantibus*, Sankill and Stoker. Cro. Car. 225. adjudged *per curiam cont.* Croke 1 Jones 245. adjudged *per curiam cont.* Croke, but *vide* 1 Brownl. 274. where it was adjudged according to the Opinion of Croke, *vide* Latch 54. but if Twenty-five are returned, and the Twenty-fifth is sworn, and tries the Cause, it is not helped, because a Mis-trial. Cro. Fac. 647. but if tried by Twelve of the other, it is helped. Cro. Fac. 647. (i) In a *Scire facias* upon a Recognizance against the Heirs and Ter-tenants of the Coruzor, the Sheriff returns J. S. Ter-tenant, but says nothing as to the Heir, and J. S. pleads to Issue, and it is found against him. Cro. Car. 295. adjudged by three Judges against Croke, that *quoad* the Heir, there being no Return, it is not helped by the Statute; but *per Croke*, the Defendant having pleaded to Issue, and that being found against him, he shall not now take Advantage of the Heir's not being returned summoned, and Cro. Car. 312, 313. it was adjudged for the Plaintiff, because *quoad* the Heir, it was only a Discontinuance, which is aided by the 32 H. 8. 1 Jones 319. adjudged.

These Statutes were extended only to the Courts above, but the subsequent Statutes extend to all Courts of Record, and remedy several Defects and Omissions not included in the former. 2 Sand. 258.

“ By the 21 Jac. 1. cap. 13. it is enacted, That after Verdict for Plaintiff or Demandant, Defendant or Tenant, Bailly in Assise, Vouchee Praice in Aid, or Tenant by Receipt, in any Action, Suit, Bill, Complaint or Demand, in any Court of Record, Judgment thereupon shall not be stayed or reversed for any Variance in Form only between the Original or Bill, and the Declaration, Plaint or Demand, or for (a) Lack of the Averment of any Life, so it be proved they are living, or because the *Venire Habeas Corpora* or *Distringas* was awarded to a wrong Officer upon any insufficient Suggestion, or (b) for that the *Vifne* is in (c) some Part mis-awarded or sued out of more or fewer Places (d) than it ought to be, so as some one Place be right named, or for mis-naming any of the Jurors in (e) Surname or Addition, in any of the Writs or Returns thereof, so as they be proved to be the same as were meant to be returned, or for that there is no Return upon any of the Writs, so as a Panel be returned and annexed thereto; or for that the Sheriff or other Officer's Name is not set to the Return of such Writ, so as it appear by Proof the Writ was returned by him, or (f) for that the Plaintiff in *Ejectment*, or other Personal Action, being under Age, appeared by Attorney, and the Verdict passed for him.

(a) 1 Sid. 61.  
(b) Cro. Car. 17, 162, 284, 480.  
1 Jones 395.  
Stile 201, 206.  
Raym. 67.  
(c) This Statute aids not, unless the *Venue* arises from several Places, and one of those Places is truly named  
1 Sid. 20.

— But if it arises from several Places, though in several Counties, and it is tried by one only, it is helped. 2 Lev. 122. per Hale. (d) By the Opinion of the greater Part of the Judges, where by particular Custom a Trial was to be *De vicineti* of the four Wards next adjoining, and the *Venire* is awarded *De vicineti* of two of them only, it is helped by the Statute. 2 Sand. 258. but *Sanders dubitavit*, whether it should extend to aid any Proceedings except such which were according to the Course of the Common Law. (e) But this extends not to any Mistake in the Christian Name. Cro. Car. 202. (f) Stile 158, 218.

The main Design of this Statute was to help any Mistake in the Jury Process, but there were several Things still to be supplied, and several others to be adjudged Form, which were always construed to be Matters of Substance, and consequently not aided by any of the former Statutes; wherefore the 16 & 17 Car. 2. was made, the Act which *Twifden* called *The Omnipotent Act*. 1 Vent. 100.

“ By the (a) 16 & 17 Car. 2. cap. 8. it is enacted, That after Verdict in any Action, Suit, Bill or Demand, in the Courts of Record at *Westminster*, County Palatine of *Chester* or *Durham*, or of the Great Sessions in *Wales*, Judgment thereupon shall not be stayed or reversed for Want of Form or Pledges returned upon the Original, or for Want of Pledges upon any Bill or Declaration, or for Want of a *Profert in curia* of any Deed, or of Letters Testamentary, or of Administration, or for the Omission of *vi & armis* or *contra pacem*, or for the Mistake of the Christian or Surname of either Party, Sums, Day, Month or Year, in any Bill, Declaration and Pleading, being right in any Writ, Plaint, Roll or Record preceding, or in the same to which, the Plaintiff might have demurred and shewed the same for Cause, or for Want of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*, or *prout patet per recordum*; or for that there is no right Venue; so as a Trial was by a Jury of the (b) proper County or Place (c)

B b

(a) This Act was only for three Years, but is made perpetual per 22 & 23 Car. 2. cap. 4.  
(b) But this extends not to any Trial

in an improper County. 1 Mod. 37. 2 Mod. 24. 1 Mod. 199. (c) In Debt upon a Bond in *London*, conditioned for the Performance of Covenants, one of which was for the Enjoyment of *Shrub-Walk*, in the Forest of *W.* in *Com' N.* and the Defendant pleaded Performance generally, and the Plaintiff replied, That the Earl of *N.* having Title by Grant, &c. entred and ousted him, and the Defendant pleaded the Earl of *N.* had no Title; and thereupon Issue was joined and tried by a *Vifne* of *Shrub-Walk*, and found for the Plaintiff; and though no *Vifne* could arise of the *Walk*, and it could not be intended a *Vill*, being only collaterally alledg'd as a Thing granted, and not as a Place where any Fact was done, yet being tried by a Jury of the County where the Mat-

ter

ter of the Issue arose. “ where the (d) Action is laid, nor shall any Judgment after Verdict, Confession by *Cognovit Actionem* or *relieta verificatione*, be reversed  
*Stirk and Bates,* “ for Want of a *Misericordia* or a *Capiatur*, or because one is entred for  
 1 *Lev.* 207. “ the other, nor for that *ideo concessum est per curiam* is entred for *ideo*  
 it was ad- “ *consideratum est*, &c. or for that the Increase of Costs after Verdict in  
 judged for “ an Action, or upon a Nonsuit in Replevin, at the Request of the  
 the Plaintiff, “ Party for whom the Judgment was given, nor for that the Costs in  
 by three “ any Judgment whatsoever, are not entred to be by Consent of the  
 Judges cont’ “ Plaintiff; and that all such Omissions, Variances and Defects, and  
*Twisden*, who “ (e) other Matters of like Nature, not being against the Right of the  
 said it was “ Matter of the Suit, nor whereby the Issue or Trial are altered, shall be  
 not within “ amended where such Judgments are or shall be removed by Writ of  
 the Words, “ *Error*.  
 and being a “  
 new Law, it “  
 should not

be taken according to the Intent against the Words; and after *Error* was brought, but the Parties agreed, the Defendant making the Plaintiff Satisfaction. 1 *Sid.* 326. adjudged *per totam curiam prater Twisden*, though objected, the Action being laid in *London*, the Issue should have been there tried, unless some other Place had been shewed in the Record; and *vide* 2 *Lev.* 122. (d) The Plaintiff declared that the Defendant *apud London*, said of the Plaintiff, That he had stole Plate at *Oxford*; and the Defendant justified that he did steal Plate at *Oxford*, *per quod* he spoke the Words at *London*, and the Plaintiff replied *De injuria sua propria*, &c. and thereupon Issue was joined and tried in *London*, and found for the Plaintiff; and though it was adjudged that the only Point in Issue was, Whether the Felony was committed, which was triable at *Oxford*, yet the Plaintiff had Judgment. *Craff* and *Boite*, 1 *Sand.* 247, 248. by three Judges, who said that the Issue being tried by a Jury of the proper County, it was within the express Words of the Statute; but *Twisden Fortment cont’*, and by the Reporter, this Judgment was given not only against the Opinion of *Twisden*, but of several others, as he was informed; and being of Counsel with the Defendant, he agreed the Meaning of the Statute was, that the Issue should be tried in the proper County where it arises, else it would be impossible by any Plea, to remove the Trial from the County where the Action is laid. *Raym.* 181. adjudged that it was helped by the Statute, but said that the Defendant might have demurred upon it. 2 *Keb.* 496. adjudged, 1 *Vent.* 263. cited to be adjudged; so *Adderly and Wife*, 2 *Lev.* 164, 165. adjudged, 1 *Vent.* 263. cited, and *vide Raym.* 392. where the like Point was in Question, & *adjorn’*; so 2 *Jones* 82. & *adjorn’*. And in the Case of *Fenning and Hunking*, 1 *Vent.* 263. (where the Court said it was within the Words, but not the Meaning of the Act; for the Intention was so, that the Trial was in the County where the Issue did arise) but in Regard of these Precedents cited, they would not stay Judgment; but by the Report of this last Case, 2 *Lev.* 121. it does not appear how the Judgment was, but *Hale*, Ch. Just. there said the Meaning of the Statute was, If the Issue was tried in the County where the Matter thereof arose; for it is not reasonable to believe the Parliament intended to alter the whole Course of Trials, and to have Things tried in foreign Counties, & *adjornatur*; and by the Report of the same Case, 3 *Keb.* 350, 371, 509. the Parties agreed to amend and lay the whole Matter in the County where the Action was laid; and said the Court inclined strongly against the Judgments cited. (e) 1 *Vent.* 272. *Raym.* 398.

*Cartb.* 66.  
*Skin.* 49.

The above Statutes being chiefly calculated to aid Imperfections after Verdict, and the Statute 27 *Eliz.* aiding Defects in Form only on a general Demurrer, it was thought adviseable to enlarge the Authority of the Courts further in Favour of Suitors; and therefore,

“ By the 4 & 5 *Ann. cap.* 16. for the Amendment of the Law, it is  
 “ enacted, That where any Demurrer shall be joined and entred in any  
 “ Action or Suit in any Court of Record, the Judges shall proceed and  
 “ give Judgment according as the very Right of the Cause and Matter  
 “ in Law shall appear unto them, without regarding any Imperfection,  
 “ Omission or Defect in any Writ, Return, Plaint, Declaration or other  
 “ Pleading, Process or Course of Proceeding whatsoever, except those  
 “ only which the Party demurring shall specially and particularly set  
 “ down and express together with his Demurrer, as Causes of the  
 “ same, notwithstanding that such Imperfection, Omission or Defect  
 “ might have heretofore been taken to be Matter of Substance, and  
 “ not aided by the 27 *Eliz.* so as sufficient Matter appear in the  
 “ said Pleadings, upon which the Court may give Judgment according  
 “ to the very Right of the Cause, and no Advantage or Exception shall  
 “ be taken of or for an immaterial Traverse, or of or for the Default  
 “ of entering Pledges upon any Bill or Declaration, or of or for the De-  
 “ fault of alledging the bringing into Court any Bond, Bill, Indenture or  
 “ other

“ other Deed whatsoever, mentioned in the Declaration or other Pleading,  
 “ or of or for the Default of alledging of the bringing into Court Let-  
 “ ters Testamentary or Letters of Administration, or of or for the  
 “ Omission of *vi & armis, & contra pacem*, or either of them, or of or  
 “ for the Want of Averment of *hoc paratus est verificare*, or *hoc paratus*  
 “ *est verificare per recordum*, or of or for not alledging *prout patet per re-*  
 “ *cordum*, but the Court shall give Judgment according to the very Right  
 “ of the Cause, as aforesaid, without regarding any such Imperfections,  
 “ Omissions and Defects, or any other Matter of like Nature, except  
 “ the same shall be specially and particularly set down and shewn for  
 “ Cause of Demurrer.—*And* that all the Statutes of *Jeofails* shall be  
 “ extended to Judgments which shall be entred upon Confession, *Nibil*  
 “ *dicit*, or *non sum informatus*, in any Court of Record, and no such  
 “ Judgment shall be reversed, nor any Judgment upon any Writ of En-  
 “ quiry of Damages executed thereon, be stayed or reversed for or by  
 “ Reason of any Imperfection, Omission, Defect, Matter or Thing  
 “ whatsoever, which would have been aided and cured by any of the  
 “ said Statutes of *Jeofails*, in Case a Verdict of twelve Men had been  
 “ given in the said Action or Suit, so as there be an Original Writ or  
 “ Bill, and Warrants of Attorney duly filed according to the Law as  
 “ is now used.

Notwithstanding the great Enlargement of the Power of the Judges, *Carth. 158,*  
 by the above recited Statutes in amending Writs, Processes, &c. yet *367. 520.*  
 none of them were thought to extend to Writs of *Error*, and the rather *1 Salk. 49.*  
 because such Amendment would not be in Affirmance of the Judgment ; but it being found that defective Writs of *Error* occasioned great Delay of Justice,

“ By the 5 *Geo. 1.* it is enacted, That all Writs of *Error* wherein  
 “ there shall be any Variance from the original Record, or other Defect,  
 “ may and shall be amended and made agreeable to such Record, by the  
 “ respective Courts where such Writ or Writs of *Error* shall be made  
 “ returnable ; and that where any Verdict hath been or shall be given  
 “ in any Action, Suit, Bill, Complaint or Demand, in any of his Majesty’s  
 “ Courts of Record, the Judgment thereupon shall not be stayed or  
 “ reversed for any Defect or Fault, either in Form or Substance, in any  
 “ Bill, Writ Original or Judicial, or for any Variance in such Writs  
 “ from the Declaration or other Proceedings.

### (C) Whether the Statutes of Amendment extend to the King or to any criminal Proceedings.

It has been a great Question, Whether any of those Statutes extend *Vide Cro. Car.*  
 to the Case of the King, either to Remedy the Party where he has pre- *144. 312.*  
 vailed against the King, or the King against the Party ; but as it has *1 Jones 320.*  
 been ruled in both Cases, and seems now established that these Statutes *3 Mod. 7,*  
 do not extend to the King, it will be needless to enter minutely into this *167.*  
 Enquiry ; for though only Indictments, Appeals and Informations on *2 Lev. 239.*  
 Penal Statutes are excepted in all the Statutes from 8 *H. 6. cap. 12.* yet *Hob. 328.*  
 because the first Statute says it shall be amended on the Challenge of the *2 Sand. 258,*  
 Party, in which the King cannot be included, the subsequent Statutes *308.*  
 are supposed to be made on the same Plat-form ; and that this Excep- *3 Bullst. 276.*  
 tion is only *ex abundantia cautelæ.* *1 Rol. Rep.*  
*447.*  
*4 Mod. 396.*  
*6 Mod. 269.*  
*1 Salk. 51.*

Thus *1 Sand. 249.*  
*2 Mod. 144.*

<sup>1</sup> *Jones* 320. Thus in a *Quo warranto quare* the Defendant claims a Warren, the Defendant prescribes for a Warren within the Manor of *Ridge*, and the *Venire* was awarded from the *Villa* of *Ridge*, and not from the Manor of *Ridge*, and a Verdict for the Defendant; the Court awarded a new *Venire*, because they held the King was not within the Statute 21 *Fac.* 1.

So in an Information for a seditious Libel, the *Venire* was returnable <sup>1</sup> *Salk.* 51. 13 *October*, and the *Distringas* tested <sup>6</sup> *Mod.* 268. 24 *October*, this was a Discontinuance, because not returned in the Presence of the Party; and though <sup>S. C.</sup> the Queen had a Verdict, the Court would not amend it, though such <sup>*Mich.* 3 *Ann.*</sup> Amendment would have been warranted by the Roll, where the *Distringas* <sup>the *Queen*</sup> *Amendment* would have been warranted by the Roll, where the *Distringas* <sup>verf. *Tut. bin.*</sup> was well awarded. <sup>by three</sup> *Judges, Hesit ante Gould.*

<sup>*Cro. Fac.*</sup> But it has been adjudged that the several Proviso's in these Statutes, <sup>414.</sup> which except Appeals and Indictments of Felony, &c. and that they <sup>*Hob.* 101.</sup> shall not extend to any Writ, Bill, Action or Information upon any Po- <sup>*Cro. Fac.* 318.</sup> pular or Penal Statute; do not (a) extend to those Cases in which a <sup>2 *Bullf.* 66.</sup> Remedy is given by Way of Recompence to a Party; as upon the Sta- <sup>1 *S.d.* 66.</sup> tute of *Waste*, for not setting forth Tithe, Forcible Entry, &c. <sup>*Stile* 307.</sup> <sup>2 *Sand.* 258.</sup>

(a) But a Writ of *Ravishment* of Ward upon the Statute of *Westm.* 2. *cap.* 35. is within the Proviso. *Dr. Hussy and Moor.* 3 *Bullf.* 275, 276.

“ Also by the 4 & 5 *Ann. cap.* 16. for Amendment of the Law, it is  
“ enacted, That all the Statutes of *Jeofails* shall extend to all Suits  
“ in any of her Majesty's Courts of Record at *Westminster*, for Re-  
“ covery of any Debt immediately owing, or any Revenue belonging  
“ to her Majesty, her Heirs or Successors, and shall also extend to all  
“ other Courts of Record.

*Vide Title* “ And by the 9 *Ann. cap.* 20. it is enacted, That the Statute for  
*Informations.* “ the *Amendment of the Law*, and all the Statutes of *Jeofails* shall be  
“ extended to Informations in Nature of a *Quo warranto*, and Proceed-  
“ ings thereon for any the Matters in the said Act mentioned.

## (D) In What Cases the Proceedings in Civil Causes are amendable, and the Manner thereof; as by amending one Part of the Record by another. And herein,

### 1. Of the Original Writ and Process.

The Original Writ is made amendable by 8 *H.* 12. and other Sta-  
tutes, when it is not made out pursuant to the Instructions given to the  
Curfitor, and likewise in those Misprisions which appear to be *vitia*  
<sup>*Hob.* 118.</sup> *scriptoris*, and are not of the Substance of the Writ; as were the In-  
<sup>*Cro. Eliz.* 644.</sup> structions to the Curfitor are for a *Præcipe* against *Lentbrop Frank Milite*,  
<sup>S. P.</sup> and the Curfitor makes the Original *Lentbrop Frank Generoso*, the Writ  
<sup>3 *Co.* 15. b.</sup> (a) shall be amended according to the Instructions given the Curfitor.  
<sup>*Lit. Rep.* 50.</sup>  
<sup>S. P.</sup> but if the Instructions were strong, it is not amendable. 2 *Vent.* 46, 49, 130. <sup>S. P.</sup> 1 *Sid.* 412.  
<sup>S. P.</sup> (a) So *Devist* for *Dimist.* 1 *Rol. Abr.* 198. <sup>*Hob.* 249.</sup> 1 *Brownl.* 130. *Vacariam* for *Vicariam.*  
<sup>*Hob.* 128.</sup> were amended, because the Instructions to the Curfitor in both Cases were right.

<sup>2 *Vent.* 152.</sup> So if Instructions are given to the Curfitor for drawing a Writ against *Westby*, and he by Mistake makes it *Westly*, and so are all the Proceed-  
ing afterwards, this shall be amended; and accordingly the Court ordered

dered the Curfitor to attend, who fatisfying them that his Inſtructions were right, they ordered the Original to be amended in Court, without any Application to the Chancery, or Order thence, and they amended all the Proceedings after.

So when there are two Defendants, and the Writ is *Præcipe* to them both, *quod teneat conventionem*, this ſhall be amended, becauſe the Inſtructions being againſt ſeveral, the Curfitor had not purſued them. 2 Lev. 173. So where in a Writ it was reddat inſtead of reſtant. 2 Sand. 38.

A *Quare Impedit* was brought *ad præſentand' ad Eccleſiam de Watton*, where it ſhould have been *ad Vicariam Eccleſiæ de Watton*, though this be an Error in Subſtance, the Vicarage being diſtinct from the Parſonage; yet becauſe the Inſtruction to the Curfitor was right, and this a peremptory Writ, it was allowed to be amended. Cro. Car. 74. Turner and Palmer.

So if the Party; in order to have a *Formedon* in Descender, draws Inſtructions that the Land descended to him as Son and Heir of the Donee's, and the Clerk draws the Writ that the Land descended to him as Son, and omits Heir, if the Clerk ſhows his Inſtructions, and will make Oath thereof, it ſhall be amended. 8 Co. 159. b.

Alſo the Writ was held amendable if there was (a) falſe *Latin*, or a Word that was no *Latin*, if it were only in the (b) Form of the Writ; but if it were of the Subſtance of the Writ it could not; for by the Statutes the Courts are allowed, where they have ſufficient Authority, to amend the Form of that Authority, but not to make an Authority for themſelves, by altering the Subſtance of the Writ. (a) For a Di- verſity be- tween falſe Latin and no Latin, vide 1 Lev. 2. 2 Vent 173. (b) There is

a Diverſity between the Negligence and the Neſcience of the Clerk; for the Negligence had a Copy of the Bond, and does not follow it) ſhall be amended; but his Neſcience or Ignorance in the legal Form and Cauſe of Originals is not amendable; for if this were allowed it would introduce Error and Barbarity into legal Proceedings. 8 Co. 159. a. 1 Lev. 2.

Therefore if the Writ be *imaginavit for imaginatus eſt*, or *avæ for aviæ*, it ſhall be (a) amended. 8 Co. 159. b. Moor 5. Pl. 17. S. P.

*N. Bendl. 33. S. P. cited. 1 And. 24. S. P. cited.* (a) But in *Blackmore's Caſe*, *8 Co. 159. b. hoſ breve for hoc breve* is held not amendable; but *Quare*, & vide *2 Vent. 173.* which ſeems to hold other- wiſe.

But the eſſential Part of a Writ is not amendable; as in *Aſſiſe*, where the *Teſte* was *duodecno Regis* for *duodecimo*, the Writ was abated; (a) be- cauſe it would have been erroneous to have proceeded on a wrong Writ; for this could not have been pleaded in Bar of a new *Aſſiſe*; and the Court could not amend it; becauſe the Curfitor was Judge of the Day when the Writ iſſued, and there were no Inſtructions to amend the Writ by. 1 Lev. 2. Heath and Pageat. (a) Diſtrictionem, when it ſhould have been Deſtrictionem in a Writ of

*Waſte*, not amendable. *Freeman's Caſe*, *5 Co. 43. adjudged. Cro. Eliz. 462. adjudged*, the Word there being *Diſtrictionem* with an *i*, and not an *e*. *2 Bulſt. 51. cited, and vide Hut. 56. indicari for indiſtari*; and *2 Rol. Rep. 255.*

So if a Writ be brought againſt Executors in the *Debet* and *Detinet*, that ſhall not be amended, becauſe the Action is miſ-conceived, giving the Court Authority to proceed againſt Executors *Jure proprio*, when they are not ſo chargeable by the Law. 8 Co. 159. a. 5 Co. 36.

But the negligent (a) Omiſſion of what the Clerk in Courſe ought to have inſerted (as the Omiſſion of *Dei gratia*) in the Stile of the King, ſhall be amended. 8 Co. 160. (a) So in a Writ of Partition, the

Omiſſion of the Words *oſtenſurus quare non fecerit*, was ſupplied. *8 Co. 160. a.*—In a *Quare Impedit*, the Word *ad* was omitted and amended, *Gouſf. 78. Cro. Eliz. 119.*—In a *Formedon* of Lands in *L.* the Word *in* was omitted and amended. *Noy 73.*

(a) So is the want of a *Venire*, *Di-stringas*, and other Pro-  
 And here it may be proper to observe, that the want of an (a) Original is (b) helped after Verdict by 18 *Eliz.* so is the want of a (c) Bill upon the File, (d) but the Statute does not extend to help a vitious Writ.

*cefs. Vide supra* the Notes on 18 *Eliz.* and 1 *Salk.* 454 (b) *Vide supra* the Notes on 18 *Eliz.* (c) that the want of a Bill upon the File, which is in Nature of an Original, is aided by the Equity of the Act. *Hob.* 130, 134, 264, 282. 1 *Jones* 304. *Cro. Car.* 282. *Style* 91. *Cro. Fac.* 91. *cont.* (d) *Cro. Eliz.* 722. *Yelv.* 108. 1 *Sid.* 84.

1 *Sand.* 317. But if the Original be misrecited on the Roll, as in Ejectment, if it be  
 3 *Mod.* 3. *Summonitus* instead of *Attachiatus*, after Verdict, if on Search no Original  
*Redman* and is found, such Original will not be erroneous, for the Statute helps the  
*Edolph.* want of an Original to all Intents, as if there had been a good one on the File; and if there had been a good one, such Misrecital would not have been erroneous; and if the Recital of the Original being but Form; it was not necessary after Verdict to amend the Bill.

## 2. Of the Imparance Roll.

1 *Rol. Abr.* After the first Term it is allowed in C. B. to mend the Imparance  
 198. Roll by the Office Paper-Book, because that is Instructions to the Pro-  
*Hob.* 83, 246. thonotary to enter up the Imparance Roll; and therefore that is equally  
 2 *Rol. Rep.* amendable as the Original is by the Instructions given the Cursitor; but  
 152. this must be on Affidavit that the Paper-Book has not been altered since  
*Moor* 892. the Defendant's Attorney has put his Hand to it.  
*Hut.* 83.

*Lit. Rep.* 278. In the King's Bench they will amend both the Bill and the Roll by the Office Paper Book, because this is Instructions for making them both, but they cannot amend from any other Paper Book, because such Book is not Instructions left in the Office to make up both the Roll and the Bill, but where there is no Office-Book, as where the General Issue is pleaded, it seems they should amend either the Bill or the Roll by the Declaration, of which they gave the Defendant a Copy, because such Declaration is the only Instruction to the Clerk of the Office.

*Lit. Rep.* 278. If the Bill on the File be with Blanks, or the Imparance Roll be with  
*Hetley* 142. Blanks for Dates or Quantities, yet it may be amended by the Paper by  
*Latch* 165. the Clerks themselves, until a *Recordatur* be ordered of the Verdict returned on the *Nisi Prius* Roll; but after such *Recordatur* it can only be  
 1 *Rol. Abr.* amended by the Court; for the Roll lies with the Prothonotary to be  
 207. made up according to the Paper-Book, until the *Recordatur* of the Verdict be allowed; but if after the *Recordatur* be entred, it is ordered on the Roll *in Statu quo tunc*; and then the Court is supposed to take Cognizance of it, in what Manner it then was, and if the Clerks might afterwards alter the Roll after Entry of the Verdict, they might amend it in the Verdict which is on the *Nisi Prius* Roll, and which was settled by the Judge of *Nisi Prius*, and cannot be altered but by Rule of Court.

The Imparance Roll cannot be amended by the Original Writ, because the Original Writ is the Authority on which the Court proceeds, which the Plaintiff must prosecute, for otherwise he does not proceed in that Cause.  
 1 *Rol. Abr.* And note; if the Count  
 198. varies in Form, the Defendant may plead it in Abatement, for he has abated his own Writ by prosecuting it in a different Manner; but if it varies in Substance, the Defendant may move in Arrest of Judgment, because the Court has no Authority to proceed, having prosecuted a different Matter from that which the Writ has given Authority to the Court to take Cognizance of. 1 *Jon.* 304. *Cro. Eliz.* 722. *Cro. Fac.* 654.

varies in Form, the Defendant may plead it in Abatement, for he has abated his own Writ by prosecuting it in a different Manner; but if it varies in Substance, the Defendant may move in Arrest of Judgment, because the Court has no Authority to proceed, having prosecuted a different Matter from that which the Writ has given Authority to the Court to take Cognizance of. 1 *Jon.* 304. *Cro. Eliz.* 722. *Cro. Fac.* 654.

1 *Rol. Abr.* The Imparance Roll cannot be amended by the Plea Roll or *Nisi*  
 207. *Prius* Roll; for the Imparance Roll is the Original Declaration and the  
*Cro. Car.* 92. Ground of all.

*Lit. Rep.* 72. *Hut.* 92. *Hestl.* 59. 3 *Bulst.* 227. *Hob.* 76. *Latch* 165.

But if the Declaration be against *H. B.* and he Imparls by the Name of *R. B.* but pleads by his right Name *H. B.* this is no material Fault, because it is only a Continuance from one Term to another, and by pleading by his right Name he acknowledges he imparled by a wrong Name. 1 Rol. Abr. 199.

### 3. Of the Plea Roll.

The Plea Roll may be amended by the Imparlance Roll, which is no more than a Recital of the Imparlance Roll, and begins with an *Alias prout patet*, being the Count of the second Term; to which the Defendant pleaded *ore tenus*. Hob. 76. 1 Rol. Abr. 207.

If there be a Mistake in the Attorney's Name, it may be amended by the Warrant of Attorney, for the Warrant of Attorney being precedent will amend the Plea Roll, and the Court will take Notice that it is the same that appeared. Moor 711.

But if the Name of a Stranger be put into the Plea, this will be Error, for it cannot then appear to the Court that the same Man that appeared did plead, and then there was no Plea pleaded; and so if the Defendant's Name be mistaken in the putting in his Plea, as if in an *Audita Querela* the Plaintiff surmises that he entred into a Statute of 300 *l.* to the Defendant, for the Payment of 50 *l.* per Ann. for six Years, to *John Busb*, a Stranger, if the Defendant comes, and *Protestand' &c. pro Plac' idem Jobannes Busb*, instead of the Defendant, this is erroneous, because it does not appear to the Court that the Plea was put in by the Stranger, to whom the Payment was to be made, and not to the Defendant; but if the Plea had been, that the *predict' Plaintiff venit & dicit*, instead of the Defendant, this will be construed to be the Misprision of the Clerk; for it is apparent that the Plaintiff could not be the Defendant; but it shall be supposed to be put in by him that appeared, since there is no other Person. Telv. 38. Cro. Jac. 13. Cro. Eliz. 94.

### 4. Of the Jury, Procefs and Nisi Prius Roll.

If the *Venire* be of the same Place, and in the same Action, and between the same Parties, all other Faults will be amended. Vide Head of Juries.

But if the Place be totally mis-awarded, this is not helped by any Statute; but if it is only mis-awarded in Part, this is helped by the express Words of 21 Jac. 1. Vide 4 & 5 Ann. cap. 16. That the Award is to be

at large of the Body of the County; and 3 Geo. Head of Juries.

In Ejectment, where the *Venire* was *de placit' transgressionis*, omitting *& Ejectionis Firmæ*, the Court held the *Venire* to be ill, because it was not in the same Action, for an Action of Trespass and Ejectment are different, and there might be an Action of Trespass between the same Parties; but if the *Distringas* had been right, they would have judged this *Venire* to have been null, and the want of a *Venire* is aided by the Statute. 1 Jones 302. Godb. 194. Cro. Eliz. 259. Cro. Jac. 528. Quare.

If the *Jurata* mentions the Issue to be *de placit' Transgressionis*, where the Action is Debt, and the Award of the *Venire* and *Distringas* Debt, this shall be amended; for the *Jurata* is an Award of the *Distringas*, in pursuance of the Award of the *Venire*, and the *Venire* being right, the (a) Secondary Procefs ought to be made accordingly. Cro. Car. 275. 1 Danv. Abr. 334, 335. (a) The Award on the Roll being

right shall amend the *Venire*, and the *Venire* being right shall amend the *Distringas*, which is the proper Procefs for convening the Jurors in the King's Bench: So of the *Habeas Corpora*, which is the Common Pleas Procefs. Litt. Rep. 252, 253.

- 1 *Rol. Abr.* 202.  
*Cro. Car.* 275. So if the Sheriff return *nomina Furat' inter Partes predict' de placit' Transgressionis*, where the *Venire* is *de Placit' debit'*, this shall be amended; for in *dorso Brevis* he says *executio istius Brevis Patet, &c.* which could not be if it was not in the same Action.
- Moor* 465,  
 710. The Award of the *Venire* must be to a Day in the same Term, or to the next Term, but it must be in Term, otherwise it is erroneous.
- 1 *Danv. Abr.* 335.  
 3 *Med.* 78. But if the *Distringas* be without the Day of *Nisi Prius*, or mentions a wrong Day, if the *Furata* Roll be right the *Distringas* may be amended by the *Furata* Roll.
- Cro. Eliz.* 760, 820.  
*Owen* 62.  
*Cro. Jac.* 162.  
*Cro. Car.* 38. So if the Return of the *Venire* be mistaken, this may be amended by the Roll; and if the *Teste* of the *Venire* be out of Term, or before Plea pleaded, it is no Error; for the *Teste* of Judicial Writs being only Matter of Form, shall not vitiate if mistaken.
- 2 *Rol. Abr.* 200. If the Number or Qualifications of the Jury be omitted in the *Venire*, it may be amended by the Roll, and the rather, because theie Matters *Vide Head of* are ascertained by the Law.
- Furies.* If there be a Mistake in the Christian Name of a Juror it is (a) incurable, for the Statutes do not extend to it, but only extend to cure Surnames and Additions, for there can be but one Name of Baptism, but there may be various Surnames and Additions; and therefore if it can be proved what Person the Sheriff meant by his Surname or Addition, it the Christian Name may be amended and set right.
- Name be wrong in the *Distringas*, or in the Panel returned, or in the Panel of the Jury sworn, if it can be proved to be the same Man that was intended to be returned in the *Venire*, having there his right Christian Name, it may be amended. 1 *Rol. Abr.* 196, 197. 3 *Bulst.* 18. *Hob.* 64. 1 *Brownl.* 174.
- Vide for this Head of Furies.* If the Court on an insufficient Suggestion awards the Process to an improper Officer, yet this is aided after Verdict, for that only makes an Insufficiency in the Return of the Jury, and insufficient Returns are aided; for it was the Design of the Statute, that if the Cause was tried by a right Jury, that it should not be material what Officer got them together.
- 8 *Co.* 166.  
*Moor* 681.  
*Carth.* 506.  
 5 *Mod.* 211.  
 1 *Salk.* 48, 49. As to the *Nisi Prius* Roll, which is only a Transcript of the Plea Roll to carry the Issue into the Country, if it differs from the Plea Roll in any Matter which does not alter the Issue, it may be amended; but if it differs in any Matter which alters the Issue, it cannot be amended by the Plea Roll, because it does not give the Judge of *Nisi Prius* Authority to try the Matter which is in Issue between the Parties on the Plea Roll.
- 8 *Co.* 166. As if the Issue be on the Addition of the Defendant's Name, whether *J. S.* was Husbandman *die impetrationis Brevis*, and the *Nisi Prius* Roll be, whether he was Husbandman Generally, omitting the Words *die impetrationis Brevis*, this is not the Issue on the Plea Roll, and therefore cannot be tried.
- Brownl.* 47. So in a Bond conditioned for the Payment of a certain Sum at the first ——— next ensuing the Date, and on the *Nisi Prius* Roll the Date be omitted, this is not the same Issue as on the Plea Roll.
- N. Dyer* 260. But where the Defendant's Name is omitted in joining of Issue, this shall be amended by the Plea Roll, because the Issue is not varied, and the Justices of *Nisi Prius* have Authority to try it by the *Distringas*.
- 1 *Rol. Abr.* 202, 203. So where in an Action on the Case upon *Assumpsit*, the Defendant (upon the Plea Roll) pleads *Non Assumpsit*, and in the *Nisi Prius* Roll it is *Non Culpabilis*; after Verdict the *Nisi Prius* Roll shall be amended by the Plea Roll, for both Pleas traverse the Gift of the Action; and the Defendant has the same Advantage in the *Non Culpabilis*, as in the *Non Assumpsit*, and the Issue is the same in Substance.
- 1 *Salk.* 48. So in Ejectment against seven Defendants, who entred into the common Rule, and pleaded to Issue, the Plea Roll, *Venire*, *Distringas* and *Furata* were right; but the Issue on the *Nisi Prius* Roll was between the Plaintiff

Plaintiff and five Defendants only; after Verdict for the Plaintiff this was amended, for the Lessor's Title was the Gift of the Action, and the only Thing inquirable of by the Jury.

5. Of the Verdict.

If the Jury find a certain Verdict, and it is entred incertainly on the Record, if the Judge who tried the Cause remembers certainly how the Jury found it, it shall be (a) ascertained by the Memory of the Judge, (a) Where and the Verdict may be made certain as the Jury found it. the Postea is amendable

by the Notes of the Verdict taken by the Clerk of Assize. *Moor* 689. *Cro. Eliz.* 112. Where the Misentry of the Verdict shall be amended. *Vide Cro. Eliz.* 677. 2 *Jones* 211.

As if in Debt for 19 l. 10 s. the Plaintiff declares upon a Lease of Copyhold Lands, rendring 38 l. per Ann. and upon a Lease of Freehold Land, rendring 20 s. per Ann. and demands 19 l. for Half a Year's Rent of the Copyhold, and 10 s. for the Freehold; and upon *Nil debet* pleaded it is found for the Plaintiff, *quoad* the 10 s. for the Freehold, and for the Defendant *quoad* the 19 l. for the Copyhold; but in the *Postea* it was returned, that they found for the Plaintiff *quoad* 10 s. Part of the said 19 l. 10 s. and *quoad* the Residue *Nil debet*, so that it was altogether incertain which of those Rents were paid; yet if the Judge that tried the Cause remembers that, *quoad* the Copyhold Rent, the Jury found for the Defendant, and *quoad* the Freehold for the Plaintiff, the *Postea* shall be amended accordingly. *Cro. Car.* 338. *Eliot* and *Skypp* adjudged.

Also a Special Verdict may be (b) amended by the Minute or Notes taken by the Counsel or Clerk of Assize, after a Writ of Error brought. 1 *Rol. Rep.* 82. 1 *Rol. Abr.* 207. 3 *Bulst.* 181. *Hetl.* 52. *Lit. Rep.* 61. *Cro. Cas.* 144. 4 *Co.* 52. 1 *Salk.* 47, 48. (b) But though a Verdict General or Special may be amended by the Notes in the Book of the Clerk of Assize, if there be a Misprision; yet this cannot be done in a Criminal Case. 1 *Salk.* 53, 47. S. P.

But nothing can be added to the Minute or Notes, though never so strongly proved by the Evidence, because that would be to subject the Jury to an Attaint for a Fact that was never found by them. *Cro. Eliz.* 150. *Godb.* 57. *Style* 110, 120, 191.

*Cro. Jac.* 239. *Poph.* 102, 203. *Mo.* 686. *Pl.* 947.

(E) What Defects may be amended or aided after Verdict: And herein,

1. Of the want of sufficient Certainty in the Plaintiff's Declaration, in not setting forth his Cause.

A Verdict cures not only such Defects as may be called artificial Defects, and come within the Purview of the several Statutes of Amendment and Jeofail, but also Natural Defects, or the Omissions of the Parties in their Allegations, which must be presumed to have been given in Evidence to the Jury; otherwise they could not have found a Verdict for the Party. For this vide Head of Error.

The chief Intent of all the Statutes of Jeofails seems plainly to be, that the wrong Pleading of any collateral Matters not essential to the Action, should, after the Expence of a Trial, and Verdict for the Party, be aided, but not to extend to Matters of Substance, or whatever is essential to the Gift of the Action; for this would have ruined all Proceedings in the Courts of Justice; besides, had such essential Part been set forth, it might occasion a contrary Verdict; neither can the Jury be attainted for

a false Verdict on the uncertain Allegations of the Parties, for it cannot appear whether the Damages given by the Jury be proportionable to the Demand or not.

*Vide Head of Pleadings, 5 Mod. 286.* Whatever therefore appears to be essential to the Gift of the Action, cannot be cured after Verdict; for the Law requires, that all substantial Facts should be laid in proper Time and Place, so that the Defendant may traverse them distinctly if he pleases; for as he may traverse the Whole, so he may traverse each substantial Part, in order to put the Weight of the Cause on any one Thing that will put an End to the Cause.

But as this Matter is more fully treated of under the Heads of *Error* and *Pleadings*, we shall here only observe, that the Difference in all the Cases on this Head Turns upon what is Substance, and what is Form; which must be determined in every Action according to its Nature.

## 2. Of Repugnancy and Surplusage.

*Cro. Jac. 94.* Surplusage does not vitiate after Verdict, according to the Maxim, *utile per inutile non vitiatur*, and therefore if such Surplusage is repugnant to what is before alledged, it is void; as if in *Trover*, the Plaintiff declares that he was on the 4th of *March* possessed of Goods, and that afterwards, *scilicet* the 1st of *March*, they came to the Defendants, who converted them.

*Yelv. 94. Carth. 288, 289.* So in Ejectment, the Plaintiff declares on a Lease made to him the 3d of *May*, and that the Defendant *Postea, scilicet* 1st of *May*, ejected him; this was held good after Verdict, for by the *Postea* it appears, that the Defendant committed a *Tort* on the Plaintiff's Title, and when he says a repugnant Day, it is as if he had laid none; and if no Day be laid, it shall be intended after Verdict, that the *Tort* was committed before the Action brought; for it would be very foreign after Verdict, to intend that the Action was brought by the Spirit of Prophecy for a Wrong to be committed afterwards; besides, the Jury could not take Cognizance of any Fact done since the Action brought, for that was not in Issue.

*Cro. Jac. 549.* In Debt on an Obligation, the Defendant pleads Payment of 50 l. 14 Junii 11 Jac. according to the Condition; the Plaintiff replies *quod non solvit 50 l. Prædict' 14 August Anno 11. suprad' quasi ad eundem diem solvisse debuisset, & hoc, &c.* the Verdict found *quod non solvit Prædict' 14 Junii* prout the Defendant had alledged, the Objection here was, that no Issue was joined, because they do not meet in the Time the Money was paid; but the Word *August* being plainly Surplusage, for when he said *quod non solvit Prædict' 14 Die*, it is a sufficient Traverse without the Word *August*, and *August* is plainly repugnant to the Word *Prædict'*, for *Prædict'* refers to *June*; and such Surplusage being a Repugnancy to what was before material, was idle and void.

But if there be a Repugnancy in any Point material, there it is not helped by a Verdict, unless the Verdict appears to have been given on a different Part of the Declaration.

But where the Plaintiff may release such repugnant Part, *vide 1 Sand. 282, 286. and Head of Pleadings.*

*Cro. Jac. 264. 1 Sand. 116, 226.* If the Replication be repugnant to the Declaration, it makes the Declaration bad, because the subsequent Pleading falsifies the Declaration; as if a Man declares on a Bond made 10 *Martii*, if the Plaintiff replies that the Bond was delivered 30 *Martii*, this falsifies the Declaration, because it could not be made the first; so if the Rejoinder falsifies the Bar, the Bar is vicious.

## 3. Of Insufficiency in the Defendant's Bar.

As the Plaintiff's Action must have all Essentials necessary to maintain it, so the Defendant's Bar must be substantially good; and if the Gift of the Bar be naught it cannot be cured by a Verdict found for the Defendant; but if it had been found for the Plaintiff, he shall have Judgment either for the Badness or Falshood of the Bar; but if it be bad only in Form, a Verdict will cure it, and if the Gift be traversed, all collateral Circumstances will be intended after a Verdict.

Thus in an Action of Debt on a single Bill, and the Defendant pleads Payment without an Acquittance, and it is found for the Defendant, yet he shall not have Judgment, because the Gift of the Plea is bad, since the Obligation is in Force till dissolved *eo ligamine quo Ligatur*, and the Acquittance under the Seal of the Plaintiff is the Gift of the Bar; but if it had been found for the Plaintiff, he should have Judgment, because the Bar was not only bad in Substance but found false.

But if the Bar be only bad in Form, a Verdict will supply it; as if in Debt on a Bond conditioned for Payment of 100*l.* 25 *Junii Prox'*, and the Defendant pleads Payment on the 20th of *June*, and it is according to the Condition found that he did pay it the 20th, though this Bar be bad in Form, because it does not follow the Condition, and the Plaintiff might have taken Advantage of it on a special Demurrer, yet the Verdict having found Payment before the Day, that in Law is Payment at the Day, and the Substance is found.

## 4. Of Immaterial and Informal Issues.

A Verdict cannot help an (*a*) Immaterial Issue, for if what is material in the Pleadings be not put in the Issue, it is not made necessary to be proved on that Trial; or if it be alledged and proved, yet if it appears insufficient, so as not to be decisive between the Parties, the Verdict will be no good Foundation for the Judgment, but an Informal Issue is helped by the Verdict.

Pleadings is not traversed; but an Issue taken upon such a Point as will not determine the Merits of the Cause, and an Informal Issue is where it is not traversed in a right Manner. 1 *Brownl.* 229. *Cré Eliz.* 227. 2 *Mod.* 137.

If the Plaintiff declares on a Promise to find the Plaintiff, his Wife and two Servants, with Meat and Drink for three Years, on Request; the Defendant pleads that he promised to find the Plaintiff Meat, &c. *absque hoc*, that he did promise to find, &c. for three Years next following, and *hoc petit*, &c. and Verdict for the Plaintiff; yet he shall not have Judgment, because the Promise in the Declaration is laid to be on Request, which Promise is traversed in the same Manner; the Plaintiff in his Replication alleges a Promise next after he was married, which is not the same the Defendant traversed; so that they are not at Issue on a Point traversed in Bar, since the Bar is for a Contract for three Years on Request, and the Replication for a Contract for three Years next ensuing the Marriage, and *non constat* by the Verdict which of the Contracts was proved on the Trial.

So in Trespass, the Defendant pleads an Accord between the Plaintiff and *J. S.* of the one Part, and the Defendant of the other Part; the Plaintiff replies *quod non habetur talis concord'* between the Plaintiff and Defendant, *qualis* the Defendant had alledged; and on Issue joined a Verdict for the Plaintiff; yet he shall not have Judgment, because the Plaintiff does not traverse the same Concord that is set out in the Defendant's

Defendant's Bar, but puts another Concord in Issue not alledged in the Defendant's Bar between the Plaintiff and Defendant only.

*Cro. Fac.* 585. So in Debt on a Bond conditioned for the Payment of 105 l. the Defendant pleads Payment of 100 l. *Secundum formam & effectum conditionis*; the Plaintiff replies *non solvit predict'* 105 l. this is an (a) Immaterial Issue not aided, for the Plaintiff has not traversed the same Payment that is in the Defendant's Plea.

*Hob.* 173. S. P. adjudged. (a) But where an Issue is decisive between the Parties, though not so apt, shall yet be cured after Verdict, *vide Yelv.* 58. *Cro. Fac.* 44, 435. and Heads of Error and Pleadings.

*Cro. Car.* 78. If an Issue be on a Point that is impossible in Substance and Nature of the Thing, it is not cured by the Verdict; but if it be only impossible in the Manner and Form of it, a Verdict will cure it; as in Debt on a Bond conditioned for the Payment of 100 l. on the 31st of September, and Defendant pleads Payment at the Day, and it is found against him, the Plaintiff shall have Judgment, because the Payment is what is material, and the Day impossible and altogether idle and void; for not being paid before the End of that Month, the Obligation is absolute.

In an Action of Assault and Battery, the Defendant pleads that the Plaintiff neglected his Service, *per quod Moderate Castigavit*; the Plaintiff replies *quod non Moderate Castigavit*, and the Issue was found for the Plaintiff; though this be an Informal Traverse, being (b) rather a Traverse of the Chastisement, than of the moderate Manner of doing it, and the right Traverse should have been *de Injuria sua Propria absque tali causa*, yet after Verdict it is good, because the Jury have ascertained that he did not beat him moderately.

good after Verdict, *vide Cro. Fac.* 87. *Cro. Car.* 312. *Cro. Eliz.* 457. and Head of Pleadings.

In an Action of Debt, if Not guilty be pleaded, and there be a Verdict for the Plaintiff, it shall be aided by the Statute, because being an (c) ill Plea and a false one, the Plaintiff ought to have his Judgment, both for the Badness of the Plea and for its Falshood; but if the Verdict had been for the Defendant, yet the Plaintiff should have Judgment, because the Declaration is not answered by the Plea.

Plaintiff had Judgment, though an improper Plea. *Cro. Eliz.* 470. *Palm.* 393. 2 *Rol. Rep.* 368. cont. In Debt against an Executor upon the Bond of his Testator, the Defendant pleads *non est factum*, &c. *Hard.* 458. In an Action of Covenant on a Covenant, that C. was seised in Fee, and assigns for Breach that C. was not seised in Fee, & *sic infregit conventionem*; though in Covenant the Defendant ought to traverse either the Deed or the Breach, and both cannot be involved in *non infregit conventionem*, because the Gift of the Action lies on the Deed, which must be traversed by it self, yet when the Defendant pleads a bad Plea, which is found against him, the Plaintiff may have Judgment either for the Insufficiency or Falshood of the Plea. 1 *Sid.* 289. 1 *Lev.* 183. S. C. *vide Moor* 399. *Cro. Eliz.* 457. 2 *Leon.* 116. S. P.

1 *Rol. Abr.* 200. If on an Issue tendred by the Plaintiff, the Defendant joins the *Scilicet* by the Plaintiff's Name, or the Plaintiff joins the *Scilicet* by the Defendant's Name, to an Issue tendered by the Defendant, this shall be amended, there being a Negative and Affirmative before between the Plaintiff and Defendant, which is the Pattern from whence the Joining that Issue is to be taken; there is a sufficient Copy from whence this may be amended, it being a plain Mistake from the Nature of the Thing, of one Man's Name for another.

*Misnomer* in joining Issue upon an Information. *Style* 167.

(F) Of amending the Judgment.

It is a general Rule, that the Court will make no Amendment that will defeat a Judgment, the Statutes allowing Amendments in Affirmance of Judgments only. 1 Leon. 134.  
8 Co. 158.  
Carth. 158,  
367, 520.

But in Affirmance of the Judgment the Judgment it self may be set right and amended by another Part of the Record, in a Fact which appears to be the Misprision or Neglect of the Clerk, as in the Mistake of the Names of the Parties; so in Debt against *A.* and the Judgment is *quod Prædictus B. capiatur*, when it should have been *Prædictus A.* this shall be amended. 1 Rol. Abr. 337.

So in an Action brought by *Robert Meredith*, and the Judgment, as entered, was *quod Prædictus Carolus Meredith recuperet*, and the Court held this amendable, being only the Fault of the Clerk, the Misprision being only in the Name, which was right in the rest of the Record, which was before the Clerk, and should have directed him. 1 Vent. 217.  
vide Several Cases to this Purpose Cro. Eliz. 400,  
864. Hob. 327. Moor 361, 697. Hut. 41. 1 Brownl. 56. Raym. 39. Comb. 64.

So if in an Action of Debt upon an Obligation against *Rob. H.* conditioned that if *Henry H.* or *Rob. H.* the Defendant, should pay, &c. Judgment is entered that the Plaintiff *recuperet debitum & Damna* against the said *Robert*, & *Prædictus Henricus in Misericordia*, where it should have been *Robert*, for *Henry* was no Party to the Record; this shall be amended, for 'tis only the Mistake of the Clerk. Cro. Car. 594.  
Pelham and Heming.  
A Judgment quod prædictus Thomas recuperet, instead of Prædicti

*Arthurus*, amended after twenty Years Standing. 4 Mod. 371.

As to the amending the Judgment by the Docket, it is to be noted, that before the Statute 4 & 5 *W. & M. cap. 2.* which for the Security of Purchasers, requires that all Judgments should be Docketed, the Courts used to amend both the Judgment and the Docket, where there were sufficient Instructions to amend by; but now the Docket cannot be amended, and therefore if there be a false Docket, which is as none, tho' a right Judgment, the Purchaser is safe, and the Party grieved must take his Remedy against the Officer for not Docqueting it truly. For this vide Head of Judgments. Cro. Car. 574.  
Raym. 39.  
1 Sid. 70.

In a *Quare Impedit* for the Presentation of a Vicarage, and the Judgment is *quod recuperet Ecclesiam*, this shall be amended, (*a*) being the Mistake of the Clerk, who had sufficient Instructions from the *Possea* to enter it right. Hob. 327.  
Hut. 41.  
Cro. Fac. 633.  
S. C.  
(a) So in

Debt, where the Judgment was entered *quod recuperet* the Sum in the Declaration, *pro missis & Custagiis*, instead of *pro debito prædicti*, and amended. 1 Vent. 132. In Debt against an Attorney by Bill, the Judgment is quod Querens nil Capiat per breve, where it ought to be per billam, yet it shall be amended. 1 Rol. Abr. 206. Cro. Car. 580.

So if Judgment be against a Man and a Wife, and the Judgment is, that the Wife is *in Misericordia*, and not the Husband, this is amendable by the Paper-Book that is right. Hob. 127.  
Moor 869.  
Cro. Fac. 633.  
1 Brownl. 16.

1 Rol. Abr. 206, 215. S. C.

In Ejectment brought by two, if Judgment be entered that the Plaintiff *recuperet*, this is a plain Mistake of the Clerk, and shall be amended. 2 Jones 199.

If the Damages *de Incremento* be (*a*) mistaken by the Clerk, the Court will amend it by the Judgment-Book, because that is a sufficient 1 Rol. Abr. 205.

E c

Instruc- (a) As where the Jury

found for the Plaintiff, and gave 2 s. Damages and so much for Costs, and the Clerk in entering thereof, says 2 s. for Damages, and so much for Costs, and so much *pro incremento quæ in* 10

to so much; Instruction to the Clerk to have entred the Judgment by, and therefore in which it was his Misprision not to go according to his Instructions, which may Sum the 2 s. be rectified and amended.

is not com- prehended, this shall be amended. 3 *Bulst.* 114. 8 *Co.* 162. *Palm.* 509. *Dyer* 55. 1 *Rol. Rep.* 272. and *vide* like Amendments in Declarations, where the total Sum is miscast. 1 *Bulst.* 171, 179. 2 *Bulst.* 149. *Yelv.* 5 *Noy* 44. *Popb.* 209.

1 *Rol. Abr.* 206. In Ejectment, if the Judgment is entred *quod Querens recuperet* the Damages and Costs, and not *quod recuperet Terminum*, as the Cause is, this shall be amended, though this be but an Action of Trespas in its own Nature.

1 *Rol. Abr.* 205. In the Entry of the Judgment is of a Nonsuit instead of a Judgment in Demurrer, this shall be amended.

Repleader, for the Error of the Defendant's Plea, it was entred *quia Placitum est sufficiens in Lege*, instead of *Quia minus sufficiens est*, and the Court held this not amendable (though it was right in the Paper-Book between the Parties); but *Popham* and *Granville contra.* *Owen* 19.

2 *Sand.* 289. If in Replevin the Defendant demurs to the Plaintiff's Plea in Bar to Between *Pool* the Defendant's Avowry, and Judgment is entred *quod visis Præmissis, &c.* and *Longville,* *videtur Justiciariis quod placitum Prædict'*, &c. *minus sufficiens, &c.* but amended after a Writ of Error these Words *Ideo consideratum est quod* the Plaintiff  *nihil Capiat per breve suum, sed sit in misericordia, & Prædict'* Defendant *eat inde sine die* are total- brought, and ly omitted, yet this shall be amended. the first Judgment affirmed accordingly. *Raym.* 39. *S. P.* cited. 1 *Sid.* 70. cited.

3 *Mod.* 112. If Judgment is given upon a Demurrer, and a Writ of Inquiry awarded, but in the Entry thereof upon the Roll, these Words *per Sacramentum duodecim Proborum & Legalium hominum* are left out, this shall be amended.

1 *Salk.* 50. In Debt upon a *Mutuatus* the Judgment was entred up as of *Hill.* Term *Parsons and Gill.* 1700. whereas the Borrowing appeared to be 2 *April* 1701. after Error brought it was moved to amend the Judgment by the Paper-Book, signed by the Master, which was the 2d of *January* 1700. and allowed to be amended; for 'tis but a slip of the Clerk, who should have perused the Paper-Book signed by the Master, which is authentick enough to amend by.

*Cro. Eliz.* 497. But if there be a Mistake or Error in the Judgment in any such Mat- *Palm.* 98. ter in which the Clerk has no Instructions; as if before the 16 & 17 *Car.* 2. a *Capiatur* were entred for a *Misericordia*, or *e converso*; this was Error in the Judgment, because before the Statute it made Fine to the King, and a Difference in the Execution; and there being no Instruction in the Record it self, or in the Judgment-Book, whereby to amend it, it did not appear whether it was the Error of the Clerk in the Entering, or of the Court in giving the Judgment, and therefore could not be amended;

(a) 4 *Mod.* 6. but may now by the (a) exprefs Words of the Statute; (b) also by the *C.urb.* 167. 5 & 6 *W. & M.* which takes away the *Capiatur* Fine, in Actions *Vi & Armis*, (b) *Carth.* 390. no *Capiatur* shall be entred against the Defendant, nor any Thing in Lieu thereof.

(G) At What Time the Amendment must be made, and therein of Records removed out of Inferior Courts, and paying of Costs.

It seems to be the established Doctrine of the Courts, to allow the Plaintiff to amend his Declaration at (a) any Time, whilst the Cause is in Paper, on Payment of Costs, and giving the Defendant Liberty to alter his Plea, because the Pleading in Paper came in only instead of the ancient Way of Pleading *ore tenus*, and in Pleading *ore tenus* the Record was only in *Fieri*, but after the Pleadings were entred on Record, if it were not a Record of the same Term, then it could not be amended or altered.

<sup>1 Salk. 47.</sup>  
(a) And by *Style's Pract.* Reg. 45. the Plaintiff may amend his Declaration, though it be seven Years past since

he Declared, if it be but in Paper, paying Costs, or suffering the Defendant to imparle till the next Term after. After Plea pleaded, and Replication and Rejoinder to Part, and Issue, Notice of Trial with *Proviso* as to the other, and Rule served to make up the Issue to carry it down to Trial, and the *Nisi Prius* Roll ingrossed in Parchment, but all the Proceedings above continuing in Paper, the Plaintiff had Leave to amend upon Payment of Costs. *Farell.* 156, *vide* 1 *Salk.* 47. Where *per Holt* said, That he had known an Amendment made, not only after Plea pleaded, but after the Record was scaled up, just even when it was going to be tried; the Defendant cannot amend his Plea after Issue joined, or a Demurrer thereto; for by this he delays the Plaintiff, which may turn greatly to his Prejudice. *Style's Pract. Reg.* 49.

If the Plaintiff declares, and the Defendant pleads, and the Plaintiff replies, and the Defendant demurs, and the Plaintiff joins in Demurrer; yet the Plaintiff may move to amend on paying of Costs, if the Cause be still in Paper; so may he withdraw a Demurrer not entred of Record, and move to amend.

But where the Plaintiff declared against *J. G. Knight*, the Defendant pleaded in Abatement he was a Knight and Baronet; and the Plaintiff replied that he was a Knight, &c. on Motion to have it amended upon Payment of Costs, all being in Paper, and that the Action being by Bill the Addition was not material; not being within the Statute of Additions it was denied, there being nothing to amend by, and the Defendant had taken (b) Advantage of the Fault.

(b) Where after a De-

murrer the Court cannot give Leave to amend, *vide* 1 *Bullst.* 204. *March* 1. *Yelv.* 38. *Cro. Jac.* 13, 14. 1 *Leon.* 28. 1 *Sid.* 54. 107. *Raym.* 231. 2 *Vent.* 142. 3 *Lev.* 39. 2 *Bullst.* 149 3 *Mod.* 255. 6 *Mod.* 263, 310. Where after Issue joined or Plea pleaded, and where not. 1 *Vent.* 336. *Style Rep.* 33, 85.

An Action was brought by the Master on the Statute of *Winton*, for a Robbery committed on his Servant, in which he declared of an Assault and Battery done to himself (though then fifty Miles from the Place) also that he made Oath that he did not know any of the Persons; the Issue was entred of Record, and the Jury appeared at the Bar ready to try it, but being for other Business adjourned to another Day, the Plaintiff observing his Mistake, moved to Amend, by declaring of a Robbery on his Servant, &c. and it appearing that the Year in which the Action must be brought was expired, and consequently the Action must be lost, if not allowed; the Court after long Debate, and Consideration of former Precedents admitted him to amend.

<sup>3 Lev. 347.</sup>  
*Bearecroft v. Hundred of Burnham and Stone.*

So where in *Assumpsit* an Executor laid the Promise to be made to his Testator, and the Defendant pleaded the Statute of Limitations, and on Motion to amend and lay the Promise to himself, it was objected, that this would alter the Nature of the (c) Issue, and take away the Party's Defence; yet it appearing that by the Expiration of the six Years the Action would be lost, the Court gave Leave to amend.

<sup>Hill. 4 Geo. 2.</sup>  
*The Dutchess of Marlborough and Wigmore.*

(c) If the Issue shall be changed

thereby, there shall be no Amendment. *Lit. Rep.* 349. *Hest.* 164. *Mo.* 681. 2 *Rel. Rep.* 312.

If

*Lit Rep.* 278. If the Bill on the File be with Blanks, or the Imparlance Roll be with  
*Cro. Jac.* 142, Blanks for Dates or (a) Quantities, yet it may be amended by the Paper  
 365. by the Clerks themselves, until a *Recordatur* be ordered of the Verdict  
 2 *Leon.* 120. returned on the *Nisi Prius* Roll; but after such *Recordatur* it (b) can  
*Hetl.* 142. only be amended by the Court, for the Roll lies with the Prothonotary,  
*Litch* 164. to be made up according to the Paper-Book, until the *Recordatur* of the  
 2 *Mod.* 316. Verdict be allowed; but if after the *Recordatur* be entred it is ordered on  
 (a) So in an the Roll *in Statu quo tunc*, and then the Court is supposed to take Cog-  
*Ejectione* nizance of it, in what Manner it then was, and if the Clerks might after-  
*Erma.* where wards alter the Roll after Entry of the Verdict, they might amend it in  
 the Bill was the Verdict which is on the *Nisi Prius* Roll, and cannot be altered but  
 with Blanks for the by Rule of Court.  
 Quantities of Land and  
 Meadow.

1 *Rel. Abr.* 207. 8 *Co.* 162. (b) *Raym.* 53. S. P.

*Cro. Eliz.* 435, The Inferior Court from whence the Record is returned, whether it  
 459, 677. be by the Common Pleas, or another Court of Record, may amend after  
 2 *Rel. Rep.* Judgment, as well after as before a Writ of Error brought, and the  
 471. Rule of such Amendment is to be certified by the Clerk of such Inferior  
 8 *Co.* 162. Court to the Superior; for though the Record is removed by Writ of  
*Moor* 407. Error, and a *Mittimus recordum* is entred on the Roll, yet the Writ of  
*Hob.* 327. Error is to send the Record in the State and Condition in which it ought  
*Hutt* 41. to be by Law, and that is corrected from all Misprisions of Clerks; or  
 1 *Rel. Abr.* on alledging Diminution the Record is to be sent up amended as it  
 209, 210. ought to be, or it may be amended in the Superior Court, if the other re-  
 1 *Salk.* 49. fuseth; for as it superintends such inferior Court, so it may correct the  
 2 *Jones* 212. Misprisions of the Clerks of that Court.

*Cro. Car.* 410. But there is this Difference, where the Clerks carry the Rules of A-  
 amendment to a Superior Court, and where Diminution is alledged, and  
 a *Certiorari* thereon issues; for when the Clerks bring up the Roll, it ap-  
 pears to have been amended by the Date of the Rule after Error brought,  
 but when Diminution is alledged, they bring up the Record *in Statu quo*  
 the *Certiorari* finds it; and therefore when it is brought up they will in-  
 tend it to be amended at the Time of the Judgment given, and that the  
 Transcript first sent up was a Diminution and a Mistake; and therefore  
 if Dower be brought against an Infant, who appears and pleads by Guar-  
 dian, he ought not to have been amerced, for an Infant cannot be  
 amerced for his Indiscretion; nor a Guardian, because he is appointed by  
 the Court; so this is Error in the Judgment it self, which is not amend-  
 able; and, if certified by the Clerks of the Court to have been amended  
 after Error brought, could not have been amended, but yet certified to  
 the *Certiorari* rightly amended, they will suppose it was amended the  
 same Term Judgment was given, and during that Term whilst Matters  
 are *in feri*, they can rectify not only the Misprision of Clerks, but their  
 own Mistakes.

3 *Lev.* 344, If a Writ of Error be brought, the Defendant in Error shall pay all  
 345. the Costs of the Writ of Error, because until the Record was amended,  
 1 *Salk.* 49. the Plaintiff in Error had sufficient Reason to bring the Writ; but then  
 the Plaintiff in Error must nonsuit his Writ; for if he proceed to reverse  
 the Judgment on any other Error, there the Defendant shall not pay  
 Costs for his Amendment, because it is plain that the Plaintiff did not de-  
 pend on the Error the Defendant had amended.

## (H) Where Records defaced by Design or Accident Will be set right and amended.

If any Part of the Record be vitiated by Rasure, the Court will restore it by Amendment, because the Wickedness of any Person in corrupting the Records of the Court, ought not to obstruct the Justice of the Court, or prejudice any of the Parties; (a) as in *Ejectione Firmæ*, the Lease was made the 10th of May, after Verdict for the Plaintiff it was made the 11th of May by a Rasure; and it appearing to the Court that the Declaration was (b) vitiated by such Rasure, they amended it both in C. B. and B. R.

1 Rol. Abr. 208, 209. Latch 162. S. C. Poph. 196. S. C. (a) 2 Rol. Rep. 80, 81. S. P. adjudged, though

objected, that if the Record should be amended, the Delinquent could not be impeached for Felony; for to make it so by the Statute, the Rasure must be such that the Judgment be defeated thereby; But per two Judges, the Rasure of the Record, is the Offence, and not the Annulling the Judgment thereby; and per 11 Co. 34. The Rasure of a Record, by which an Outlawry was made good, was held Felony. (b) Where in a *Venire Facias* the Word *Chumley* was razed, and made *Himly*, and amended. 1 Rol. Abr. 208.

If an Original Writ, upon which a Common Recovery of several Manors, &c. was suffered, being larger than the other Writs on the same File, through the Negligence of the Officer, and by continual Handling, is so obliterated and worn out, that but a Letter of the Name of several of the Manors can be seen, but the Names of the Manors are truly recited in the Count, and in the *Habere facias seisinam*, the Original shall be amended according to the other Parts of the Record.

8 Co. 160. Earl of Arundel and Lord Lumly, cited to have been adjudged by all the Judges of England, una

voce, eo potius, because a Common Recovery. 1 And. 79, 80. S. C. adjudged by all the Judges of England; and there is a *Nota* by the Reporter, that all the Parchment remained intire, and if not that, perhaps it might have been otherwise; and vide 1 And. 170.

So if the Original, or other Part of the Record be stole, taken away, withdrawn, or avoided by any Clerk, though this be Felony per 8 H. 6. cap. yet this may be supplied and amended by the other Parts of the Record; but if such Part stole, &c. or obliterated, cannot be supplied by the Record, or any Exemplification thereof, then it shall not be amended.

8 Co. 160. b.

## Antient Demesne.

- (A) The Nature of the Tenure, and how proved.  
 (B) Of the Privileges annexed to Antient Demesne.  
 (C) How it may become Frank-fee.  
 (D) Where Antient Demesne may be pleaded, and the form thereof.

### (A) The Nature of the Tenure, and how proved.

**A**LL those Lands which were in the Possession of *Edward the Confessor*, and afterwards came to *William the Conqueror*, and were by him about the 20th Year of his Reign set down in a Book, called *Domesday*, under the Title *de terra Regis* are

(a) Antient Demesne Lands; these were exempt from any Feudal Servitude, and were let out to Husbandmen to plough and cultivate for supplying Provisions and Necessaries for the King's Household and Family; and for this Purpose the Tenants (who are called by *Bracton*, *Villani Privilegiati*) enjoyed certain Privileges, and the Tenure it self had several Properties distinct from others, which it retains to this Day, though the Lands be in the Hands of a Subject, and the Services changed from Labour to Money.

(a) Lands which are next or most convenient to the Lord's Mansion-House, and which he keeps in his own Hands for the Support of his Family, and for Hospitality, are called his Demesnes, but have not the same Properties with Antient Demesne. *Spelm.* 12.

*1 Salk.* 57. This Tenure, my Lord Ch. Just. *Holt* says, is as antient as any other, though he supposes that the Privileges annexed to it commenced by some Act of Parliament, for that it cannot be created by Grant at this Day.

The Lands which were in the Possession of *Edward the Confessor*, and were given away by him, are not at this Day Antient Demesne, nor are any others, except those writ down in the Book of *Domesday*; and therefore, whether such Lands are Antient Demesne or not, is to be (b) tried only by that Book.

*Domesday* was brought into Court by a *Certiorari* out of Chancery, directed to the Treasurer and Chamberlain of the Exchequer, and by *Mittimus* sent into the Common Pleas, *Dyer* 150. b. Issue was taken whether *Longhope*, in the County of *Gloucester*, was Antient Demesne or not; and on producing the Book of *Domesday*, it appeared that *Hope* was Antient Demesne, but nothing said of *Longhope*; and the Court held, that the Party failed in his Proof. *1 Lev.* 106. *1 Sid.* 147.

*Salk.* 56, 774. But if the Question is, Whether Lands be Parcel of a Manor which is where an Antient Demesne, this shall be tried by a Jury.

Acre of Land may be Antient Demesne, though the Manor of which it is Parcel is not so, *vide 1 Rol. Abr.* 321. and for this *vide F. N. B.* 14. *1 Leon.* 232. *Dyer* S. 11 Co. 10. *Bro. Antient Demesne* 15. *2 Leon.* 191. *3 Lev.* 405.

(B) Of the Privileges annexed to Ancient Demesne.

MY Lord Coke enumerates the six following Privileges which Tenants in Ancient Demesne are to enjoy. (a) 1. That they shall not be impleaded for any of their Lands, &c. out of the said Manor, but are to have Justice administered to them at their own Doors by *Petit Writ of Droit Close*, directed to the Bailiffs of the King's Manors, or to the Lord of the Manor, if it be in the Hands of a Subject.

4 *Inst.* 265. *vide* 1 *Roll.* *Abr.* 323. (a) But it must appear first that the Land is Ancient Demesne; for if a Fine levied of those Lands in C. B. be still in Force, the Land is Frank-fee till it is reversed; and therefore may be impleaded at Common Law. 2. The Land must be holden of the Manor, being Ancient Demesne. 3. It must be held by Knights-Service, because Husbandry is the Cause of the Privilege. 4. If there be no Suitors, or but one Suitor, for that the Suitors are Judges; otherwise there would be a Failure of Justice. 5. If the Tenant accept a Release of his Lord of his Seignory, or the Seignory be otherwise extinguished, by Reason of the Seisin of the King, or otherwise. 6. Or if the Lord disseise his Tenant, and make a Feoffment in Fee. 7. If the Lord grant the Services of his Tenant, and the Tenant attorn. And for all these it said that the Tenant may remove the Cause out of the Lord's Court. 4 *Inst.* 269. Also if the Manor and Demesne of the Manor is in Dispute, it must be impleaded at Common Law, and not in the Lord's Court, otherwise the Lord would be Judge in his own Cause. 1 *Salk.* 56.

2. They cannot be impanelled to appear at *Westminster*, or elsewhere in any other Court, upon any Inquest or Trial of any Cause. 4 *Inst.* 269. That they may have a Writ *De non ponendis in Assis & Juratis* against the Sheriff or any one who hath Return of Writs; and if notwithstanding such Writ, the Sheriff will return them, they may have an *Attachment*. 1 *Co.* 105.

3. They are free and quiet from all Manner of Tolls in Fairs and Markets, for all Things concerning (b) Husbandry and Sustenance. 4 *Inst.* 269. 1 *Roll.* *Abr.* 321. S. P. (b) But this Privilege does not extend to him who is a Merchant, and gets his Living by buying and selling, but is annexed to the Person in Respect to the Land, and to those Things which do grow and are the Produce of the Lands. *F.N.B.* 228. 2 *Leon.* 191. *Crc. Eliz.* 227. 1 *Leotr.* 231, 233. 2 *Inst.* 221. S. P. *vide* 2 *Lutw.* 1144. and how it must be set forth in Pleading; and that this Privilege extends to Tenant in Ancient Demesne, whether he hold in Fee, for Life, Years, or at Will. 1 *Roll.* *Abr.* 322. 2 *Leon.* 191.

4. They are to be Free of Taxes and Tallages by Parliaments, unless they be specially named. 4 *Inst.* 269. That regularly all general Acts of Parliament extend to Ancient Demesne Lands, *vide* 2 *Inst.* 270. 1 *And.* 71.

5. That they were not to contribute to the Expences of Knights of Parliament. 4 *Inst.* 269.

6. That if they be severally (c) distrained for other Services, than they are obliged to by the Custom of the Manor, they all for saving of Charges may join in a Writ of *Monstraverunt*, albeit they be several Tenants. 4 *Inst.* 269. (c) Where the Tenants in Ancient Demesne are distrain'd to do the Lord other Services or Customs than they or their Ancestors have formerly done, they may have a Writ of *Monstraverunt* directed to the Lord, commanding him not to distrain for other Services; and if he will still distrain, &c. then by a Writ directed to the Sheriff he may command him not to demand or distrain for other Services; and if he still persists, then he may raise the *Pesse Comitatus*, or command the Neighbours to rescue and restore the Distress; but the usual Course is, that if after the Writ to the Sheriff, the Lord will distrain, then an *Attachment* lies against him, returnable in one of the Courts of Record at *Westminster*, to answer the Contempt. *Flow.* 129.

Lands in Ancient Demesne are extendable upon a *Statute-Merchant*, 2 *Inst.* 397. *Staple*, or *Elegit*. 4 *Inst.* 270. S. P.

*Moor* 211. S. P. Lands in Ancient Demesne, upon an *Elegit*, may by the Sheriff be delivered in Execution, because the Title of the Land is not directly put in Plea in the King's Court; and judged. *Hob.* 47. *Moor* 211. *Pl.* 551. and 1 *Brownl.* 234. S. C.

1 Vent. 344. In an Indictment for not taking upon him and executing the Office of a Constable, to which he was chosen by the Leet, the Question was, whether a Tenant in Ancient Demesne was obliged to execute that Office, and the Court held he was.

### (C) How it may become Frank-fee.

4 Inst. 270. 10 Co. 50. IF a Fine be levied, or Recovery suffered of Lands in Ancient Demesne, this makes them Frank-fee.

7 H. 4. 44. But if the Lord be not a Party, he may (a) have a Writ of *Disceit*, and avoid the Fine or Recovery; for Lands in Ancient Demesne were not originally within the Jurisdiction of the Courts of *Westminster*; but the Tenants thereof enjoy this among other Privileges, not to be called from the Business of the Plough by any foreign Litigation.

(a) But cannot bring a *Scire facias*, because not a Party to the Fine or Recovery. 3 Lev. 419. that a Termor may have a Writ of *Disceit*, and make it Ancient Demesne at least during his Term. 1 Rol. Abr. 327.

2 Rol. Abr. 324. But if the Lord be Party, then the Lands become Frank-fee, and are within the Jurisdiction of the Courts of *Westminster*, for the Privilege of Ancient Demesne being established for the Benefit of Lord and Tenant, they may destroy it at Pleasure.

1 Salk. 57. If a Fine be levied of Lands, Part Ancient Demesne, and Part Frank-fee, and the Lord brings a Writ of *Disceit*, the Court of B. R. upon View of the Transcript of the Record, and Proof that Part are Ancient Demesne, will reverse and avoid the Fine as to that Parcel; but they will not order the Fine to be torn off the File, as in Cases where the whole Fine is reversed, because it shall stand good as to the Frank-fee; but they will order a Mark to be made on the Fine, to signify that it is cancelled as to that Part; and in this Case the Ter-tenant must be made Party by *Scire facias*; for otherwise the Conufance of him that was Party to the Fine shall not bind, if the Tenements are Frank-fee; because by that Means the Ter-tenant might be dispossessed without Notice; whereas if he appears upon the *Scire facias*, he may plead a Release or Confirmation in Bar, and so preserve his Possession.

Bro. Tit. Fine 101. But if a Fine be levied of Land all Ancient Demesne, and the Lord reverses it by Writ of *Disceit*, it seems doubtful from the Books, whether the Fine shall stand good between the Parties; some say that it ought not to be wholly set aside, nor the Conuzor restored to his Land against his own solemn Acknowledgment on Record, especially since the Lord, who brings the Writ of *Disceit*, seeks nothing but to restore the Land to the Privileges of Ancient Demesne (a); others on the contrary hold that the Writ of *Disceit*, and the Reversal thereon, wholly avoids the Fine, and restores the Conuzor to the Possession of the Land; and the Conuzance, though on Record, shall be no Estoppel; because it was made in a Court that had no Jurisdiction of the Matter; and therefore the whole Proceedings *coram non iudice*.

(a) But if after the Fine levied, the Conuzor had released to the Conuzee, and his Heirs, or confirmed his Estate, he should have retained the Lands, notwithstanding the Fine was destroyed; because by the Release or Confirmation, his Estate would have been made Firm and Rightful. 4 Inst. 470. 10 Co. 50. Fitz. *Disceit* 37. 1 Leon. 290. if Tenant in Tail of Lands in Ancient Demesne, leases for Sixty Years, and after levies a Fine, with Proclamations in the Common Pleas, and this is after reversed in a Writ of *Disceit*, yet *quoad* the Lessee, this Fine shall be avoided, but shall make the Lease good against the Issue in Tail, by the better Opinion of the Books. 1 Leon. 290. vide 1 Lutw. 710, 711.

If in a Writ of Right in Antient Demefne, the Tenant pleads in *F. N. B.* 19. Abatement of the Writ, and that by Judgment is abated, and the Demandant brings a Writ of *False Judgment*, wherein the Writ of *Right* is affirmed to be good, the Court of Common Pleas shall proceed as the inferiour Court should have done; and altho' Judgment be there given to recover the Land, yet the Land is not Frank-fee, but continues Antient Demefne; because the Beginning and Foundation of those Proceedings was in the Court of Antient Demefne.

If the Lord infeoffs another of the Tenancy, this makes the Land Frank-fee, because the Services are extinguished perpetually. *1 Rol. Abr. 324.*

So if the Lord releases to the Tenant all his Right in the Tenancy, or if he confirms to him to hold by certain Services at the Common Law, these make the Land Frank-fee. *Vide 1 Rel. Abr. 324, 325.*

Several Cases there cited out of the Year-Books, and where it becomes Frank-fee, by coming into the Hands of the King. *and the se-*

(D) Where Antient Demefne may be pleaded, and the Form thereof.

IN all Actions wherein if the Demandant recovers, the Lands would be Frank-fee, Antient Demefne is a good Plea. *8 H. 6. 35. 1 Rol. Abr. 322.*

where the Suit may be removed to the Courts above, and they to proceed as the inferiour Court might have done, *vide F. N. B. 19. 4 Inst. 270. Moor 451.*

Therefore in all Actions Real, or where the Realty may come in Question, Antient Demefne is a good Plea; as *Affise*, Writ of *Ward of Land*, Writ of *Account* against a Bailiff of a Manor, Writ of *Account* against a Guardian, &c. *Vide 4 Inst. 270. 1 Rol. Abr. 322, 323. Godb. 64.*

In *Replevin* Antient Demefne is a good Plea, because by Intendment, the Freehold will come in Question. *1 Bullf. 108. Owen 28.*

In an *Ejectione firmæ*, Antient Demefne is a good Plea; for by Common Intendment the Right and Title of the Land will come in Question; and if in this Action it should not be a good Plea, the Ancient Privileges of those Tenants would be lost, inasmuch as most Titles at this Day are tried by *Ejectment*. *5 Co. 105. Hob. 47. 1 Bullf. 108. Hetl. 177. Cro. Eliz. 826. 2 Rol Rep. 181.*

But in all Actions merely Personal, as *Debt* upon a Lease, *Trespafs*, *Quare Clausum Fregit*, &c. Antient Demefne is no Plea. *Hob. 47. 5 Co. 105. 1 Rol. Abr. 322.*

In *Trespafs contra pacem*, though the Realty comes in Debate, yet Antient Demefne is no Plea; for this is at the Suit of the King, and punishable for the Good of the Commonwealth. *Cro. Eliz. 826. 1 Rol. Abr. 322.*

In an *Affise* by Tenant by Statute-Merchant, Antient Demefne is no good Plea, because the Plaintiff does not demand the Freehold, but till he hath Satisfaction. *2 Inst. 397. Hob. 48.*

In a *Quare Impedit*, Antient Demefne is no Plea, because if it should be granted there would be a Failure of Right; for there they cannot grant a Writ to the Bishop. *1 Rol. Abr. 323. Hob. 48.*

So in an Action of *Waste* Antient Demefne is no Plea, because in Antient Demefne they cannot, upon the Distress returned, award a Writ to Enquire of Waste, according to the Statute; for the Sheriff ought by the Statute to go in Person, which cannot be supplied by their Officer; and so there would be a Failure of Right; but in this the Land shall not be Frank-fee. *2 Inst. 306. 4 Inst. 270. Hob. 47. 1 Rol. Abr. 323.*

*F. N. B.* 11. If the Manor and Demefnes thereof are demanded, Antient Demefne is no Plea, becaufe the Lord would be Judge in his own Caufe.  
*2 Leon.* 191. *1 Salk.* 56.  
*Comb.* 183. *1 Show.* 271.

Antient Demefne may be pleaded after Imparlance, becaufe the Lord may reverfe the Judgment by Writ of *Disceit*; and it goes in Bar of the Action itfelf, *viz.* in that Court, becaufe it is *coram non judice*.  
*Dyer* 210. *in Margine.*  
*Stile* 30. *Latch* 83.  
*Moor* 451. Where the Defendant in *Ejectment* pleads Antient Demefne, he need not make any Defence by adding *Defendit vim & injuriam fuam.* *Carth.* 220. *1 Show.* 386. *1 Salk.* 217. *vide Doct. Pl.* 51, 52, *1 Rol. Abr.* 322. and *Tit. Pleadings.*

## Annuitiy and Rent-charge.

*Co. Lit.* 144. b.  
*Finch* 161.  
*1 Rol. Abr.* 226.  
*Doct. & Stud.*  
*Dial.* 2.  
*c.* 30.

**A**N Annuity, ftrictly taken, is an yearly Payment of a certain Sum of Money granted to another in Fee-fimple, Fee-tail, for Life or Years, charging the *Perfon* of the Grantor only; if payable out of Lands, it is properly called a Rent-charge; but if both the Perfon and Estate be made liable, as they moft commonly are, then it is generally called an Annuity.

- (A) How an Annuity or Rent-charge differ from other Rents.
- (B) What Hall be a good Grant or Creation thereof.
- (C) Of the Remedies for the Recovery of an Annuity.

Apportionment and Extinguifhment of an Annuity or Rent-charge, *vide* Head of *Rents.*

### (A) How an Annuity or Rent-charge differ from other Rents.

*Lit. Seff.* 218.  
*vide* for this  
 Head of  
*Rents.*

*1 Vent.* 161.  
*Co. Lit.* 142.

*Lit. Seff.* 214,  
 215.  
*2 Infl.* 505.  
*Plow.* 134.

**A** Man feifed of Land grants, by Deed Poll or Indenture, a yearly Rent to be iffuing out of the fame Land to another in Fee, in Tail, or for Life, &c. with a Clause of *Distrefs*; this is a Rent-charge; and if the Grant be without Clause of *Distrefs*, then it is a Rent-feeck.

A Rent-fervice is an annual Return made by the Tenant, either in Labour, Money or Provisions, in Retribution for the Land that paffes.

If a Man makes a Feoffment in Fee, or a Leaf for Life, or a Gift in Tail, Remainder over in Fee, upon fuch Grants there can be no Rent-fervice referved at this Day, the Feoffor or Grantor having no Reverfion, and the Feoffee or Grantee by the Statute of *Quia Emptores Terrarum*

*Terrarum* must hold of the Capital Lord; therefore if in such Deeds, a Rent be reserved, there must be a (a) Clause of *Distress* inserted; and this will make it a good Rent-charge, the Land being charged with a *Distress* for the Payment of it.

(a) For without such Clause it is only a *Rent-*

*Seck*. Whether such Reservation be good in a Deed Poll, has been doubted, the Words of Reservation proceeding intirely from the Feoffor or Donor; but it seems now settled that such Reservation is good in a Deed Poll, because whoever claims an Estate under any Deed, ought in Reason and Equity to be obliged to take it under the Terms expressed in the Deed. *Vide Co. Lit. 147. b. 2 Rol. Abr. 449. Plow. 154.*

If a Man grants a Rent out of three Acres, and grants over, that if the Rent be Arrear, that he shall distrain for the Rent in one of the Acres, this is one intire Rent; but it cannot be a Rent-charge for the whole, because the greatest Part of the Land out of which it issues, is not chargeable with any *Distress* for the Recovery of it; and *denominatio sumenda a majori*; therefore it is taken to be a *Rent-seck*; for which, by the Words of the Grant, the Grantee may distrain in the third Acre; for when-ever the Remedy, by Way of Charge for the Rent, is not commensurate to the Rent, the Rent is called *Seck*, and the Charge is only appurtenant to the Rent, and does not give it its Denomination; and the Reason is, because if such Original Grant should be lost and worn out by Time, and a Man were to prescribe for it, if he were to give it the Denomination of a Charge, it would grasp more Land than was originally intended to be charged; and therefore the Law binds them down to the Denomination of the Rent, as *Seck*, and to set forth the Charge as an Appurtenant, that by Length of Time no more should be comprehended in the Charge than was originally intended in the Grant of that Charge.

*Co. Lit. 147. b. 7 Co. 51. b.*

If a Man grants a Rent out of his Lands to *J. S.* and his Heirs, and grants that he may distrain for it during his Life, this is a Rent-charge in *J. S.* because he may distrain in the Land out of which it issues, during his own Life; but it shall be *Seck* in the Hands of his Heirs; because by the express Words of the Deed, the Remedy was to cease upon his Death; *aliter*, if the *Distress* had been limited only for Years; for then the intire Rent had been *Seck*, because the Remedy being Temporary is not adequate to the Right, which is perpetual.

*Co. Lit. 147. b. 7 Co. 51. b.* If a Rent be granted to two and their Heirs, out of one Acre; and that it shall be lawful for one of

them and his Heirs to distrain for it, this is a *Rent-Seck*; and the *Distress* given to one is only an Appurtenant to the Rent; but if he to whom the *Distress* was not limited dies, the Survivor shall distrain, because the whole Rent is then in him. *Co. Lit. 147. 7 Co. 51.*

## (B) What shall be a good Grant, or Creation thereof.

IF a Man obliges himself to *J. S.* in an annual Rent of 10*l.* *percipiendum annuatim de manerio de D.* and bindeth the said Manor, and all the Chattels therein, to a *Distress*, this amounts to a good Grant of the Rent, and *J. S.* may distrain for it.

*2 Rol. Abr. 424.* For in many Cases, without our Words

of granting, the Law creates a Rent-charge, because it is the Design of the Law to render all Contracts binding and effectual, so far as the Intention of the Parties may be gathered from the Deed; and such Interpretation is made strongest against the Grantor, because he is presumed to receive a valuable Consideration for what he parts with.

- Co. Lit. 147.  
a.  
2 Rol. Abr.  
424.  
Bro. Rent 14. So if I bind my Goods and Lands to the Payment of a yearly Rent to *J. S.* this is a good Rent-charge, with Power to distrain, tho' there be no exprefs Words either of Grant or Distress; or if I grant that if such a Rent be Arrear, that *J. S.* shall distrain for it in the Manor of *D.* this is a good Rent-charge; for in all these Cases it is evidently my Intention that my Land be liable to the Charge.
- Co. Lit. 147.a.  
Lit. Sect. 221.  
2 Rol. Abr.  
424.  
7 Co. 51.  
Butt's Case. So it is if I grant to *S. S.* that he and his Heirs, or the Heirs of his Body, shall distrain for 40*s.* Rent in my Manor of *Dale*, this is a good Rent-charge in Fee or in Tail, because the Power of Distraining is in one Case given to the Heirs General, and in the other to the Descendants of the Body of *S. S.* And whoever has a Power of Distraining, has an Estate in the Rent for which the Distress is given.
- 2 Rol. Abr.  
425.  
Co. Lit. 147.  
a.  
7 Co. 51. But if I grant a Rent of 40*s.* out of the Manor of *Dale*, and if the Rent be behind, that the Grantee shall distrain in my Manor of *Sale*, this Power of Distress in the Manor of *Sale* shall not amount to the Grant of a Rent-charge out of the Manor of *Sale*; for though in the former Cases such Construction is admitted to support the Intentions of the Parties, where the Grant is not explicate; yet in this Case, the Reason of such Construction fails; because here is a plain Grant of the Rent out of the Manor of *Dale*, and the Distress is given in the Manor of *Sale*, as a Means for the Recovery of it; for which he had no Remedy by the Grant itself; and therefore the Rule, *Quod expressum semper facit cessare tacitum*, takes Place here, that where the Intentions of the Parties are evident, there that Construction shall never be admitted, which the Law only allows in dubious Contracts, *ut res magis valeat quam pereat*; for if that Manner of Interpretation were admitted, the Grant might be made Double, and the Grantor twice charged, against the Design of the Grant.
- 2 Rol. Abr.  
425. If a Rent be granted to *A.* and if the Rent be behind, that a Stranger shall distrain for it, for the Use of the Grantee, this is a good Rent-charge in *A.* and the Distress limited to a Stranger for his Benefit, is in Effect making him the Grantee's Servant for that Purpose; and what a Man may do by one Servant, he may do by himself or any other.
- 2 Rol. Abr.  
425. But if the Distress had been limited to a Stranger, without saying for the Benefit of the Grantee; so that the Limitation of the Distress may seem to be independant on the Grant, and without Relation to it, this Distress does not make it a Rent-charge; since by no Words in the Deed the Distress shall be applied to the Use or Advantage of the Grantee.
- Bro. Tit.  
Grant 69, 73.  
2 Rol. Abr.  
425. If *A.* grants and confirms to *B.* a Rent of 5*l.* to be taken out of his Lands, which Rent *B.* has of the Grant of his Father, though *B.* never had any such Rent from his Father, yet this Grant of *A.*'s shall be good to create a Rent-charge in *B.* for it is evidently the Intention of *A.* that *B.* shall have a Rent of 5*l.* out of his Land; and a Mistake or Error in the Description of the Thing referred to, shall not render the true Design of the Contract ineffectual and void.
- Co. Lit. 147.  
1 Rol. Abr.  
228.  
Kew. 3.  
If two Tenants in Common, or several Tenants be, and they Grant a Rent of 20*s.* *per Ann.* out of their Land, the Grantee shall have 40*s.* Rent; for as their Estate is several, so shall there Grant be too; and therefore each shall be taken to Grant a several Rent of 20*s.* 5 Co. 7. b. *Plew.* 140. b. 161, 171, 289. Co. Lit. 197. a. 267. b.
- Co. Lit. 147.b. If *A.* bargains and sells Land to *B.* by Indenture, and before Inrolment they both join in a Grant of a Rent-charge to *C.* this after the Inrol-

Inrolment shall be construed the Grant of *B.* and the Confirmation of *A.* because when the Bargain and Sale is inrolled, it has the Effect of a Deed inrolled, from the making thereof; and therefore it must be the Grant of *B.* who had the Land at the Time of the Grant made; but if the Deed had never been inrolled, then it should have been the Grant of *A.* and Confirmation of *B.* because the Land never passed from *A.* the Deed being Ineffectual and Void, without Inrolment.

If an Original Grant be made of a Rent-charge to commence after the Death of *J. S.* it is good; for this is not like the Case of Lands, where the Livery must carry the Freehold immediately, and where the Abeyance, or want of distinguishing where the Freehold is, may be of Prejudice to the Rights of others; for if the Freehold was to be granted *in futuro*, a Man that had brought his *Præcipe* against the Grantor, after he had proceeded in it a considerable Time, the Writ might abate by the Freehold's vesting in a Stranger, by Reason of a Conveyance made by the Grantor, before the Writ brought; but the Grant of a Rent *de novo* is not attended with this Inconvenience; for no Man can have a precedent Right to a Thing which is originally created by the Grant itself; yet *Quere* at what Distance of Time such Charges may be allowed to commence, whether it must not be after the Lives of the Persons *in esse*; for if they be indefinite, they seem to have the same Tendency to a Perpetuity as any other contingent Remainders or executory Interest; and the bare Affectation of a Perpetuity is sufficient to condemn any Conveyance.

*Bro. Tit. Grant 86. S. H. 7. 3. Plow. 156. Palm. 29. 30. 2 Vent. 204. But a Rent in esse, or already created, cannot be granted to commence after the Death of J. S. because to such Rents there may be precedent Titles, and therefore*

such Grants are not good; for such Freehold, by thus being split and severed, do hide the Person in whom the Right is; and therefore the Party, that has Right, will not be able to discern against whom to bring his *Præcipe* for the Recovery of it. *Bro. Tit. Grant 86. S. H. 7. 3. Plow. 156.*

(C) Of the Remedies for the Recovery of an Annuity.

IF a Man grants by his Deed an annual Rent to *J. S.* in Fee, for Life or Years, out of certain Lands, with Clause of *Distress*, the Grantee may at his Election either distrain for this Rent, or have a (a) Writ of *Annuity*, and thereby charge his Person.

*Lit. Sect. 219. F. N. B. 152. 6 Co. 58. b. (a) But no Writ of Annuity*

lies for a Rent Service, *vide Tit. Rents*, and *1 Rol. Abr. 226. 1 H. 4. 4.* not if a Man devises a Rent out of his Land, and dies; for after his Death it is impossible to charge his Person. *6 Co. 58. b.* Nor will a Writ of *Annuity* lie for a Rent granted for Equality of Partition, or in Lieu of Dower; for tho' these be given by the Person, yet being granted in Satisfaction of a Real Estate, they retain the Nature of the Things for which they are given, and therefore not recoverable in a Personal Action. *Pop. 87. Co. Lit. 144, 145. 1 Rol. Abr. 227. Co. Lit. 144. a.*

If a Man grants a Rent out of his Land, and by a Proviso in the Deed, or by Deed of Defeasance, provides that the Grant, nor any thing therein contained, shall be construed to extend to charge his Person by Writ of *Annuity*; in this Case the Person of the Grantor is not chargeable; because the Charge upon the Person arising only from the Manner of construing Grants, which for the Consideration given, ought to be extended as far as the Words will bear against the Grantor, there can be no Room for such Construction, when by the express Words of the Grant, the Person of the Grantor is not charged; for no Implication shall be admitted to overthrow an express Clause in the Deed.

*Lit. Sect. 220. Pop. 87. 6 Co. 87. a. But if the Proviso had been that the Grant, nor any thing therein contained, should charge the*

Land, that Proviso had been void, as repugnant to the Grant. *Co. Lit. 146. a.*

Co. Lit. 146.  
6 Co. 41. b.  
7 Co. 65. b.

If a Man grants a Rent-charge out of the Manor of *Dale*, in which the Grantor has no Interest, with a Proviso that the Grant shall not charge his Person, this Proviso is void; because the Grantor having nothing in the Manor of *Dale*, could not by any Act of his charge it; and consequently the Grantee having no Remedy for his Annuity, but against the Person of the Grantor, the Proviso to exempt his Person is void, as rendering the whole Grant ineffectual; and if in this Case the Grantor had been seised of the Manor, and had granted a Rent-charge out of it, for the Life of the Grantee, with a Proviso that the Grant should not charge his Person, though the Grantee himself could have no Remedy but by Distress, because that Remedy being open to him, the Proviso is good to exonerate the Person; yet upon the Death of the Grantee, his Executor may have an Action of *Debt* against the Grantor for the Arrears, because the Executor has no other Remedy for the Recovery of them; for he cannot distress after the Grant is determin'd; and therefore the Proviso to exempt the Person is void against the Executor, as rendering the Grant useless and ineffectual.

6 Co. 58. b.  
But if the Grantor had given a Penny, or any other Thing, in the Name of

And hence it is, that if a Rent be granted out of Lands, with a Proviso that the Person of the Grantor shall not be charged, that this Proviso is void, because the Grantee having no Distress given by the Deed for the Recovery of the Rent, would be without any Manner of Remedy, if the Proviso took Place.

*Seisin*, the Proviso had been good, because he might recover the Rent in an *Affise*. 6 Co. 58. b.

Co. Lit. 146.  
If *A.* and *B.* Jointenants, grant a Rent-charge out of their Land, with a Proviso that the Grantee shall not charge the Person of *A.* this Discharges the Person of *A.* but leaves *B.* liable to the Writ of *Annuity*

If a Man by his Deed, grants that if *7. S.* be not yearly paid the Sum of 10s. that then he may distress for it in his Manor of *Dale*, this is a good Rent-charge out of the Manor, but no Writ of *Annuity* lies for it, because there is no Grant of the Rent made by the Grantor; yet because he hath given the Grantee a Power to distress, if such a yearly Sum be not paid him, the Manor is thereby charged with the Distress, and consequently with the Distress for which the Rent is given.

Co. Lit. 147. b.

Co. Lit. 147.  
Cro. Jac. 390.  
1 Rol. Rep. 330.  
Cro. Eliz. 607,  
622.

If a Man seised of Land in Fee, and possessed of other Land for Years, grants a Rent-charge for Life out of both, with a Power to distress in both, if the Rent be Arrear, the Leasehold as well as the Lands of Inheritance are subject to the Distress; because a Man may oblige his Cattels to the Discharge of the Rent; but the Rent being a Freehold shall issue only out of the Inheritance; because the Leasehold, being only a temporary and perishing Interest, is not a Fund commensurate to the Charge; and therefore the Rent shall issue out of the Inheritance, which for its Duration is a more compleat Estate to support the Charge, and render the Grant effectual. And hence it was (a) adjudged, that tho' the Grantee might distress the Leasehold Lands, yet he must avow for a Rent issuing out of the Inheritance.

(a) 7 Co. 51,  
52. Butt's Case.

7 Co. 51.  
Cro Eliz. 183.

But if a Man possessed of a Term for Years, grants a Rent out of it to another for Life, though the Estate be of shorter Duration than the Charge; yet because it is the only Fund provided by the Grant, for the Payment of the Rent, it shall answer the Grantee so long as it has Continuance, if the Life for which the Rent was granted, lasts so long.

1 Sid. 223,  
262, 344.  
2 Lev. 170.  
1 Keb. 784.  
Raym. 135,  
158.

There is another Remedy for the Recovery of an Annuity or Rent-charge, and that is when a Power is given the Grantee to enter and hold the Lands till satisfied the Arrears by the Perception of Profits, the Grantee, when the Rent is Arrear, may in such Case enter and hold the

Lands

Lands till satisfied by the Perception of the Profits; though in this Case it was objected, that there was no Estate conveyed, out of which a Use might arise to the Grantee, upon the Nonpayment of the Rent; and that this Grant could pass no Estate to the Grantee, as a Conveyance at Common Law, because the Grantee could have no Inheritance or Freehold in the Land, when the Rent was in Arrear for want of Livery, nor an Estate for Years, for want of a certain Commencement and Determination; yet it was adjudged, that by the Grant he had an Interest vested in him, when the Rent was Arrear; and though it be an uncertain Interest, which, for the Uncertainty of its Commencement and Determination, might be void by the strict Rules of Law, if it were granted Independent of any Estate certain, yet it is good in this Case, because it is created to attend a determinate Estate; and the Nonpayment of the Rent fixes the Certainty of its Beginning, and the Satisfaction of the Arrears, by the Perception of the Profits, the End and Determination of such Interest; and therefore the Grantee may reduce such Interest, as it rises, into his Possession by *Ejectment*, which is the proper Remedy to recover the Possession.

If a Man grants a Rent-charge to *J. S.* his Heirs and Assigns; and if it shall happen that the Rent be behind and unpaid, that then the said *J. S.* his Heirs and Assigns, shall enter into the Land, and have and enjoy the Rents thereof, until the Arrears be fully satisfied; and the Grantor covenants to levy a Fine to the Uses of the said Deed; if after the Fine levied the Rent be Arrear, the Grantee may enter into the Land, or make a Lease for Years to try his Title in *Ejectment*; because by the Fine there is an Estate vested in the Conuzees, to raise an Use in the Grantee, of the Rent-charge, when the Rent is behind; and whenever the Rent becomes Arrear, the Possession is executed to that Use, and consequently the Grantee hath a Right to take and keep that Possession till the Use for which it was executed be satisfied; and that was till the Arrears of Rent be paid by the Perception of the Profits; and therefore, though the greatest Interest in the Land be uncertain (because it is uncertain when the Rent will be paid out of the Profits) yet while his Interest remains, if his Possession be disturbed or divested, he may restore it by *Ejectment*, which is the proper Remedy to recover the Possession; and if the Grantee assigns over the Rent, the Assignee may likewise enter and maintain a Title in *Ejectment*; for though the Use arises out of the Estate of the Conuzee only, as the Rent is in Arrear, and till the Rent be behind and unpaid, there is nothing more than a bare Possession of a Use, which in its Nature is not assignable; yet by the Conveyance of the Rent it shall pass, because it is nothing more than a Remedy or Security for the Rent; and therefore shall attend that into whose Hands soever it comes.

Fine is guided by the Deed of Grant, and both amount but to one Assurance.

An Action of *Debt* does not lie for the Arrearages of an Annuity, if the Grantee be seised of it in Fee, Tail or for Life.

an Annuity was granted by Deed for two Years, and the Grantee brought an Action of *Debt* for the Arrears, on Demurrer it was held that *Debt* would lie upon the Contract, it being granted by Deed and for Years. *Cro. Eliz.* 268. for the Remedies which Heirs and Executors have by *Distress* or Action of *Debt*, vide Head of *Rents*, and the Statutes 32 *H. 8.* and 3 *Ann.*

As regularly the Remedies for Recovery of an Annuity or Rent-charge are either by Writ of *Annuity* or *Distress*, it is to be seen which is the most eligible Method, and what shall determine the Grantee's Election. If *A.* grants a Rent-charge to *B.* and his Heirs, if the Rent be Arrear, not only the Grantee, but his Heirs *in infinitum*, may distrain for it; for the Remedy being commensurate to the Right, must be of equal Duration with the Right; but if in this Case the Rent be Arrear, and the

*1 Sand. 112.*  
*113. Fenett*  
*and Cowley.*

*Cro. Jac. 510.*  
*511, 512.*  
*2 Rol. Rep.*  
*12.*  
*Poph. 126,*  
*147.*

*2 Rol. Rep. 427.*  
*3 Bril. 250.*  
*Havergile and*  
*Hare.*

And by the better Opinion it seems, that if the Rent be Arrear before the Fine levied, yet the Fine levied afterwards shall be sufficient to raise an Use in the Grantee to enter into the Land for the Recovery of these Arrears; because the

*Cro. Jac. 512.*

*Co. Lit. 162.*  
*4 Co. 49. a.*  
But where

*1 Rol. Abr.*  
*226.*  
*Poph. 87.*  
*Hob. 58.*  
*Dyer 344.*  
*Co. Lit. 145.*

the Grantee brings a Writ of *Annuity*, in order to charge the Person of the Grantor, it is no longer to be considered as a Rent issuing out of the Land, because the Writ of *Annuity* has intirely turned the Charge upon the Person of the Grantor; and under that Denomination it must determine with the Life of the Grantor, because his Heirs are not chargeable.

2 Rol. Abr.  
226.  
Co. Lit. 144.  
Poph. 87.

But if *A.* had granted for him and his Heirs to *B.* and his Heirs, such a Rent out of his Lands, in this Case the Heirs, being comprehended in the Contract, are bound to make good the Grant so far as they have Assets by Descent from the Grantor.

Poph. 87.  
Co. Lit. 19. a.  
7 Co. 61.  
Nevil's Case.

If a Rent be granted in Tail, the Grantee cannot alien it while it continues a Rent; because as such it may be intailed within the Statute *De donis*; but if the Grantee brings his Writ of *Annuity*, it is no longer within the Statute, because then it is become a Charge meerly Personal, without any relation to the Land out of which it was at first granted, and therefore is become a Fee-simple conditional, as such a Gift of Lands had been before the Statute; and therefore the Annuity not being within the Statute may be aliened.

Poph. 87.

But in some Respects the Writ of *Annuity* is the better Remedy; as if a Termor for Years grants for him and his Heirs a Rent-charge out of his Land to another and his Heirs, in this Case if the Grantee distrains, and thereby has thrown the Charge intirely off the Person upon the Land, upon the Expiration of the Term, the Rent is gone, because the Grantor could not charge the Land longer than his own Interest in it continued; but if the Grantee had brought his Writ of *Annuity*, the Charge upon the Person had been perpetual, so long as the Heirs of the Grantor had any Assets; because the Grant was for him and his Heirs.

Lit. Sect. 219.  
1 Rol. Abr.  
223.  
Co. Lit. 145.

The next Thing to be enquired into is, what Acts of the Grantee are sufficient to determine his Choice; and this Determination must be by some solemn Act in a Court of Record, that it may appear to be the Act of the Grantee himself, and not of a Stranger, without his Permission or Authority; and therefore if the Grantee distrains for the Rent, that is no Determination of his Election; neither is the suing forth a Writ of *Annuity* any Determination, because these may be done by a Stranger, without the Grantee's Knowledge or Consent; or rather because the Design of the Law being to help Men to the Recovery of their Rights, in the most beneficial and best Method, the Grantee shall not be foreclosed of either of his Remedies, by any rash or unadvised Act of his; but if the Grantee Counts in the Writ of *Annuity*, or avows the Taking of the Distress, the Count and Avowry is a repeated Determination, or plain Confirmation of his first Choice and Election; and this being entred on Record is taken to be the deliberate Act of his Mind, and therefore he shall not be allowed to recede from what he has done in so solemn a Manner.

Dyer 344. b.  
Hob. 58.

But if a Man grants a Rent-charge in Fee, without saying for him and his Heirs, and the Grantor dies, and the Grantee brings a Writ of *Annuity* against the Heir, though he Counts thereon, and proceeds to Judgment, yet that does not foreclose him of his Distress on the Land out of which the Rent issues, because by the Death of the Grantor the Grant as an Annuity was determined, and consequently the Grantee had no Election, having but one Remedy for the Recovery of it, which was by Distress; but the Distress in this Case still remained, because the Grantee lost his Election by the Act of GOD, for which no Man ought to suffer.

Poph. 86.  
Co. Lit. 148.  
Mo. 301.  
2 Co. 36.

So it is if Tenant *per auter vie* grants a Rent-charge for Ten Years, and the *Cestuy que vie* dies, in this Case the Charge is determined as a Rent, because the Estate for Life, out of which it issued is ended; but the Grantor is still liable to a Writ of *Annuity* for the growing Annuity,

nuity, because the Grantee had not by any Act of his determined his Choice, and therefore the Election being taken away by the Act of God, and not by any Act of his own, he may pursue the other Remedy by Writ of Annuity.

But if the Grantee of a Rent-charge, before he has made his Election, purchases Part of the Land, in this Case he is (a) without any Remedy, either against the Land or against the Person of the Grantor, the Land is not liable because the Rent is extinct by the Purchase, and it being in its original Creation a Rent-charge; though the Law gave a double Remedy for it, yet when the Grantee has by his own Act discharged the Land, and extinguished the Rent, he can have no Remedy for the Thing which he has wilfully destroyed, and therefore he can have no Writ of Annuity against the Person.

*Co. Lit. 143.*  
 (a) But *Q.*  
 Whether the  
 Case may  
 not be in  
 circumstan-  
 ced as to in-  
 title him to  
 Relief in E-  
 quity, *vide*  
*2 Vern. 143;*  
*144.*

## Appeal.

**A**N Appeal is the Party's private Action; seeking Revenge for the Injury done him, and at the same Time Prosecuting for the Crown, in respect of the Offence against the Publick.

Though this be a legal Suit, and therefore to be carried on in a reasonable Way, yet as none of the Statutes of *Amendment* or *Jeofail* extend to it, the utmost Exactness is required in the Proceedings, especially where the Life of a Man is brought into Danger; but as the nice Distinctions made and allowed of in the several Kinds of Appeals, are accurately treated of by Mr. Serjeant *Hawkins*, it may be sufficient to set down here what seems to have been most materially said by him, relating to Appeals, under the following Heads.

(A) Of the different Kinds of Appeals: And herein,

1. Of an Appeal of Death.
2. Of Appeals of Larceny.
3. Of an Appeal of Rape.
4. Of an Appeal of Mayhem.

(B) In what Courts an Appeal may be brought.

(C) Who may bring an Appeal.

(D) Within what Time an Appeal must be brought.

(E) In what County an Appeal must be tried.

(F) How the Appellant is to Appeal and Prosecute.

(G) How the form of the Writ must be, and for what Faults it may be abated.

- (H) How the form of the Declaration must be.  
 (I) What may be pleaded in Bar to an Appeal.  
 (K) How the Appellant is to be punished for a false Appeal.

### (A) Of the different Kinds of Appeals.

**T**HERE were antiently several Kinds of Appeals which seem obsolete at this Day, as Appeals of Treason, which might be sued before the Parliament and other Courts of Law, as well as before the Constable and Marshal, and were determinable by Battle.

But Appeals before the Parliament are taken away by 1 H. 4. cap. 14. (a) But as to and those before other Law Courts are become (a) obsolete.

the Jurisdiction of the Constable and Marshal, in relation to Treasons committed out of the Realm, it seems to continue still in Force; for in the Seventh Year of Charles the First, an Appeal of Treason supposed to be committed beyond Sea, was actually commenced before the Constable and Marshal; who for want of sufficient Proof to clear the Truth, awarded that a Duel should be fought between the Parties, for the Final Determination of the Matter. *Rushworth's Collect.* Part 2. Vol. 1. fol. 112. Between Donald, Lord Rea, and David Ramsay, Esq;

Appeals *de Pace, de Plagis* and *de Imprisonamento* are out of Use, and have been turned to Actions of Trespas for many Hundred of Years past, also the whole Learning of Appeals of (b) *Arson* seems obsolete at this Day.

The Kinds of Appeals therefore that seem to require any Consideration at this Day, are those of Death, Larceny and Rape, which are Capital Appeals, and that of Mayhem, which is considered as a Trespas: And therefore,

#### 1. Of an Appeal of Death.

An Appeal of Death, which is now chiefly in use, is a vindictive Action which the Law gives a Wife against her Husband's Murderer, and to the Heir at Law against one who kills his Ancestor, which being the Suit of the Subject the King cannot Pardon; but as the several Matters set forth in the following Part of this Head more particularly relate to this kind of Appeal, it seems needless to insert them here.

#### 2. Of Appeals of Larceny.

An Appeal of Larceny is an Action which a Person robbed of Goods may bring against the Felon, in which there shall be (c) a Restitution of the Goods, and the Offender to suffer such Punishment as if he were convicted at the Suit of the King.

order to intitle the Party to a Restitution, *vide* 2 *Hawk. P. C.* 169.

In every Appeal of Larceny it is necessary to set forth whose the Goods were that were stolen, and (d) what the Price of them was, and that (a) But the Words *Felonice cepit* be made use of.

2 *Hawk. P. C.* 177. This does not seem necessary for any other Purpose, than to shew that the Crime amounts to Grand Larceny, and to ascertain the Goods, in order thereby the better to intitle the Appellant to a Restitution.

They who are robbed of Goods, in which they have a special Property, <sup>2 Hawk. P. C.</sup> as Church-wardens, Carriers, &c. may maintain an Appeal of Larceny, <sup>167</sup> and (a) may either bring it generally for their own Goods, or specially <sup>(a) Keilw. 70. pl. 7.</sup> for the Goods of J. S. &c. in their Custody.

3. Of an Appeal of Rape.

By the Common Law, any Virgin, Wife or Widow, might bring an <sup>2 Inst. 180.</sup> Appeal of Rape against any one who had ravished her, though she were <sup>Co. Lit. 123.</sup> his Nief; but a lawful Wife could never bring such Appeal without her Husband; and by the Common Law the Ravisher was to suffer Death.

But by the Statute of *Westm. 1. cap. 13.* the Offence of committing a <sup>2 Hawk. P. C. 172.</sup> Rape was reduced to a Trespass, and punishable in the same Manner with other Trespases, till the making of the Statute of *Westm. 2. cap. 34.* by which it is enacted, *That whoever ravishes any Woman, where she did not consent before or after, shall have Judgment of Life and Member; and tho' she do consent after, he shall have Judgment if attainted at the King's Suit;* but it is observable, that this Statute does not restore the old Common Law in relation to such Appeals, as it would have done if it had only repealed the said Statute of *Westm. 1.* but makes a new Law concerning them; from whence it follows, that all Appeals of Rape, which are impliedly given by this Statute, must conclude *contra formam Statuti.*

4. Of an Appeal of Mayhem.

An Appeal of Mayhem lies for any Hurt done to a Man's Person, <sup>Hob. 134.</sup> whereby he is rendred less able in Fighting, to annoy others or defend <sup>2 Jones 205.</sup> himself.

In this Action the Words *Felonice Mayhemavit* are necessary, though <sup>Vide 2 Hawk. P. C. 158.</sup> the Defendant is not subject to the Loss of Member.

(B) In what Courts an Appeal may be brought.

Appeals are commenced either by Writ, which is an Original out of <sup>2 Hawk. P. C. 155.</sup> Chancery, returnable in the King's Bench only, or by Bill.

Appeals by Bill may be sued in the *King's Bench* against any Person in <sup>Cro. Eliz. 609.</sup> actual Custody, or by (b) having Bail filed for him there. <sup>(b) But not against one</sup>

who is mainprized *de die in diem.* <sup>Cro. Eliz. 694. 2 Hawk. P. C. 155. and Note;</sup> That if the Appellee be arraigned and tried the same Term, there is no Necessity to file a Bill against him. <sup>1 Jones 425. Cro. Car. 532. 1 Rol. Abr. 536. But vide Skin. 634.</sup> Where notwithstanding, the Court ordered a Roll to be made, and a Copy of it to be delivered to the Appellee, and gave him a Day to plead.

If a Man be brought into Court either by a void Writ of Appeal, or by <sup>2 Hawk. P. C. 155.</sup> a voidable one, which is afterwards abated, he may be arraigned by Bill <sup>Skin. 634. vide Cro. Eliz. 605, 695.</sup> in *Custodia Marescalli.*

A Bill of Appeal lies before Justices of *Eyre*, and before Justices specially assigned, and before Justices of Gaol-Delivery, and for the same <sup>Vide 2 Hawk. P. C. 156.</sup> Reason, as some say, before Justices of Assize; who by the Purport of several Statutes are authorized to deliver Gaols without any special Com- and the Au-  
 thorities

there cited, for Appeals before the Sheriff and Coroner, and Appeals of Felonies done out of the Realm, before the Countable and Marshal, <sup>vide 2 Hawk. P. C. 157.</sup> And that they cannot be sued before Justices of the Peace. *Idem.*



and it seems the stronger Opinion, that if the Right of bringing an Appeal be once vested in an Heir, who dies without bringing any, the Right of Appeal is gone for ever; and if an Heir die after Judgment given against the Appellant, it is Questionable whether his Heir can sue Execution.

(D) **Within What Time an Appeal must be brought.**

BY the Statute of Gloucester, cap. 9. which has been construed to extend only to Appeals of Death, *An Appeal shall not be abated for Default of fresh Suit, if the Party sue within the Year and Day after the Deed done*, the Computation whereof, as the Law is now settled, shall be made not from the Day when the Wound was given, but from the Day when the Party died; also the Year and Day shall be computed from the Beginning of the Day, and not from the precise Time when the Death happened, because regularly no Fraction shall be made of a Day.

2 Inst. 320.  
3 Inst. 53.  
4 Co. 42. b.  
2 Hawk. P. C. 162.

An Appeal of Rape may be brought in any reasonable Time, the Judgment whereof lies in the (a) Discretion of the Court; for, as has been said, the above Statute of Gloucester, cap. 9. extends only to Appeals of Death.

2 Hawk. P. C. 175.  
(a) So of Appeal of Larceny.  
2 Hawk. P. C. 168.

(E) **In What County an Appeal must be tried.**

ALL Appeals are Local Actions, and regularly to be tried in the County wherein the Offence was committed.

Dyer 38.

But it is said, that if a Person had died in one County, of a Wound given in another, the Appeal might be brought in either of them, and the Trial be at the Bar by a Jury returned from the Body of each of those Counties; but since the 2 & 3 E. 6. cap. 2. which enacts, *That the Party may sue an Appeal in the County where the Person feloniously stricken, &c. shall die, &c.* it seems the Trial may be from such County only.

2 Hawk. P. C. 163.

So an Appeal of Larceny is a Local Action, yet if one rob me of Goods in the County of A. and carry them into the County of B. I may (a) either bring an Appeal of Robbery in the County of A. or an Appeal of Larceny in the County of B.

Dyer 39.  
7 Co. 2.  
2 Hawk. P. C. 168.

(a) But if one take me from the County of A. into that of B. and there rob me, he shall be appealed of Robbery in the County of B. only, for he was only a Trespasser in A. So in Rape, if a Man takes a Woman by Force in one County, and carries her into another; and there ravishes her, the Appeal shall be brought in the latter only.

2 Hawk. P. C. 168. So in Rape, if a Man takes a Woman by Force in one County, and carries her into another; and there ravishes her, the Appeal shall be brought in the latter only. 2 Hawk. P. C. 174.

## (F) How the Appellant is to Appear and Prosecute.

**A**T Common Law neither Plaintiff nor Defendant in any Appeal whatever, could make an Attorney-(a) except in some Special Cases, but now by the 3 H. 7. cap. 1. it is enacted, *That the Appellant in any Appeals of (b) Murder, or Death of a Man, where Battle by the Course of the Common Law lies not, may make an Attorney, and appear in the same, in the said Appeals, after they be commenced, to the End of the Suit and Execution of the same.*

2 Inst. 313.  
2 Hawk. P. C. 175.  
(a) As where a Defendant prayed his Clergy after his Conviction, and the Plaintiff replied Bigamy; in which Case he was allowed to make his Attorney, in order to procure the Bishop's Certificate. 2 Hawk. P. C. 175. Also after a Defendant is acquitted, he may appear by Attorney, in order to recover Damages from the Abettors. 8 E. 4. 3. pl. 5. (b) Cannot appear by Attorney in an Appeal of Mayhem. Carth. 395.

Skin. 48, 670.  
Carth. 394  
1 Salk. 61. But it seems that the Appellant cannot make an Attorney till he has once appeared in proper Person, and that if the Plaintiff or Defendant Appear or Flead by Attorney where they ought not, and the Court receive the Plea, and adjourn the Cause, it seems that the Appeal is discontinued, because such Appearance was merely void in Law.

Noy 88.  
Litch 173.  
Moor 407  
Cro. Eliz 465.  
1 Rol. Abr. 131.  
2 Bulst. 19. The Appellant may be nonsuited for not appearing when demanded, at any Day of Continuance, except a Verdict hath been given against him; in which Case by the 2 H. 4. cap. 7. he cannot be nonsuited.

2 Rol. Abr. 131.  
2 Bulst. 19.  
Skin. 670.  
Carth. 394,  
395. Where an Appeal is commenced in the Court below, and removed into the King's Bench, the Appellee is to be arraigned *de novo* on the same Bill of Appeal, and it is not necessary to exhibit a new Bill against him *in Custodia Mareschalli*; and if the Appellant will not appear to Prosecute his Appeal, the Appellee may sue out a *Scire Facias* reciting the whole Matter, warning him to appear at a certain Day; and if he make Default on that Day, the Court on Demand will nonsuit him; but the Appellant may appear *Gratis*, and Prosecute without any *Scire Facias*.

## (G) How the Form of the Writ must be, and for what Faults it may be abated.

Abr. Eq. 416. **T**HE Writ in an Appeal is an Original issuing out of Chancery, returnable into the King's Bench only; before the Return thereof the Court of Chancery only can supersede or set it aside, where it appears to have issued *erronice* or *improvidē*, by some Error extrinseck to the Writ it self; but for any Error or Defect on the Face of it, it may be quashed after it is returned into the King's Bench.

2 Hawk. P. C. 184. The Court (c) *ex Officio* will quash the Writ for apparent Faults appearing on the Face of the Writ; as where the Sense is defective for want of a material Word, or where it wants those Words of Art which the Law has appropriated for the Description of the Offence.

Where it might be quashed for false Latin, vide 1 Danv. 252. (c) But the Appellant is first to demand Oyer of the Writ, and this he must do in open Court. 2 Hawk. P. C. 184.

2 Hawk. P. C. 185. So if in a Writ of Appeal brought by Husband and Wife, the Conclusion is in the Name of the Wife only; or if the Writ omits either the

Name of Baptism, or Surname of the Appellant or Appellee being under the Degree of Nobility, it shall be abated.

Also the Court will abate the Writ when the Declaration varies from the Writ in some material Point, either as to the Reign of the King, or as to the County wherein the Fact is laid, &c.

in the Declaration are not fatal, if the Writ on the File be right. 8 Co. 162. and Title

*Vide Hawk. P. C. 184. and where such Faults Amendment*

On the Exception of the Party the Court will abate the Writ; as if he shews that there are not 15 Days between the *Teste* and Return of the Writ; but this he must do before he has pleaded in Chief, without taking Advantage of it.

1 *Salk. 63.*  
1 *Vent. 7.*

If the Writ or Declaration mistake either the Name of Baptism, or Surname or Addition of the Appellant or Appellee, the Appellee before Impar lance may plead it in Abatement.

For this *vide Title Mistrimer, and the*

want of Addition; and 2 *Hawk. P. C. 184 to 193.*

But the Omission or Insufficiency of an Addition, are salved by the Appellee's coming in and pleading, without taking any Advantage of such Defect, but not by his bare Appearance.

2 *Hawk. P. C. 190.*

The Defendant may at the same Time plead as many Pleas in Abatement as he pleases, together with Matter in Bar, and the General Issue, if he can do it without Repugnancy; and if he be (a) suffered to plead any such Plea without pleading with it the General Issue, the Finding it against him doth not conclude him from pleading the General Issue afterwards.

2 *Hawk. P. C. 191, 192.*  
(a) *Vide Carth. 56.* That he must plead the General Issue at the same Time that he pleads in Abatement.

## (H) How the Form of the Declaration must be.

THE Declaration must set forth the Offence with the utmost Certainty, and likewise describe it by such Words of Art as the Law has appropriated to the Purpose; therefore if the Words *Felonice* in any Appeal, *Murdravit* in an Appeal of Murder, *Rapuit* in an Appeal of Rape, *Cepit* in an Appeal of Larceny, *Mayhemavit* in an Appeal of Mayhem, be omitted, they cannot be supplied by any Circumlocution.

2 *Hawk. P. C. 177.*  
*vide Head of Indictments.*

The Declaration must set forth in what Part of the Body the Wound was given; and therefore if it only says, that the Wound was given *circa Pectus* it is vicious; but it is certain enough by shewing that the Wound was given in the Left Part of the Belly, or of the Side, or in the Left Leg, &c.

2 *Hawk. P. C. 177, 178.*  
*Carth. 333.* Must shew the Length and Breadth

of the Wound, if practicable. 2 *Hawk. P. C. 178.*

“ By the Statute of *Gloucester, cap. 9.* If an Appeal declare the Deed, the (b) Year, the (c) Day, the (d) Hour, the Time of the King, and the (e) Town where the Deed was done, and with what (f) Weapon, it shall stand in Effect.

(b) The Year is sufficiently expressed by shewing the Year of the

King, without adding that of the Lord, or saying that it was in such a Year of the Reign of the King. 3 *Inf. 318.* 2 *Hawk. P. C. 181.* (c) Must not only shew the Day of the Hurt, but also the Day of the Death; and if done in the Night-time, proper to alledge *notte ejusdem diei*; but a Mistake of the Day is not material on Evidence. 2 *Hawk. P. C. 180.* (d) *Circa Horam Primam* sufficient. 2 *Hawk. P. C. 180.* *Carth. 333.* S. P. But a Mistake of the Hour on Evidence is not material. (e) If a Place be generally alledged, the Law will intend it a Vill, unless it be mentioned with some Addition which shews the contrary. 2 *Hawk. P. C. 182.* *Skin. 554.* *Carth. 333.* But upon Evidence the Place is not material, so as the Fact be proved any where within the County. 2 *Hawk. P. C. 182.* (f) If it were by other Means, as by poisoning, drowning, suffocating, burning, or the like, the Circumstances must be Specially set forth; but if the Count be for killing with one Weapon, and the Evidence of killing with another, the Variance is not material, if the Means made use of may any way come under the Notion of a Weapon. 2 *Hawk. P. C. 179.* 3 *Mod. 158.*

(1) What

## (I) What may be pleaded in Bar to an Appeal.

*1 Hawk. P. C. 195.* IF the Appellant wants any of those Requisites required by Law in a Person who brings an Appeal, it will be a good Plea; as that a Woman was never lawfully married, that *A. B.* is Heir at Law, and not the Appellant, &c.

*Carth. 17.* *Auterfoits convicted* of Manslaughter is a good Plea to an Appeal of Murder for the same killing. Where the Appellee pleaded that he was before indicted of Murder and convicted of Manslaughter, and prayed his Clergy, which the Court would not allow him, *vide 3 Mod. 101. Carth. 16, 19. Salk. 61. Skin. 670.*

*Salk. 64. Cro. Eliz. 605. 1 Sd. 32.* A Retrait of one Appeal is a good Bar of another for the same Thing, and so also is a Nonsuit; and according to some Opinions, so is a Discontinuance after Appearance, but not before.

*1 Inst. 141. Cro. Jac. 283. Telo 204.* A Release of all manner of Actions, or of all Actions Criminal, or of all Actions concerning Pleas of the Crown, or of all Appeals, or of all Demands, is a good Bar of any Appeal; but a Release of all Personal Actions does not Bar an Appeal of Felony, being an Action of a higher Nature.

*2 Hawk. P. C. 196. Carth. 56.* If the Appellee pleads a Special Plea, which does not amount to a Confession of the Fact, he must at the same Time plead over to the Felony, except in Special Cases; as where such Plea would be prejudicial to him, or where such Plea declines the Jurisdiction of the Court.

## (K) How the Appellant is to be punished for a false Appeal.

*Co. Lit. 283.* BY the Common Law a Defendant may recover Damages for a false and malicious Appeal against the Appellant and his Abettors, by a Writ of Conspiracy or Action on the Case.

“ And by *Westm. 2. cap. 12.* it is enacted as followeth, For as much as many through (a) Malice, intending to grieve others, do procure false Appeals to be made, of (b) Homicides and other Felonies, by Appellors having nothing to satisfy the King for their false Appeal, nor to the Parties appealed for their Damages; it is ordained, That when any being appealed of Felony furnished upon him, doth (c) acquit himself in the King's Court in due Manner, either at the Suit of the Appellor or of our Lord the King, the Justices before whom the Appeal shall be heard, shall punish the Appellor by a Year's Imprisonment, and the Appellor shall nevertheless restore to the (d) Parties appealed their Damages, according to the (e) Discretion of the Justices,

2  
 Appellor nor his Abettors cannot be punished. *2 Hawk. P. C. 198.* (b) In the Construction of the Words *Homicides and other Felonies*, it has been held, that they extend to Offences made Felony by subsequent Statutes. *2 Inst. 384.* (c) But an Acquittal by an Abatement of the Appeal by a bare Nonsuit on a Plea, which shews that he is not intitled to the Appeal, nor a Judgment on a Demurrer, nor an Acquittal on an insufficient Original, nor any other Discharge of the Appellee, which does not finally Bar all other Prosecutions against him, either at the Suit of the Party or of the King, for the same Felony, does not intitle him to his Damages. *2 Hawk. P. C. 199.* (d) If there are several Appellees, Damages shall be assessed according to the different Circumstances of their several Cases. *Dyer 120. pl. 10. 2 Inst. 386.* (e) Therefore if the Jury give too small Damages, the Justices may increase

“lices, having respect to the Imprisonment or Arrestment, that the Party appealed hath sustained by reason of such Appeals, and to the Infamy that they have incurred by the Imprisonment or otherwise; and shall nevertheless make a grievous Fine unto the King; and (a) if peradventure such Appellor be not able to recompence the Damages, it shall be inquired by whose Abetment by Malice the Appeal was commenced, if the Party appealed desire it; and if it be found by the same Inquest, that any Man is an Abettor through Malice, he shall be distrained by a Judicial Writ at the Suit of the Party appealed, to come before the Justices; and if he be lawfully convicted of such malicious Abetment, he shall be punished by Imprisonment and Restitution of Damages, as before is said of the Appellor.

increase them, and in like Manner abridge them when they appear to be exorbitant. <sup>2 Hawk. P. C. 200.</sup> (a) The Abettors are only liable in Case the Appellors be insufficient; but if the Ap-

pellor be found sufficient to render only Part of the Damages, the Judgment against the Abettors shall be for the Whole. <sup>2 Hawk. 202, 203.</sup>

Also at Common Law, an Appellant shall be Fined for an ill-grounded Appeal, at the Discretion of the Justices, in Cases not provided against by this Statute; as upon a Nonsuit after Appearance, or where the Appeal abates by the Folly of the Appellant, or where a Feme Covert sues an Appeal known by her to be groundless; as for the Death of a Husband whom she knows to be alive. <sup>2 Hawk. P. C. 204.</sup>

## Approver.

**A**N Approver, or in Latin, Probator, is one who being indicted of Treason or Felony, for which he is in Prison, confesses the Indictment; and being sworn to reveal all the Treasons and Felonies he knows, enters before a Coroner his Appeal against all his Partners in the Crime within the Realm. <sup>Hal. P. C. 192. 3 Inst. 129. S. P. C. 142.</sup>

All Persons may be Approvers, except Peers of the Realm, Persons attainted of Treason or Felony, or (b) outlawed, Infants, Women, Persons Non Compos, or in Holy Orders. <sup>3 Inst. 129. Hal. P. C. 192.</sup> (b) Whether disabled by being outlawed in a Personal Action, vide <sup>2 Hawk. P. C. 205.</sup> And whether Infants and Women may not be Approvers, as they may bring an Appeal at this Day, though they cannot Wage Battle, vide <sup>2 Hawk. 205.</sup> And that a Man above the Age of Seventy, or maimed, may be an Approver, though he cannot wage Battle. <sup>Hal. P. C. 192.</sup>

The Court is not bound of Right to admit any Person whatsoever to be an Approver, nor will any Person be admitted, unless he be actually indicted of Treason or Felony, and (c) confesses the Indictment; neither shall a Person indicted of Felony continue to be an Approver after an Appeal exhibited against him for the same Felony; neither shall the Appellee of an Approver be himself an Approver; for it would falsify the Appeal of the first Approver, in supposing that he had omitted some of his Partners, but also, because it would cause an infinite Delay; for the Approver, though he cannot be an Approver, but shall be hanged, because he is found false, and his Confession contradicts his former Plea. <sup>3 Inst. 139. S. P. C. 144. 2 Hawk. P. C. 205.</sup> (c) That if he hath once pleaded Not guilty, he cannot be an Approver, <sup>3 Inst. 129. H. P. C. 193. S. P. C. 144. But vide Finch 387. cont. and 2 Hawk. P. C. 205. Q.</sup>

Appellee of such an Approver might as well become an Approver of others, and so on.

<sup>2</sup> *Inst.* 629.  
*Fitz. Coron.*  
127  
<sup>2</sup> *Hawk. P.*  
*C.* 206.

A Man can only approve others of the very same Crime with that for which he is indicted, and therefore no Man can approve another with having been an Accessory to himself, because it is an Offence of which it is not possible that he himself can be guilty; but in as much as an Approver is sworn to reveal all the Treasons and Felonies he knows, if he accuse Persons of Crimes different from his own, such Accusation seems a reasonable Ground to carry on a Prosecution against them for such Crimes, though it be not of it self sufficient to put them on their Trials.

<sup>2</sup> *Hawk. P.*  
*C.* 206. and  
the Authori-  
ties there  
cited.

If it appear either by the Confession of the Approver, or by the Return of the Sheriff, or the Testimony of Persons of Credit, that there are no such Persons as some of those appealed *in rerum Natura*, or in the Realm, or in the County wherof they are named in the Appeal, he shall be hanged, unless the Court in Mercy spare him.

<sup>3</sup> *Inst.* 130.  
*H. P. C.* 194.  
But whether  
the Lord  
High Stew-  
ard, or Jus-  
tices of Oyer  
and Terminer  
can do it without a Special Clause in their Commission, authorizing them to assign a Coroner, *Q. & vide* <sup>2</sup> *Hawk. P. C.* 207.

The Justices of the King's Bench, and Justices of Gaol-Delivery, and Justices in *Eyre*, may admit a Man to be an Approver, because such Justices may assign a Coroner to take the Appeal; but Justices of the Peace cannot admit a Man to be an Approver, because they cannot assign a Coroner.

<sup>3</sup> *Inst.* 129.  
*H. P. C.* 144.  
<sup>2</sup> *Inst.* 629.  
<sup>2</sup> *Hawk. P.*  
*C.* 207.

As soon as a Person has confessed the Indictment, with an Intent to become an Approver, he puts it in the Discretion of the Justices, either to give Judgment and award Execution against him, or to respite them till he hath convicted his Partners; if the Justices think fit to admit him to be an Approver, they will assign a Coroner to receive his Appeal, and will take his Oath to discover all the Treasons and Felonies he knows, and will assign him a certain Number of Days to make his Appeal in, during which he shall be at Liberty, and shall have from the King a (a) Penny a Day; also he must make his Appeal before the Coroner on each Day during the Time limited, and must at last repeat it *verbatim* in Court; and if the Coroner record his Failure of making his Appeal on any of the Days, or the least Variation in his repeating it in Court, he shall have Judgment of Death.

(a) *Q.* Whether he shall have the Penny till he has made good his Appeal, by convicting the Appellees. <sup>2</sup> *Hawk. P. C.* 207.

<sup>2</sup> *Hawk. P.*  
*C.* 208.

The Coroner may award Process against the Appellee, to the Sheriff of his own County, till he come to the Exigent, from awarding whereof he seems to be restrained by *Magna Charta*, cap. 17. The King's Bench and Justices in *Eyre*, and Justices of Gaol-Delivery, may award Process into any County to apprehend and try the Appellee; but it seems Questionable, Whether *Judices* of Gaol-Delivery can award Process of Outlawry into a Foreign County, as the King's Bench and Justices of Oyer clearly may.

<sup>2</sup> *Hawk. P.*  
*C.* 208.

It is at the Election of the Appellee, either to put himself on his Country, or wage Battle with the Approver; and if several Persons be appealed by one Approver, every one of them has his Election, either to put himself on his Country, or to wage Battle with the Approver, who must fight them all, or at least till one of them have vanquished him; after which he cannot maintain his Appeal against the rest; but if a Person appealed of the same Felony by several Approvers vanquish one of them, he shall be discharged against all the rest.

*H. P. C.* 201.  
<sup>3</sup> *Inst.* 130.  
*S. P. C.* 149.

If the King Pardon either the Approver or Appellee, hanging the Appeal, the Approvement ceases, and the Appellee shall be discharged; in the first Case, because by the Pardon the Felony is extinct, and the Ap-

prover

prover is no longer liable to be condemned; in the Second, Because the Approvement is in Truth the Suit of the King, and therefore as much in his Power to Pardon, as an Indictment.

Neither the Approver's confessing his Appeal to be false, nor the Con-<sup>2 Hawk. P.</sup> viction of the Appellee, exclude them from the Benefit of the Clergy. <sup>C. 208.</sup>

If an Approver convict all the Appellees, whether by Battle or Ver-<sup>2 Hawk. P.</sup> dict, the King *ex Merito Justitia* is to Pardon him as to his Life, and <sup>C. 209.</sup> also give him his Wages from the Time of the Appeal to the Time of the Conviction; but antiently he was not suffered to continue in the Kingdom. It is recited by *5 H. 4. cap. 2.* " That divers notorious Felons, for Safeguard of their Lives, had become Provers, to the Intent  
 " in the mean Time, by Brokage and great Gifts to pursue and have  
 " their Pardons, and then after their Deliverance, had become more no-  
 " torious Felons than they were before; and thereupon it is enacted,  
 " That if any Person pray or pursue, or cause to be prayed or pursued,  
 " for any such Felon so attainted by his own Confession, to have any  
 " Charter of Pardon, the Name of him that pursues such Charter, be  
 " put in the same Charter, making mention that the same Charter is  
 " granted at his Instance; and if he to whom such Charter is granted be-  
 " come a Felon again, the Party who pursued the Charter shall forfeit 100 l.

## Arbitrament and Award.

**A**N Award is the Determination of Matters in Controversy, by Submission to Persons indifferently chosen by the Persons contending.

Under this Head we shall consider,

- (A) The Matter in Controversy.
- (B) The Submission, and therein of the different Kinds, and the Revocation thereof.
- (C) The Parties to the Submission.
- (D) The Arbitrators or Ampire.
- (E) The Award it self, or final Determination of the Arbitrators or Ampire.

1. That it be made according to the Submission.
2. It ought to be certain.
3. That it ought to be equal and mutually Satisfactory.
4. The Award must be of a Thing lawful and possible.
5. That the Award must be Final.

(F) The

(F) The Construction and Effect of the Award, and therein of the Performance thereof.

(G) Of the Pleadings in Awards.

### (A) The Matter in Controversy.

**W**HERE the Right of Freehold is in Debate, the Property cannot be transferred by an Award; for the Arbitrators are in the Room of the Parties themselves, and act in their Stead as far as Commissioned; whatever therefore the Parties can do, may be done by the Arbitrators, but the Parties (a) cannot pass Corporal Inheritances without solemn Livery.

1 Rol. Abr. 242.

14 H. 4. 19.

24.

9 H. 6. 6.

3 H. 4. 6.

11 H. 4. 12.

Keilw. 99.

1 Leon. 228. 1 Rol. Abr. 244. 9 E. 4. 44. (a) But if the Condition of an Obligation is to stand to the Award of J. S. touching such Lands, and the Arbitrator awards the Land to one, and that the other should Release to him, if he do not do this, the Obligation is forfeited; if the Arbitrator awards the Land to one, it seems the Obligation is not forfeited, though the other do not convey to him to make him a good Title; for the Arbitrator hath not awarded any Act to be done by the Party, and the Award it self cannot transfer the Right, and so must be void, and then the Condition of the Obligation cannot be forfeited; for the Awarding the Lands to one cannot be expounded, that the other shall infeof him. If, where there is no Bond, the Arbitrator award that one shall infeof the other, it seems an Action on the Case may be maintained for not doing it; for the Award in it self is as good as if there were a Bond, and then there is the same Reason an Action should lie, as that the Condition of the Obligation should be forfeited; for if such an Award were void, then the Condition of the Obligation to perform it could not be broken, *vide* the Authorities *supra*.

9 H. 6. 60.

14 H. 4. 19.

3 H. 4. 6.

1 Rol. Abr.

266.

1 Rol. Abr.

242.

1 Rol. Abr.

242.

9 Co. 78.

6 Co. 41.

1 Leon. 104.

(b) An Award of the

Arrears of Rent reserved on a Lease for Years, is good. 1 Rol. Abr. 264. Where an Award may be made in Walle. 6 Co. 44. 9 Co. 78. Cro. Jac. 100. 1 Rol. Abr. 266.

9 H. 6. 60.

9 H. 6. 60.

6 H. 4. 6.

8 H. 5. 3.

4 H. 6. 17.

1 Rol. Abr.

264. cont.

2 H. 4. 18.

(c) An Award may be made in Attaint, because not barely founded on the Record, but also on the supposed false Oath. 13 E. 4. 1.

West Symb.

Part 2. Sect.

33. (d) Tho'

the Submission be by Bond, yet the Obligation is void, and the Parties may be punished for entering into such Bonds. 2 Vent. 109.

Causes Criminal are (d) not Arbitrable, because they ought to be punished for the Common Good.

(d) Tho'

the Submission be by Bond, yet the Obligation is void, and the Parties may be punished for entering into such Bonds. 2 Vent. 109.

Also Causes Matrimonial seem not Arbitrable, because Marriage ought to be free, and Religion disallows the Severing those whom the Church hath joined.

*West. Symb. Part 2. Sect. 33. 1 Rol. Abr.*

252. But the Damages a Person sustained by a Promise of Marriage, or any Thing relating to a Marriage Portion, may be submitted. 16 E. 4. 2.

Debts due by Specialty cannot be discharged by naked Award; but if the Submission were by Bond the Award would be a good Bar, for one Specialty may be dissolved by another.

1 H. 7. 16. E. Dyer 51. 6 Co. 44. Cro. Jac. 99. 447, 647.

A certain and fixed Debt is not discharged by an Award, for the End and Design of an Arbitration is to reduce uncertain Debts and Duties to a Certainty; and to award a Man a certain Debt is to give him no more, nor do any greater Thing for him than was done before, for now he can have but an Action, and that he might have before, and to give him less than he had before is to do him a manifest Injustice, which the Arbitrator cannot do.

3 H. 4. 4. 4 H. 7. C. 10 H. 7. 4. 1 Rol. Abr. 264. But if 20 l. be due to a Man, and he and

another submit all Personal Things, &c. to Arbitration, there if the Arbitrator award a good Award, because there were other uncertain Things submitted, and the Arbitrator had Consideration of all, and set one against the other in making the Award, so as perhaps the Debt of 20 l. was diminished in Consideration of some Trespasses done by him to the other Party. 10 H. 7. 4. *Allen* 52. for this *vide* 1 Lev. 292. 2 Sand. 190. 2 Mod. 303. In Debt on Arbitration, whereas the Plaintiff claimed 40 l. *pro diversis negotiis*, and sets out the Award, and it was held that the Action lay, for the Debt being *pro diversis negotiis*, it was uncertain what was due for Business. *Cro. Eliz.* 422.

It is held clearly; that all Chattels Personal, and Personal Actions, such as Trespas, Conspiracy, Maintenance, &c. may be determined by Arbitration, and the Right transferred by naked Award, though the Submission were not by Deed; for these being transferrable by the Party himself without any Solemnity, whatever the Parties themselves could do, may be done by the Arbitrators, who are their Substitutes, and stand in their Place; and if on these Submissions without Deed the Arbitrators award one Party a Sum certain, he may bring an Action of Debt for it; but if they award the doing of some other Thing, which is Beneficial to him, he must bring his Action on the Case.

22 H. 6. 39. 9 Co. 78. *Peytoe's Case*, 1 Rol. Abr. 242. Of Submissions made pursuant to a Rule of Court, *vide post*, Letter (B)

The Arbitrators cannot make an Award of Matters different from those which were submitted; therefore if the Submission be of Ewes with Lamb, and after the Submission the Lambs are yeaned, they cannot arbitrate concerning the Lambs.

1 Keb. 600. 2 *West. Symb. Sect.* 32.

(B) The Submission, and therein of the different Kinds, and the Revocation thereof.

THE Submission is the Authority given by the Parties in Controversy to the Arbitrators, to determine and end their Grievances; and this being a Contract or Agreement must not be taken strictly, but largely, and according to the Intent of the Parties submitting.

*West. Symb. Part 2. Sect. 1, 2.*

This Submission may be by Word or Deed; if the Submission be by Word, there is no Remedy to enforce the Party to perform the Award, but reciprocal Actions on the Case, and an Action of Debt will lie, if Money be awarded, for it is in Nature of a Simple Contract.

5 E. 4. 7. 1 Keb. 600. 2 Keb. 238. 3 Keb. 64.

If the Submission be without Deed, it may be revoked without Deed, and the Party shall lose nothing, for *ex nuda Submissione non Oritur Actio*.

21 H. 6. 10. 8 Co. 81, 82. But the

Party must give Notice of the Revocation. 1 Sid. 281.

8 Co. 82. Also if the Submission be by Deed, it is of its own Nature (a) coun-  
 1 Sid 281. termandable, though made irrevocable by the exprefs Words of the Deed,  
 1 Brownl. 62. for the Arbitrators being constituted and put in the Place of the Parties,  
 2 Brownl. 290. by their Consent, to act for them, they can no longer act than they have  
 (a) But it can- such Consent.  
 not be coun-  
 termanded

without Deed, *quia Solvitur, &c.* 1 Brownl. 62. If you plead *quod revocavit*, without giving any Notice  
 to the Arbitrators, the Party may take Issue upon the Revocation; for not to let them know you have  
 revoked is no revoking; for *de non Apparentibus & non existentibus eadem est ratio*, but it need not be  
 shewn in Pleading, that Notice was given, for there *quod revocavit* necessarily implies Notice. 8 Co. 82,  
 290, 291.

8 Co. 82, 83. But a Man obliges himself to stand to an Award, if the Party revokes  
 1 Brownl. 62. it according to his Power, he hath forfeited his Obligation, for the making  
 the Award becomes impossible by his own Default, and therefore the  
 Obligation is Simple; but if it be without Obligation he forfeits no-  
 thing.

38 H. 6. 6. If several Plaintiffs or Defendants submit themselves to an Award, one  
 1 Brownl. 62. cannot revoke the Submission without the other, for joint Acts are con-  
 sidered as the Acts of one Person, and there can be no Revocation with-  
 out the Act of that Person that made the Submission.

2 Keb. 865. If a Feme Sole submits to Arbitration, and afterwards marries, this is  
 1 Jones 388. a Revocation of the Submission; and if it be by Bond the Bond is for-  
 feited.

T. Jones 134. If one have Judgment in an Ejectment, and then they submit the  
 Controversy to Arbitration, but before any Award be made he sues out  
 Execution, it is a Forfeiture of the Bond, for he is the (b) Cause no  
 (b) A Matter Award can be made.

was referred  
 by Consent to the three Foremen of the Jury, and before the Award was made, one of the Party's  
 served the Arbitrators with a *Subjæna* out of Chancery, which hindred them from proceeding in the  
 Award; and the Court held this a Breach of the Rule, and granted an Attachment *Nisi*. 1 Salk. 73.

1 Sid. 290. In Debt upon a Bond to perform an Award, and *Oyer* of the Condi-  
 tion, the Defendant pleads no *Submissit*, the Plaintiff need not assign a  
 Breach; for the Defendant puts the whole Strefs of his Cause upon a  
 Matter antecedent to the alledging a Breach; for if there was no Sub-  
 mission there could be no Award, and consequently no Breach of it.

1 Salk. 73. Also a Submission may be made a Rule of Court, pursuant to the  
 (c) *Vide* 1 Sid. Statute (c) 9 & 10 W. 3. and it is said, that although the Submission be by  
 54. Raym. 35. Bond, yet the Party may have it made a Rule of Court; in which Case,  
 where such it is said, he may proceed on the Bond, and likewise have an Attachment  
 Rules have been before for not performing the Award.

this Statute. By the 9 & 10 W. 3. *cap.* 15. it is enacted, " That it shall and may  
 " be lawful for all Merchants and Traders, and others desiring to end  
 " any Controversy, Suit or Quarrel, for which there is no other Re-  
 " medy but by Personal Action, or Suit in Equity by Arbitration, to  
 (d) " (d) agree that their Submission of the Suit to the Award or Umpirage  
 " of any Person or Persons should be made a Rule of any of his Ma-  
 " jesty's (e) Courts of Record, which the Parties shall chuse, and to  
 " insert such their Agreement in their Submission, or the Condition of  
 " the Bond or Promise, whereby they oblige themselves respectively to  
 " submit

(d) An Arbitration Bond had these Words, and if the Obligor shall consent that his Submission shall be made a Rule of Court, that then, &c. Upon Motion to make this Submission a Rule of Court, it was ob-  
 jected, that these Words did not imply his Consent, but if he would forfeit his Bond, he need not let it  
 be made a Rule of Court; yet because this Clause could be inserted for no other Purpose, the  
 Court took these conditional Words to be a sufficient Indication of Consent. 1 Salk. 72. (e) A Mat-  
 ter being referred by Rule of Court to the Determination of the Judges of Assize, it was moved that  
 the Judges Determination might be made a Rule of Court; and *per Holt*, Where a Matter is referred  
 to Arbitrators by Rule of Court, and they make their Award, we will compel a Performance of  
 it, as much as if the Award were Part of the Rule, so a new Rule is needless. 1 Salk. 71. Note; the  
 constant Practice is to make the Rule at *Nisi Prius* a Rule of the Court above, which is always  
 granted

“ submit to the Award or Umpirage of any Person or Persons; which Agreement being so made and inserted in their Submission, or Promise or Condition of their respective Bonds, shall or may upon producing an Affidavit thereof, made by the Witnesses thereunto, or any one of them, in the Court of which the same is agreed to be made a Rule, and reading and filing the said Affidavit in Court, be entred of Record in such Court, and a Rule shall thereupon be made by the said Court, that the Parties shall submit to, and finally be concluded by the Arbitration or Umpirage which shall be made concerning them by the Arbitrators or Umpire, pursuant to such Submission; and in Case of Disobedience to such Arbitration or Umpirage, the Party refusing or neglecting to perform and execute the same, or any Part thereof, shall be (a) subject to all the Penalties of contemning a Rule of Court, where he is a Suitor or Defendant in such Court, and the Court, on Motion, shall issue Procefs accordingly, which Procefs shall not be stopped or delayed in its Execution, by any Order, Rule, Command or Procefs of any other Court, either of Law or Equity, unless it shall be made appear on Oath to such Court, that the Arbitrators or Umpire (b) misbehaved themselves, and that such Award, Arbitration or Umpirage, was procured by Corruption or other undue Means: And that any Arbitration or Umpirage, procured by Corruption or undue Means, shall be judged and esteemed void and of none Effect; and accordingly be set aside by any Court of Law or Equity; so as Complaint of such Corruption or undue Practice be made in the Court where the Rule is made for Submission to such Arbitration or Umpirage, before the last Day of the next Term after such Arbitration or Umpirage made and published to the Parties.

granted on Motion.  
(a) If one of the Parties revokes the Submission, or hinders the Arbitrators from proceeding in the Award, the Court will grant an Attachment.  
1 Salk. 73.  
But if the Party dies, there is no Remedy by Attachment against his Representative, for the Contempt dies with him. 2 Vern. 444. If the Party excepts to the Award, tho' it be affirmed, an Attachment will not be granted.

ed, for the Nonperformance of it, while the Matter was *sub judice*, was no Contempt. 1 Salk. 73. Also the Party must be required Personally to perform the Award, and such Personal Demand must be made out by Affidavit; otherwise the Court will not grant an Attachment. 1 Salk. 83. (b) On Motion to set aside an Award, because the Arbitrators went on without giving the Party Time to be heard, or produce a Witness, *Holt* said, That the Arbitrators being Judges of the Party's own chusing, he shall not come and say, that they have not done him Justice, and put the Court to examine it; *aliter* when they exceed their Authority. 1 Salk. 73. But Awards have been frequently set aside, especially in Equity, where the Arbitrators have appeared to have been mistaken, or have been guilty of Corruption or Partiality; as if they have an Interest in the Thing in Controversy. 2 Vern. 251. So where there are three Arbitrators, and two of them by Fraud or Force exclude the other, or if they have private Meetings, and admit one of the Parties, and give no Notice to the other. 2 Vern. 514. So where they awarded 495 l. against one of the Parties, for calling the other, who was a Butcher, a *Bankrupt Knave*, to repair his Honour, as they call'd it. 3 Chan. Rep. 76. 2 Vern. 251. *Vide* 1 Vern. 157. So where the Submission was to Arbitrators, and they had Power to chuse an Umpire, which they did, by throwing *Cross* and *Pile* who should name him, and for this the Court set aside the Award. 2 Vern. 485.

Submissions are likewise General, as of all Controversies, Debts, *Cro. Eliz.* 839. Dues, &c. and here the Arbitrators are not obliged to determine all Matters disclosed, but their Arbitration of some Things will be good, tho' they leave other Things undone; but where the Submission is Special or Conditional, *ita quod* an Award be made of all Controversies depending, they ought to determine all Matters whereof they have Notice, because here by the express Words of the Authority, I do not own his Determination unless all Matters in Controversy are settled; and therefore to determine one without the others, is to act contrary to the Authority; but if upon such a Submission the Arbitrators make an Award but of one Thing, it shall be intended there were no others to make an Award of, unless the other Side shew there was, and that the Arbitrators had Notice thereof.

1 Rol. Abr. 257.  
1 Sand. 32.  
1 Brownl. 63.  
*vide postea*,  
that Awards now receive a more favourable Interpretation than formerly,  
*vide* 6 Mod. 332.

## (C) The Parties to the Submission.

- 9 E. 3. 23. **P**ersons that cannot Contract cannot submit to Arbitration, therefore  
 10 H. 6. 14. Feines Covert, Persons compelled by Threats and Imprisonment,  
 19. Persons professed in Religion, cannot submit.  
 Lat b 27. The Husband may submit the Chattels he hath in Right of his Wife  
 Style 351. to an Award, for he may dispose of them.  
 March 77, 78. If the Husband submits to Arbitration the Chattels the Wife has as  
 21 H. 7. 29. Executrix or Administratrix, this shall bind the Wife, because the Wife  
 1 Rol. Rep. cannot (a) Personate any one without the Husband during Coverture.  
 269. Cro. fac. 447.  
 (a) But *Q*, for by some Opinions the Wife, in this Case, may submit to an Award without the Hus-  
 band, for when the Husband allows her a Power of Administration, he must suffer her to act pur-  
 suant to the Trust reposed in her, and his express Consent to her Administration is a tacit Consent to  
 all future Actions of that Nature, and consequently are his own Acts; but whether this makes him  
 liable to a *Decastavit* is a greater Question, because they are not properly Acts of Administration,  
 and consequently he never consented to them. Vide 10 H. 7. 30. 1 And. 117, 181. 5 Co. 27.
- 13 H. 4. 12. If an Infant submit to Arbitration, he may execute or avoid it at his  
 10 H. 6. 14. Election, as he may all other his Contracts.  
 March 111,  
 141. 1 Jones 164. 1 Lev. 17. 1 Rol. Abr. 730.
- 3 H. 6. 26. Persons attainted or outlawed cannot submit to Arbitration, for they  
 5 H. 7. 16. have no Property, and cannot by the Law controvert any Thing.
- 21 E. 4. 13. A Dean without the Chapter, a Mayor without his Commonalty, the  
 Master of a College or Hospital without his Fellows, cannot submit to an  
 Award, for the Submission has the Force of a Contract, and they cannot  
 contract without them.
- Dyer 21. If one Party and the Deputy or Attorney of the other Party submit  
 1 Rol. Abr. to an Award, this is well enough, for the Act of my Deputy is my own  
 244. Act.  
 2 Mol. 228. If several Persons do a Trespass, and one of the Wrong-doers and the  
 1 Salk. 70. Party to whom it is done submit to Arbitration, and an Award is made,  
 Carth. 412. the other Persons shall take Advantage of it by way of Extinguishment  
 20 H. 6. 12. of the Trespass; the same Law where the Party Releases to one of them;  
 a. 41. a. for in both Cases a Satisfaction really is, or is presumed to be made, and  
 1 Rol. Abr. a Man cannot receive a double Compensation for the same Wrong.  
 268.
- 2 Rich. 3. 18. If several Persons on the one Part, and several on the other submit  
 2 Keb. 886. generally to any Award, the Arbitrators have not only Power to deter-  
 22 E. 4. 25. mine Matters between them jointly, but severally and distinctly also;  
 Latch 208. and an Award between one only of the one Side and another of the  
 1 Rol. Rep. other Side is good; for this is not doing less than the Commission war-  
 298. rants, since there is an Authority in it to determine Matters distinctly  
 1 Brown 112. between them, for the Submission is of all Matters, so that it contains as  
 Yelv. 205. well all Things severally between each of them, as jointly between  
 3 Bullst. 6. them all, and perhaps there may be no Cause of Award between the  
 Cro. Car. 433. others.  
 Style 471. 1 Rol. Abr.  
 261. Hard. 399.  
 1 Vern. 259.

(D) The Arbitrators or Umpire.

THE Arbitrators are Persons indifferently chosen, to determine the Matters in Controversy according to their own Minds, whether they be Matters of Law or Fact; Infants, Persons excommunicate, outlawed, &c. may be Arbitrators, for every Person must use his own Discretion in the Choice of his Judges, and being at Liberty to chuse whom he likes best, cannot afterwards object the want of Honesty or Understanding to them, or that they have not done him Justice.

The Arbitrators are Personally trusted with the Authority, and it is not within their Power to assign it; therefore if an Award be to stand to the Determination of a Stranger, this is void; but if the Award be, that an Arbitrament made by *J. S.* shall stand, this is good, because it is their own Award, though it refers to the Act of another; but though the Arbitrators cannot transfer their Power, yet they may award that others shall do a ministerial Act in Subserviency to their Award; for what is done by such Persons, is done by them as Servants and Instruments of the Arbitrators, and is the Act of the Arbitrator himself; as that such a Conveyance should be made as Counsel should direct, such Costs paid as the Prothonotary should tax, is a good Award.

by *Randolphus S.* the Award is not good, because they cannot be taken to be the same Persons, being different Christian Names. 1 *Roll. Rep.* 271.

The Arbitrators cannot reserve to themselves a future Power, since that would enable them to make a double Award, without the Interposition of those who impowered them at first.

The Arbitrators cannot make their Award by Parcels at several Times, for when they have made an Award they have executed their Authority, and can do no more; and therefore if two submit all Debts, Trespasses, &c. and the Arbitrators one Day make an Award of the Debts, and of the Trespasses another Day, this is not good as to the Trespasses, but they may deliberate of one Thing one Day, and of another the other Day, and then make an intire Award of the Whole; also an Award made in the Night is good, for the Party's Attendance is not requisite; but where an Act cannot be done without Personal Attendance of a third Person it cannot be in the Night.

If a Submission is made to *A.* and *B.* when their Occasion will permit, convenient Time must be given, after Request; and if no Arbitration be then made, the Parties may revoke.

If there be a Submission to Arbitration, and if they cannot agree before the first of *May*, then the Submission is made to *J. S.* to be the Umpire, to be made before a certain Day then next to come; if the Arbitrators never Discourse about the Matter, so as there is no Disagreement between them, yet if they make no Award before the Day, the Umpire may determine the Matter; for these Words, *if they cannot agree*, are not to be taken literally, but only that if they do make no Award, that then, &c.

If the Condition of an Obligation be to stand to the Award of certain Persons, *A.* and *B.* and *J. S.* being Umpire for both Parties, in this Case an Award by *A.* and *B.* is (a) good; for *Umpire*, in the common Signification of the Word, denotes a Person that is to make an End of the Matter, if the others cannot.

the Umpirage of *J. S.* the Four and *J. S.* may join in the making of the Award; otherwise if their Power had been divided in the Submission; as if it had been to the Four, and if they could not agree, then to *J. S.* 1 *Bull.* 184 side *Hard.* 44.

- If the Condition of an Obligation be to stand to the Award of *A. B. C.* and *D. ita quod* the said Award before such a Day be made in Writing by the said *A. B. C.* and *D.* or any two of them, under their Hands, &c. any two of the Arbitrators, without the rest, may make an Award; for though by the first Part they are bound to stand to the Award of those Four, yet their Power is divided by the subsequent Words, and the *ita quod* is but an Explanation of the Condition, and the whole makes but one Sentence.
- 1 *Yelv.* 203.  
*Sallowes* vers.  
*Gilling.*  
 For this *vide*  
 1 *Vent.* 50.  
 2 *Keb.* 57.  
*Cro. Jac.* 400.  
*Mo.* 349.  
 1 *Rol. Rep.* 223, 375.  
 3 *Bulst.* 62, 68.
- If the Arbitrators and Umpire have the same Time allotted them to make their Award in the Submission, as to the Umpire it is not absolutely void; for if one of the Arbitrators die, or absolutely refuse to meddle, then the Umpire may determine the Matters; otherwise not; for two different Judges cannot have a concurrent Jurisdiction of the same Thing; and a Disagreement between the Arbitrators at their first Meeting, gives no Power to the Umpire to interpose, because, though they do not agree at their first Meeting, they may at the next.
- The Arbitrators may chuse the Umpire before their own Time is expired, for that is no Relinquishing the Arbitration, but a prudent Provision in Case they should disagree; and therefore an Award by them at any Time before their Time expired is good, and an Award by the Umpire in that Time is void.
- 1 *Rol. Rep.* 263.  
 1 *Lutw.* 544. 1 *Salk.* 70. *S.P. per Holt, cont. Vide 2 Mod. Rep.* 169.
- The Condition of a Bond was, if the Arbitrators make an Award on or before 19 *Feb.* &c. and if they do not make it before, &c. their Authority doth not determine till after the 19th, and the Award cannot be made by the Umpire before the 20th.
- If the Arbitrators have Time to the 10th of *June*, and if they agree not to nominate one to determine it by the said 10th, here if the Arbitrators chuse an Umpire, that determines their Power; for it seems plainly the Design of the Parties, that either one or the other may determine it by that Time, and not that both shall have concurrent Jurisdictions.
- 1 *Mod. Rep.* 274.  
*vide 1 Danv. Abr.* 542.
- 1 *Rol. Abr.* 261.  
 1 *Sid.* 428.  
*Godb.* 241.  
 2 *Sand.* 132.  
*vide 1 Salk.* 70. *cont.*  
*vide 1 Lev.* 174 and 1 *Salk.* 72. where it is said that, if the Umpire be named in the Submission, he cannot make his Umpirage before the Time given to the Arbitrators to make their Award in be expired.
- 1 *Rol. Abr.* 262.
- If the Arbitrators make an Award of Part, during their Time, the Umpire cannot make an Award of the rest, unless the Submission be that if the Arbitrators make an Award of Part, or of None, then the Umpire may make an Award of the Part remaining or the Whole.
- If the Condition of an Obligation be to stand to the Award of *A. B.* so as the said Award be made before such a Day; and if they make no Award, then to stand to the Award of such Umpire as the said *A. B.* shall nominate, so as the said Umpire do make his Award before another Day, and the Arbitrators before the first Day make no Award, but afterwards name *C.* to be Umpire, who thereupon immediately refuses, and the Arbitrators afterwards nominate *D.* who before the last Day makes an Award; this is a good Award; for the Nomination of *C.* to be Umpire did not make him so; but when he refused, it amounted to no more than a bare Proposal to him; and the Form of Pleading always is *suscepto super se onere Arbitri*; so that it is the Acceptance makes him Umpire.
- 2 *Vent.* 113, 114.  
*Tryppit* and *Eyes*; adjudged by three Judges against *Polexfin* Ch. Just. who held that *C.* might have proceeded notwithstanding his Refusal; and there could not be two concurrent Jurisdictions in several Persons. 3 *Lev.* 263. *S. C. vide 1 Salk.* 70. where *per Holt*, if the Arbitrators chuse an Umpire who refuses, they cannot revoke or chuse again; for they have executed their Authority; *aliter*, if they chuse him on Condition he do accept; but *Rookshy* doubted whether an exprefs Condition would make a Difference, because it seemed to be implied.

If the Condition of an Obligation be, That whereas *A.* and his Son, of one Part, &c. have submitted to the Award of *B.* and *C.* *ita quod*, &c. before 1. *May*, and if they make none, to the Award of such Umpire as they should chuse to be made before the 1. *June*, and the Arbitrators make no Award, but chuse an Umpire who makes an Award, but *quoad* the Son awards nothing; this is a void Award; for though the *ita quod* be in the Clause referring to the Arbitrators, and the Award is made by the Umpire, yet the *ita quod* relates by Construction to the Umpire as well as the Arbitrators.

1 *Lev.* 139.  
140  
*Bean* and  
*Newberry.*  
1 *Keb.* 790,  
832, 851.  
S. C.

(E) The Award itself, or final Determination of the Arbitrators or Umpire.

HERE we must observe that the Courts of Justice have of late been more liberal in the Construction of Awards than formerly, and that many of the nicest Distinctions to be met with in the Books, are by no Means to be admitted as Precedents in expounding Awards at this Day; and this the Courts do in Furtherance of Justice, and for Quieting of Controversies; however, as an Award is a Judgment, and can only be expounded by itself, without the Aid of an Averment of Matters *dehors* to explain the Meaning of the Arbitrators, it is necessary that on the Face of it appear,

21 *E. 4.* 39 *b.*  
10 *Co.* 57  
*Dyer* 242.

1. That it be made according to the Submission.

If an Award be made of any other Thing than what is contained in the Submission, it is void; for no Act is my own, or binding to me, unless done by me or by Commission from me.

*Plow.* 396.  
*Dyer* 242.

If Arbitrators award to do an Act to a Stranger, this is good; for the Stranger is put by the Arbitrators in the Place of the Party, and they have Power to award this Act, since it is not impossible or unequal, and it is relating to the Submission.

*Mo.* 3, 359.  
10 *Co.* 131.  
3 *Leon.* 62.  
1 *Rol. Abr.*  
248.

*Hard.* 46. 1 *Leon.* 316.

But an Award that an Act should be done by a Stranger, is void, because he is not within the Submission.

*Hard.* 46.  
But if he  
hath any

Remedy in Law or Equity to compel the Stranger to do it, the Award is good. where they award that one of the Parties shall be bound with Sureties.

1 *Rol. Abr.* 248,  
3 *Mod.*  
272. 1 *Show. Rep.* 82.

If two submit to an Award of all Actions, and the Arbitrators award a Release of all Actions till the Time of the Award, some Books have said that this is void for the whole, because it extends to Things partly in the Submission and partly to Things out of it, and it is one intire Act; for say they, to do that Act they are not obliged, because not within the Submission; and to do an Act relating only to Things contained in the Submission, is another Act from what is awarded; (a) others have said that this is not void, unless there are shewn on the other Side Causes of Action arising between the Time of making the Award, otherwise none shall be intended; and then the Release only relates to the Things in Submission.

10 *Co.* 131,  
132.  
1 *Rol. Rep.*  
45, 162, 270.  
*Vanlore* and  
*Trip.*  
1 *Rol. Abr.*  
242.  
*Cro. Eliz.* 809.  
*Cro. Jac.* 353,  
447.  
*Poph.* 137.  
1 *Sid.* 365.  
2 *Mod.* 169.

(a) *Hob.* 190. 1 *Sid.* 154. *Mo.* 885. *Hutt.* 29.

But

3 *Lev.* 188. But it has been resolved, and seems now settled, that the Act is not  
 2 *Mod.* 169. intire; for he may release all Actions to the Time of the Submission; ;  
 1 *Salk.* 74. for though there is one Deed of Release awarded, yet that Deed relates  
 3 *Lev.* 413. to several Things that are dividable in their own Nature one from the  
 2 *Lev.* 3. other, and so it shall be good for what is in the Submission, and void for  
 the Residue.

9 *E.* 4. 44. The Arbitrators cannot bind a Man's Liberty or Right to real Things,  
 1 *Rol. Abr.* where personal Things are submitted; and therefore if they award Ser-  
 243. vice for two Years, or a Release of the Right of Lands in Satisfaction  
 for a Trespass, this is void; for no Body can be supposed to submit more  
 than his Personal Estate to answer a Personal Injury, for that only  
 might be taken in Execution for it by the Common Law; but his Personal  
 Estate may be bound to answer it; therefore if the Arbitrators award a  
 6 *Mod.* 221. Horse, Money, a Quart of Wine in Satisfaction for a Trespass, this is  
 1 *Salk.* 76. good; for here a new Personal Duty is raised instead of the former,  
 1 *Rol. Abr.* and to satisfy out of the Personal Estate is necessarily implied in the Sub-  
 243. cont. mission; for this is a Means necessary to quiet the Matters.

*Palm.* 107. If two submit to award all Quarrels concerning Tithes in a Place  
 1 *Rob. Rep.* certain, and the Arbitrator awards that one shall pay to the other 20*l.*  
 362. and the other should release to him all Actions, this shall be intended all  
*Cro. Jac.* 66. Actions concerning the Tithes, unless the contrary appear on the other  
 Side, and the Actions may be severed; and this shall be good for the  
 Acts in the Submission, and void for the rest.

2 *Sand.* 190. A Submission of all Debts and Demands, and a Release of all Judg-  
*Roberts and* ments, Executions and Extents awarded, is a good award.  
*Maries.*

10 *H.* 6. 18. A Submission of all Matters between the Plaintiff and another, and  
 3 *Bulst.* 65. an Award made of Things that the Party hath in Right of his Wife,  
 is good; for these Things are comprehended under the Words *all Mat-*  
*ters.*

3 *Bulst.* 312, A Submission of all Injuries, an Award of all Debts, Duties and  
 315. Trespases, a good Award; for whatever is against Law is an Injury.

*Cro. Eliz.* 66, A Submission of all Actions now depending, and an Award of all  
 858. Actions, good; for it shall be intended Actions depending.

Where the Words *de & super premissis* restrain the Award to the Things submitted. *Cro. Eliz.* 861. 8 *Co.* 97. *Cro.*  
*Jac.* 200. 1 *Rot. Abr.* 257. 1 *Sand.* 32. 6 *Mod.* 232. A Submission of all Controversies touching Mo-  
 ney laid out for his Wife, when she was Sole, at her Request, and the Award of 340*l.* for all Sums  
 laid out for the Wife when Sole, omitting at her Request, this is void, because they award another  
 Thing than that which is contained in the Submission. *Cro. Jac.* 640.

1 *Rot. Abr.* There is a Controversy between *A.* and *B.* on one Part, and *C. D.*  
 244. and *E.* on the other Part, and *C.* for himself, and *D.* and *E.* submits the  
 Matter, and promises to stand to the Award, if the Award be that *C.*  
 shall pay so much in Satisfaction of the Controversy, it shall bind him,  
 though it concerns *D.* and *E.* who are Strangers to the Submission, in-  
 asmuch as the Thing awarded is to be done by him, and not by the  
 Strangers to the Submission.

1 *Rot. Abr.* If there be a Controversy between the Parson and his Parishioners,  
 254. whether Tithes shall be paid in *Specie* or not, and they submit all Con-  
 troversies, and the Arbitrators award that they shall pay so much a Year  
 for Tithes, this is good; for that was the (a) Debate on the Award.

(a) If the Submission be of a Suit depending in an *Ejectione firme*, and the Award be of the Right of the Land, it is not  
 good. 1 *Rot. Abr.* 246. If the Submission be of all Actions Personal, *Settis & Querelis*, they cannot  
 make any Award of any Real Suit; for the Word *Personal* refers to all that comes after the Copu-  
 lative; but if the Submission be of all Actions Personal, *ac settis & Querelis*, they may, for the Word  
*ac* makes a plain Distinction between the several Parts of it. 1 *Rot. Abr.* 246. If the Submission be  
 of a Term, and all that belongs to it, and the Award is made of the Rent which shall become due  
 next *Michaelmas*, the Award is not good, because it may be extinguished by Surrender, *Eviction*,  
*&c.* before *Michaelmas*. 1 *Rot. Abr.* 245. if the Submission be of all Actions, they cannot make an  
 Award of Causes for Actions; but otherwise, if the Submission be of all Actions and Quarrels, for  
 the Word *Quarrels* comprehends Causes of Action. 1 *Rot. Abr.* 245.

If the Submission be of all Controversies to the Time of the Submission, and the Award be that one of them should deliver up an Obligation made since the Submission, in Satisfaction of all Matters, &c. this is good, because the Bond is given only in Satisfaction.

1 Rol. Abr. 246.  
If the Submission be of all Actions depending

between A. and B. and an Award cannot be made of any Action depending by A. and his wife against B. being out of the Submission. 1 Rol. Abr. 246. An Award that one shall pay for the Writings of the Award, or the Reckoning in the House where the Award is made, is a void Award; for such Things are plainly out of the Submission. 1 Rol. Abr. 254.

An Award may be good, though Part of it be made of a Thing not within the Submission; as if an Award be to pay 1000*l.* and to procure a Stranger to be bound to pay 22*l. per Ann.* the Plaintiff must lay the Breach in not paying the 1000*l.* for as to the other Part it is wholly void.

For this vide 1 Leon. 304, 305. Cro. Jac. 149. Poph. 134. 10 Co. 131. 5 Co. 78.

Keilw. 43, 64. 1 Rol. Rep. 437. Cro. Eliz. 758, 800, 809, 839.

If an Award be good for Part, and void for Part, the Plaintiff may assign the Breach, that the Defendant did not perform the Thing submitted, *nec performavit in aliquo*; for it shall refer only to that in the Submission, for the rest is void, and not to be performed.

2 Rol. Rep. 46.

If the Arbitrators award on one Side an Act contained in the Submission, and on the other Side an Act out of it, this is a void Award for the whole; for this is unequal, because there is something on the one Side awarded only, and nothing on the other; for what they intended to ballance it with on the other, appears to be void.

Poph. 134. Cro. Jac. 149. 3 Mod. 372.

If the Arbitrators award 10*l.* to one of the Parties, and 5*l.* to a Stranger, this is good as to the Party himself, and void for the Stranger to the Party for Life, the Remainder to *J. S.* the Remainder is void to the Stranger.

2 Sand. 293. So if a Lease be awarded Cro. Eliz. 758.

An Award may be good, though made of less than is contained in the Submission; as if the Submission be of all Actions, Trespasses, Demands and Controversies, and the Award be made of some only, this is good; for no more shall be supposed made known to the Arbitrator; and if there be other Causes of Action in Being, and they be made known to the Arbitrator, they must be shewn on the other Side; and this as well where the Submission is conditional by *ita quod*, as where it is absolute; for the Award being made *de Præmissis* shall be supposed to settle all Things.

Hob. 49. 8 Co. 98. Cro. Jac. 278, 355. for this vide etiam 1 Sand. 32. 1 Brownl. 63. 2 Brownl. 310. 1 Sid. 12. 1 Sand. 32.

Dyer 216, 242. Hard. 45.

If the Award be conditioned to be delivered in Writing under Hand and Seal, the Circumstances must be observed, or the Award is void; and therefore if it be delivered under the Seal only, it is not sufficient.

Dyer 243. 2 Rol. Rep. 24. 1 Bulst. 110.

1 Rol. Abr. 245. Cro. Jac. 277. 2 Mod. Rep. 7. that the Arbitrator, if he cannot Write, ought to set his Mark on the Award. 1 Bulst. 110.

If two submit all Actions till the Ninth of June, *ita quod Arbitrium fiat de Præmissis*, and an Award is made of all Actions till the Seventh, some have said this is less than the Submission, and void; but the better Opinion is, that this is well enough, especially unless there be shewn on the other Side an Action arising between the Seventh and Ninth.

1 Rol. Rep. 362. 2 Rol. Rep. 12, 193. Cro. Car. 216, 217. Cro. Jac.

578. Cro. Eliz. 839.

## 2. It ought to be certain.

5 Co. 77.  
Samon's  
Case.  
Cro. Eliz.  
452.  
1 Rol. Abr.  
263.  
Moor 359.  
1 Rol. Rep.  
271.  
Dyer 242.  
Telv. 78.

As an Award is in Nature of a Judgment, it ought to be wholly decisive; for if it doth not determine the Matter, it becomes the Cause of a new Controversy; therefore if the Arbitrators award a Bond for Quiet Enjoyment of Lands, without appointing a certain Sum, this is a void Award, and the Party is not obliged to give Bond to the Value of the Land; for then the Sense of the Award must be supplied by Averment; now if it hath the Credit of a Judgment, there can be no Interpretation made of the Award, but by the Words of the Award itself; for if it receives its Meaning from any Matters out of the Award, the Mind of the Arbitrators is only guesst at and not express'd; but the Parties intended to be obliged only by what the Arbitrators themselves declare to be their Award, and were the Bond to be according to the Value, they cannot assign their Power to any Person to assess the Value.

Cro. Jac. 314.  
Thine and  
Rigby.  
An Award  
to enter into an Obligation for the Payment of a Sum of Money, without mentioning the Sum, is void for Uncertainty. 1 Lev. 88. 1 Sid. 270.

So if the Arbitrators award that one Party shall give Security to the other, for the Payment of 16*l.* this is not a good Award, because it doth not appear what Security, whether by Bond or otherwise.

1 Rol. Abr.  
264.  
Massey and  
Awbrey.  
Stile 365.  
S. C.

If the Condition of an Obligation be to submit to an Award all Controversies between *A.* and *B.* and an Award is made that *A.* shall permit *B.* to enjoy certain Leases of Lands purchased from *J. S.* and that *B.* shall pay the Rents, and perform the Covenants, and deliver to *A.* a true Copy of the Leases, and pay the Arrears to the Time of the Purchase from *J. S.* this is a good Award as to the Rents and Covenants, though not particularly specified; for it is true, an Award is to be interpreted by its own Words, and not by any Matter out of the Award which doth not appear in the Words; but when the Words of an Award have relation to Things certain out of the Award, these Things may be averred; for that is the express Mind of the Arbitrators, which they have expressly referred to; but as to the Arrears the Award is void, because they have not referred to any Matter that falls within the Cognizance of *B.* for he cannot compel *A.* or *J. S.* to set the Time of the Purchase; and an Award of what cannot be certainly done is not a certain Determination.

1 Rol. Abr.  
263.  
March 18.  
S. C.

If an Award be that one shall acquit the other of an Obligation of 200*l.* *aut eo circiter*, and the Party is bound in an Obligation of 105*l.* *aut eo circiter*, this is a good Award.

1 Rol. Abr.  
263.  
Markham  
and Jennings.  
Telv. 97.  
1 Br. wnl. 92. Cro. Jac. 149. S. C.

If an Award be that one shall pay the other 6*l.* on the Twenty-first of *May*, and that the other should release his Right in certain Lands *prædict' primo die Maii*, omitting *vicefimo*, not good, because there was not any former Day before-mentioned, and so the Mind of the Arbitrators not understood.

1 Rol. Abr.  
364.  
Hurst and  
Bambridge.

If an Award be made between *A.* and *B.* touching certain Quarters of Malt delivered by *A.* to *B.* that *B.* shall pay to *A.* so much for every Quarter, as a Quarter of Malt was then sold for, this is void, because not said at what Market Price; for one Market may be much dearer than another.

1 Rol. Abr.  
249.  
Stila 133,  
136, 152.  
S. C.

If *A.* and *B.* Merchants, and *C.* and *D.* with all the other Owners and Mariners submit to the Award of *J. S.* concerning a Ship taken by Way of Reprizal, and *A.* and *B.* enter into an Obligation on one Side, and *C.* and *D.* on the other, and 1000*l.* is awarded to *C.* and

*D.* to

*D.* to the Use of themselves and the rest of the Owners and Mariners, this is a good Award, though every Man has not a certain Allotment, for *C.* and *D.* submit jointly in the Name of the rest; and therefore an Award of any Thing to them as one Person, without Subdivision, is good; and *C.* and *D.* being intrusted for the rest, they are bound to make a reasonable Division; if not at Common Law, at least in Chancery.

If an Award be made that *A.* shall pay *B.* his Day's Work, and Task Work, and *B.* should then pay 2*l.* to *A.* and then they should make each other general Releases, this is a void Award, and cannot be helped by Averment that he paid such a certain Sum for Days Work and Task Work, because the Award is void in itself, by not settling the certain Sum; and if that is void upon which the subsequent Payment and Releases are to be made, the whole Award must be void.

An Award is made of 40*l.* and mutual Releases; but if it shall appear to the Arbitrators that one of them stands obliged, &c. that then so much shall be deducted, this makes the whole Award void; for it is uncertain how much will be due; but if the Award had been that if any Bill of Debt appears, that should be deducted, that it seems would be a good Award; and though he awards mutual Releases, which would make a final End of all, yet it appears that was to be after Payment; and therefore that Part of the Award shall not stand alone, for that is contrary to the Intent of the Award; so if the Arbitrators make an Award with a *Proviso* at the End of it, That if they do such an Act the whole Award shall be void, the whole Award is void; for the Award ought in Present to be certain.

An Award that one shall pay Part of the Charge of the Voyage, and allow his Part of the Loss that shall come to the Ship upon Account, is good; for it may be reduced to Certainty.

the Parties shall account with the other, not good, because the Matter not settled. *Fitz. Abr. Tit. Award* 37. An Award that one shall pay a Moiety *cujusdam debiti*, &c. held not good, for the Uncertainty. 1 *Rol. Abr.* 263. *Quare*, and *vide* 6 *Mod. Rep.*

If the Submission be of 200 Acres, called *Kelforne Ling*, and the Award be concerning the Waste Lands in the Town of *K.* this Award is void, and cannot be helped out with an Averment; so if Money be awarded to be paid by one, and it is not said in Satisfaction of what he owes the other, that cannot be averred.

If an Award be that one of the Parties shall pay to the other so much as is due in Conscience, this is a void Award.

Quit-Rents and other small Things, void for the Uncertainty. *March* 144. An Award to pay so much Money as such Land is worth, void for Uncertainty. *Skin.* 248.

If *A.* commits a Nufance to *B.* by erecting Scaffolds on his own Ground, and the Arbitrators award that the Scaffolds shall be removed, it must be understood that they are to be removed by *A.* on whose Grounds they are; for though any Person may by Law remove a Nufance, yet the Arbitrators, who are Judges of Equity as well as Law, must be understood to intend it of him who committed the Nufance, and therefore the Award not void for Uncertainty.

An Award to pay the Charges of such a Suit is good, because it is the Intent of the Arbitrators it should be reduced to a Certainty by the Attorney's Bill, who is the only Person can know the Certainty.

3 *Lev.* 414. where the Award was to pay all Expences of a Suit, and all reasonable Expences *intra Settlementum prad.* and it was admitted *per Cur'* to be void for Uncertainty; but to pay such Costs or Charges as the Master or Prothonotary shall tax, has been always held good. 1 *Sid.* 358. *Carth.* 156.

1 *Salk.* 69. An Award was, that one of the Parties, he or his Executors should release; and my Lord *Holt* inclined to think that it may be construed that *he and his Executors* should release.

### 3. That it ought to be equal and mutually Satisfactory.

1 *Rol. Abr.* Awards must not be on one Side only; this must be understood thus; 253.  
3 *Co.* 98. That all Controversies being between two Parties, that which is awarded to be done to one must be an Advantage to both, so as to end the Controversy, and discharge one as well as give Satisfaction to the other, for if it doth not, it is manifestly unjust; and therefore whenever it appears to the Court that, notwithstanding the Award, the Thing remains a Duty as before, and is not discharged, that apparently is an Award on one Side, and consequently is void; not that where one Party is by the Award to have something paid him, or the like, and not the other, that that Award should be naught; for perhaps nothing may be due to him, and he might be the only Trespassor in the Case.

1 *Rol. Abr.* Thus in Case of a Trespass submitted, the Arbitrators award that 253, 254.  
*Hob.* 49. one shall pay the other 3*l.* this is void, because only on one Side; for it is not laid for what, and so the Trespass is not discharged, and then the other Party hath no Advantage by the Award; but if it were awarded *de & super Præmissis*, it would be well enough; likewise if the Award had been that he shall pay 3*l.* for a Trespass, it had been good, and yet one only was to do an Act, but then the Trespass by that

(a) But if an Award had been (a) discharged.

Award be that the Obligor in a single Bond shall pay the Money, that had been no Award, without saying that he should be discharged; for Payment, without a Discharge and Acquittance, will not discharge a single Bond. *Hob.* 40.

7 *H.* 6. 40. *A.* and *B.* submit all Actions had by *A.* against *B.* and all Actions by *B.* against *A.* and the Arbitrators award that *A.* shall go quit 1 *Rol. Abr.* 253. of all Actions had by *B.* against him, this is naught; because they say nothing as to the other Actions.

*Cro. Jac.* 314. An Award should give him Security to pay 16*l.* is void, because it is not certain what Security; and then that Part of the Award being void, the other that one of the Parties Part must be void too; for else it would be an Advantage to one only. should be bound with Sureties, such as the other should approve, in the Sum of 150*l.* to be paid him at such a Time, and that they should seal mutual Releases; and the Court inclined that the Award was void; for if the Party did not like the Sureties, he was not to seal a Release, so it is but an Award of one Side. 3 *Mod.* 272, 273.

1 *Rol. Abr.* If one Party alone be ordered to do something, and nothing else appears to the Court, it shall be presumed that he alone was the Wrongdoer, and the Award is good, if it appears that he is by the Award discharged of all Actions that might be brought against him for that Wrong; but when it appears that they design both Parties Satisfaction for the Wrong done each of them, there if the Satisfaction designed one be not well awarded, the whole shall be void for the Partiality. 253.

1 *Brownl.* 63. A naked Award is no good Plea in Trespass, unless something be *Cro. Eliz.* awarded to the Plaintiff in Amends; for if there be no Trespass there is 904. nothing about which an Award can be made; and if there be one, and 1 *Rol. Abr.* they do not award Satisfaction, they do not act according to the Design 251. of their Institution, for they are not indifferent, and so there is no good Award.

If Trespafs be of Beasts taken and detained, and they arbitrate that the Owner shall have the Beasts again, this is void ; for it is against natural Justice to give him his own again without Satisfaction for the unjust Taking and Detention.

1 *Rol. Abr.*  
251.  
So an Award  
that the  
Owner shall  
have Parcel

of his own Goods. *Vide* 1 *Rol. Abr.* 252. If an Award be that whereas the Parties are indebted each to the other 40*l.* they should acquit each other, a good Award; the same Law where each have done the other a Trespafs. 1 *Rol. Abr.* 252.

An Award that one shall go to *Rome* or *Paul's*, not good, because to no Body's Advantage.

1 *Rol. Abr.*  
252.

An Award that two shall intermarry, no good Award; for that ought to be at the Parties Choice; and the Bodies of the Parties are not submitted to the Power of the Arbitrators.

9 *E.* 4. 44.  
1 *Rol. Abr.*  
252.

If the Award give Satisfaction for slanderous Words spoke of a Man about a Crime which it appears was pardoned, that Award is void; for if the Crime be pardon'd, no Harm could come to him by speaking them, therefore the Award unequal.

1 *Sid.* 178.  
If there be  
an Award  
that one  
shall pay so

much Money for Cofts in a Suit for Words, the Words must be shewn, otherwise it doth not appear that the Award is just and equal. 1 *Sid.* 12. *vide* 2 *Vent.* 242. this Case cited; and there the Court seemed dissatisfied with this Opinion, and said that *Siderfin* was but a young Reporter.

If an Award be that if one will make his Law that he did no Trespafs, that then he shall go quit, not good; for that cannot be pleaded in Bar of an Action; for it supposes contrary to the Submission, that there was no Trespafs, neither can it be averred that the Award was for the same Trespafs the Action was brought for; for it supposes no Trespafs.

43 *E.* 3 28.  
19 *H.* 6. 37.  
1 *Rol. Abr.*  
251.  
*Dyer* 356.

There are Controversies between *A.* and *B.* and *A.* and *C.* as Attorney to *B.* submit to an Award, the Arbitrators award so much Money to *A.* and that *A.* and *C.* shall release to each other, to the Use of each other, this is void, because the Award is on one Side, for *B.* cannot take Advantage of the Release, for that is to the Use of *C.*

*Carth.* 412.  
*Bacen* and  
*Dubarry.*  
1 *Salk.* 70.  
*S. C.*

The Award may be beneficial to the Party, though a Thing is awarded to be done to a Stranger to the Submission; as if the Arbitrators award that one of the Parties shall pay Money to the Servant of the other.

3 *Leon.* 62.  
*N. Dyer* 242.  
But an Award  
to pay  
Money to  
a meer

Stranger is said to be void. 1 *Rol. Abr.* 247. but *vide* 1 *Salk.* 74. where by *Holt* it is good, and shall be intended for their Benefit. But an Award that the Parties shall in such Proportion discharge a Debt by Bond in which they are jointly bound, is good, though the Obligee be no Party to the Submission. 1 *Rol. Abr.* 247. if two Brothers submit to Arbitration, and one of them is awarded to pay so much to his Mother yearly, this is good; for the Payment being to be made to his Mother, shews it to be a Benefit to him. 1 *Salk.* 74.

If an Award be to pay so much Money in Discharge of all Actions, a Release shall be intended to be awarded, unless the contrary be shewn on the other Side.

2 *Rol. Rep.* 1.  
An Award  
is made  
super  
Præmissis,

that one shall pay 20*l.* to the other at *Michaelmas* next, and then the other shall release to him all Actions Personal, this shall be understood a Release to the Time of the Award, not till *Michaelmas* next. 1 *Rol. Abr.* 256.

## 4. The Award must be of a Thing lawful and possible.

1 *Rol. Abr.* 248. If the Arbitrators award a Thing (a) impossible *ex natura rei*, it is void; but if they award a Thing which cannot be done, but is not in the Nature of the Act itself (b) contradictory or repugnant, this may be a good Award; for there is no Construction to be made of the Award, but by the Words thereof.

1 *Rol. Abr.* 248. If they award a Sum of Money to be paid at a Day past, it is void. 8 E. 4. 1. b. If they award that a Man shall make an Obligation immediately, this is no good award; for Time is required to the making. 18 E. 4. 21. but *Quare*, and *vide* 2 *Brownl.* 311. and 1 *Salk.* 69 that it shall be done in reasonable Time. (b) As an Award that one shall pay 20 l where he hath not 20 d is good; for no Contradiction appears in the Award itself. 19 E. 4. 1. Awards that one shall turn the River of *Thames*, Kill, Steal, Forge a Deed, &c. are void. *Co. Lit.* 206.

1 *Rol. Abr.* 248. *Moor* 3, 359. If an Award be that one shall make a Feoffment to another of an Acre, and immediately after deliver the Charters, this is good, because they may be delivered in the same Instant.

1 *Leon.* 316. An Award that a Stranger shall (a) do an Act is void, because another in his natural Freedom is not supposed within my Power.

3 *Leon.* 62. *Hind.* 46. (a) But an Award to do an Act to a Stranger is good, because it obliges only to an Endeavour; and this shall be supposed to be for the other Party's Benefit. 1 *Leon.* 140. 10 *Co.* 131. 1 *Rol. Abr.* 249. 1 *Rol. Rep.* 270. An Award to be obliged by Sureties, void as to the Sureties. 2 *Sand.* 337. 2 *Bull.* 262.

1 *Rol. Abr.* 249. Do an Award that one shall surrender his Copyhold into the Hands of two of the Tenants of a Manor, who shall present it, is good. 1 *Rol. Abr.* 247. An Award to levy a Fine is good; for though it is an Act of the Court, yet by the Law and publick Justice of the Kingdom, it is not to be refused to any Man; but if the Award be to command the Justices to do it, this is no good Award; for the Parties in effect pray Leave to agree from the King himself, which is quite different from the Nature of a Command.

1 *Rol. Abr.* 249. An Award to pay so much *apud domum* J. S. good; for he is not bound to pay it in the House, but as near as he can to it, or it shall be intended a Common Inn; and if the Party will not let him pay there, it has been said that the Endeavour is sufficient; for they cannot award any Thing that will make the Party a Trespasser.

1 *Jones* 431. *Cro. Car.* 541. An award that one of the Parties should discharge the other of a Bond in which both were bound to a Stranger, this is a good Award; for it shall be intended that the Money was to be paid at a Day to come; and therefore he might then tender it and acquit the other; and if the Day of Payment be past, he may pay the Penalty and compel the other to give a Release in a Court of Equity.

1 *Mod. Rep.* 9. *Eekes and Taylor.* An Award that one of the Parties shall discharge the other from his undertaking to pay a Debt to a third Person, a good Award; for by the Award he is set in the Place of the other Person, and the Creditor upon Payment is compellable in Equity to give a Release.

*Yelv.* 35. *Hays and Wright.* An Award the Tenth Day of the Term to stay the Suit, and Judgment given in the Action that Term, in an Action for Non-performance, and *Non Assumpsit* pleaded, it was moved in Arrest, that every Judgment given was as of the First Day of the Term, and so the Award to stay the Suit then was altogether impossible; but it was held that though this might have been a good Objection upon a Special Demurrer, where it is shewn for Cause, yet now the Court must give Judgment on this Record only; and it doth not appear on this Record when Judgment was given on the other.

If *A.* and *B.* submit to the Award of *J. S.* and he awards that *A.* shall pay to *B.* 30*l.* within two Months next following, and that upon Payment thereof they shall give mutual Releases to one another, and within the said two Months *B.* dies, the Money shall be paid to his Executor, who thereupon must release; for the Award creates a Duty.

5. That the Award must be final.

An Award may be good for Part only, but then it must be final as to that Part.

An Award that all Suits shall (*a*) cease is a final Award; so an Award that one of the Parties shall not (*b*) sue an Obligation; for this amounts to an Extinguishment of the Debt. An Award that a Suit in Chancery shall be (*c*) discussed, a final Award; so if the Arbitrators award a (*d*) *Retraxit*, an Award that one shall not (*e*) prosecute nor proceed in such a Term, seems to be good, but an Award that one of the Parties shall be (*f*) Nonsuit is not good, because the Party may begin again, so that each Party shall (*g*) discontinue their Actions which they have against each other; for this is not a final Determination.

(*e*) *Cro. Jac.* 525. (*f*) 19 *H. 6.* 36. 1 *Rol. Abr.* 540. 6 *Mod.* 282. S. P. admitted. (*g*) 5 *H. 7.* 22.

A Conditional Award not good, because not final to determine Matters in Difference; the same Law where any Thing is referred to the Arbitrator's future Judgment or Exposition.

If the Arbitrators award general Releases within four Days after the Award, and if in ten Days after the Releases so made the Party dislike the Award, upon Payment of Ten Shillings, the Award shall be discharged, here the Award is good; and the Proviso to make void the Award after such Releases, is altogether void and repugnant; for if the Obligation be once forfeited by Non-performance of the Award, it can never be discharged by the Award itself; but if the Arbitrators award general Releases within four Days after the Award; and if ten Days after the Award made the Parties dislike the Award, &c. the Award shall be void, this Award is not good, because not final and decisive; for the Parties may dislike the Award within the four Days.

If the Arbitrators award that *A.* shall beg *B.*'s Pardon in such Manner and such Place as *B.* shall appoint, as to this Part the Award is void; for the Arbitrators ought to have made a final Determination of the Matter themselves, and not to have left the Manner and Place of begging Pardon, which in this Kind of Satisfaction makes the most considerable Part to the Judgment of *B.*

make his Acknowledgment before the Mayor of *C.* is good.

When the Arbitrators award a Thing not submitted, with a Reservation to themselves of a future Power of judging of the Matter, and they award a Thing within the Submission, this is good for the Thing within the Submission; for as to that it is final, and void for the Residue.

If they arbitrate that all Controversies shall cease, except that concerning one Bond, this is final; for as to the Bond they arbitrate that it shall continue in Force.

## (F) The Construction and Effect of the Award, and therein of the Performance thereof.

- 2 Brownl.*  
*311.*  
*1 Salk. 69.* AN Award, as has been said, is to receive a liberal Construction; and to be governed by the Intent of the Arbitrators, where no Inconvenience will ensue; therefore if the Arbitrators award a Thing to be done, without saying within what Time, the Party shall have reasonable Time; because they must intend all Things necessary to the doing the Thing they award.
- 2 Vent 249.*  
*1 Rol. Abr.*  
*257.*  
*Cro. Jac. 277.*  
*Tele. 203.* If the Award be to pay Money to J. S. if he dies, the Money shall be paid to his Executors. A Submission of all Actions, and an Award of a Release of all Actions, except a Bond, this is an Award that the Bond shall stand.
- Cro. Jac. 423.*  
*1 Rol. Abr.*  
*250. like*  
*Case.* An Award that one shall enjoy such a House and pay the Rent, or else the Award for enjoying the House to be void, is a good Award; for the Award is absolute, unless upon his own Fault; and the Thing is reserved to the future Judgment of the Arbitrators.
- 3 Bullf. 111,*  
*117.*  
*21 H. 7. 28.* If a Battery is submitted, and the Award is, That one shall release, and the other pay him 10*l.* the Release must only be understood of the Battery, and must be first performed before the 10*l.* shall be paid.
- Moor 3.*  
*Cro. Eliz. 211.*  
*cont. Cro.*  
*423.* If an Award be that one shall make a Lease to the other, rendering Rent, the Lease is made, but the Rent not paid, the Obligation is not forfeited; for the Award did not reach to the Payment of the Rent, which must be recovered by Distress or Action of Debt; but if the Award had been that he should pay the Rents at such set Times, the Obligation would have been forfeited if they had not been paid; and in such Case it is a Sum in Gross, and payable without Demand; for the Party must offer it to save his Obligation.
- 8 Co. 98.*  
*1 Sand. 32.*  
*1 Rol. Rep.*  
*362.*  
*1 Rol. Abr.*  
*256.*  
*1 Lev. 58.*  
*1 Leon. 72.* It is an established Rule, that an Award may be good in Part, though void as to other Parts of it; and that the Party is obliged to perform that which is well awarded and excused, as to that only which is void; but if an Award is good as to one Party, and void as to what is awarded to the other Party, the Award is void in the whole.
- 1 Rol. Abr. 244. Hob 218. 2 Lev. 3. 3 Lev. 413. Cro. Eliz. 758.*
- 36 H. 6. 12.*  
*7 H. 6. 40.* If the Arbitrators award one Thing on the one Part, and the Time expires before they award any Thing on the other Part, this is altogether void, and contrary to their Authority; because it doth not finally determine the Things contained in the Submission equally on both Parts.
- 8 E. 4. 11.*  
*21.*  
*1 H. 7. 5.*  
*1 Vent. 193.* If it be provided by the (a) Submission that the Award should be notified or delivered to the Parties in Writing, it is no Award till notified or delivered; because it is not according to the Power in the Submission.
- (a) But if there be no such Provision, the Parties must take Notice of it at their Peril; and if they do not the Act awarded, it is a Forfeiture of their Obligation. *8 E. 4. 18, 21. 1 H. 7. 5. Hob. 51. 8 Co. 92. b. vide Keilw. 175. cont.*
- Dyer 218.* If several Persons of the one Part, and several of the other Part, submit themselves to Arbitrament, provided the Arbitrator deliver the Award to the Parties, or one of them, he is not obliged to deliver the Award to one of each Party; but it is sufficient to deliver it to any of the said Parties.

But if two on the one Part, and one of the other submit to an Award, *ita quod Arbitrium fiat & deliberetur utrique partium predicti*, the Delivery of the Award to one on the one Part, and to the other of the other Part, is not sufficient; for each Party is each intire Party; for each, by Non-performance, incurs the Penalty, and each provides in order to his Performance, that it should be made known to him, if the Submission be by two, so that it be delivered to either Party, that is to be understood to both; and a Delivery to one only is not good.

If two Men submit to an Award, so that it be *paratum deliberare partibus* such a Day, it need not be averred that it is *paratum deliberare, &c.* at a Day, for the Publication of the Award itself is sufficient.

If the Submission be general, that the Award shall be delivered before such a Day, it may as well be delivered by Word as by Deed; and therefore *non deliberavit in scriptis*, in such Case, no good Plea.

Debt upon an Award by Word only, is within the Statute of 21 Jac. 1. cap. 16. of Limitations, and must be sued within six Years, otherwise it is of an Award by Specialty.

If there be an Obligation to stand to an Award, each ought to perform it on his own Part, at the Peril of his Obligation, awarded one of the Parties, and that they both shall give mutual Releases, if he who is to receive the Money refuses it, yet upon a Tender and Refusal, he is as much obliged to sign a Release, as if he actually received it.

If Money be awarded and not paid, the Party may either have his first Action or Action of Debt; for if there be Payment, the first Wrong was determined; but otherwise he cannot plead the Award as a Determination and Bar of the Wrong; for since the Award of Arbitrators doth not bind any Man's Property, as Judgments at Law do, it is fit the Party when he pleads it in Bar, should shew an Execution at the Time appointed.

As to the Performance of the Award, if there be no Time limited, it is to be performed in a convenient Time, be excused by the Act of GOD, *vide* 21 E. 4. 70. Where the Thing awarded to be done, becomes impossible by the Act of a Stranger, *vide* 2 Mod. 27, 28.

Though an Award cannot be made Part at one Time and Part at another, yet it may be performed Part at one Time and Part at another; for the Nature of the Thing may require Performance at different Times and Places.

An Award for one Party to deliver a Release or Bond to the other, if that one Party delivers it to A. who delivers it to B. who tenders it to the other Party, who refuses, this is a good Performance of the Award, tion for performing an Award, by which Award the Parties were to give mutual Releases, the Defendant pleaded that he made a Release to the Plaintiff, and delivered it to F. S. for his Use; and this was held a good Performance of the Award; for the Defendant could not plead *non est factum*, neither could he countermand it; and as the Arbitrators had not appointed any Place where the Releases should be delivered, if the Plaintiff should absent himself it would be very inconvenient.

If the Submission be of a Chancery Suit, and the Arbitrators award that the Suit shall stay, and that one be quit against the other for all Matters in the Bill, it is sufficient Performance to say that the other *stetit quietus*; and though he did not procure an actual Discharge; but where one by Deed is obliged to acquit another of such a Debt, or such a Suit, it is not sufficient to save him harmless, but he must procure an actual Discharge; but the Award here being *quod staret quietus*, means no more than that the Party should be acquitted by Force of the Award self, and not that another Discharge should be procured; and in this

Case, if a new Bill be exhibited, yet that is no Disturbance to forfeit, without Process issuing out as the *Subpœna*, for till Process the Party is not actually molested.

2 *Bull.* 96. But if a Man submits a Rent-charge to Arbitration, and the Arbitrator award *quod Staret quietus* of the Rent, he who hath the Rent ought to release the same to the other, in Performance of this Award, for to be quit of the Rent supposes the Demand not in Being.  
If the Award is *quod Staret* acquiesced from an Information, this is not good unless it be actually released, because the King may prosecute it. 2 *Bull.* 96.

*Cro. Jac.* 525. An Award that the Plaintiff shall not prosecute or proceed in a Suit the same Term, the Entry of a Continuance is no Breach of this Award, be not to for otherwise the Party can never afterwards go on in the Action.  
continue the Suit, if the Party continue it by Attorney, this is a Breach; but if the Attorney continue it without his Knowledge, it is no Breach. *Cro. Jac.* 525.

3 *Bull.* 65. An Award is made to infeoff *J. S.* *J. S.* comes and desires the Party to infeoff *J. M.* and him to the Use of himself, this is a good Performance of the Award, for though the Construction of the Sense of the Award is to be taken on the express Words, yet what is a Performance of the Award is to be taken according to the Intent of the Arbitrators.

*Moor* 3. pl. 9. A Man cannot plead Generally the Award performed, but he ought to set forth the Award, and therein how he hath Performed it.

### (G) Of the Pleadings in Awards.

49 *E.* 3. 3. IF the Arbitrators award Money to be paid at a Day to come, this is a good Plea in Bar in an Action of Trespas before the Day, because it is *debitum in Presenti*, though *solvendum in futuro*; and if he might have an Action of Trespas before the Day, and recover, he may have an Action of Debt after the Day, and so a double Satisfaction for the same Thing.

Note; There is a Difference between an Accord with Satisfaction and an Award; for in an Accord a Man must plead present Satisfaction, and it is no Plea in Bar to plead an Accord with Satisfaction at a Day to come; for in all Personal Injuries the Law gives Damages as an Equivalent; and when the Party accepts of an Equivalent, there is no Injury or Cause of Complaint, and therefore a present Satisfaction is a good Plea; but where the Wrongdoer promises a future Satisfaction, the Injury continues till Satisfaction is made, and consequently there is a Cause of Complaint in Being, and if the Trespas were now barred by this Plea he can have no Remedy for the future Satisfaction, for that supposes the Injury still to have Continuance; but where Persons submit to Arbitration, the Arbitrators are Judges of the Injury; and if they award Money payable at a Day to come, that is a good Award, and may be a good Plea in Bar to an Action of Trespas brought in the mean Time, because this thereby becomes the immediate Debt attainable by Law. 5 *E.* 4. 7. *Plowd.* 5 b.

1 *Rol. Abr.* 266. It was formerly held, That in an Award of a Release, a Horse, a Quart of Wine to enter into an Obligation, or any other collateral Matter in Satisfaction, without Performance, was no good Plea in Bar; for were it a good Plea in Bar, he could have no Remedy afterwards to compel the Party to do the Thing awarded, for by the Bar the Trespas would be nullified.

*Carth.* 378. But it has been since held, in an Action on the Case upon a Special Promise made by the Defendant, to deliver a Parcel of Hops to the Freeman and Bernard adjudged, *Trin.* 9 *W.* 3. 1 *Salk.* 69. S. C. and the Difference there taken, that by awarding a Collateral Thing to be done a new Duty is raised, and the Old discharged, and then it may be pleaded in Bar, though not executed; *secus* if a Release only be awarded, which created no new Duty. *Vide Carth.* 138.

Plaintiff

Plaintiff on such a Day and Place, on a certain Price agreed on, &c. to which the Defendant pleaded in Bar, that after the Promise made, both he and the Plaintiff referred all Matters, and that the Arbitrators awarded that the Defendant should release the Plaintiff, and that he should release the Defendant of all Actions and Demands whatsoever; and alledged, that from the Time of the Award hitherto, he was always ready, and yet is, to release the Plaintiff according to the Award, &c. And upon Demurrer to this Plea after several Debates, it was adjudged that this Award was no Bar to the Action, because nothing was awarded but only mutual Releases from each other, so that the Award it self is no Bar, but the Thing awarded, when executed, would be a Bar; and a Difference was taken where any Thing is awarded in Satisfaction, there the Award it self is a Bar before it is performed; but where nothing is awarded but Releases on both Sides, there when the Award is executed the Release will likewise be a Bar: And the Court held, that the Defendant may bring his Action against the Plaintiff for not releasing according to the Award, and therein ought to recover all his Damages and Costs lost in the Action against him.

The above Cases must be understood where the Action was brought before the Time for performing the Award was expired; for if an Award be to pay Money at a Day to come, and the Money be not paid at the Day, and afterwards an Action of Trespas be brought, this is no good Plea in Bar, for no Man can plead this in Bar without shewing he has paid the Money; for it is against Natural Justice to make one Default and Wrong an Excuse for another; but if the Party Tender it at the Day, and the other refuse it, then it is a good Plea in Bar, it being his own Fault, and he hath still a Remedy for the Money.

If in an Action of Debt upon an Award, the Plaintiff declares that the Arbitrators did make an Award that the Defendant should pay unto the Plaintiff 10 l. this is a good Declaration, though nothing is shewn to have been awarded on the other Side; for 'tis sufficient for the Plaintiff to set forth that Part of the Award which intitles him to his Action; and if the Defendant will impeach the Award for any Thing, he must shew it Specially on his own Part.

*Keilw. 12. 1 Rol. Abr. 267. Dyer 75. Hob. 49. Raym. 450. 1 Salk. 69. 1 Leon. 72. That the Plaintiff may declare that inter alia it was awarded. Lit. Rep. 312. Vide 1 Mod. 36. 1 Sid. 161. S. P.*

In an Action of Debt upon a Bond conditioned for the Performance of an Award, the Defendant pleaded that the Arbitrators did make an Award that the Defendant should pay to the Plaintiff 3100 l. and should give to the Plaintiff a General Release, and pleaded that he had paid the Money and given a Release accordingly; but did not shew what on the Part of the Plaintiff was awarded to be done, and the Plaintiff replied without shewing the other Part of the Award in his Replication, and took Issue that the Defendant had not paid the Money; and the Defendant put in an insufficient Rejoinder, upon which the Plaintiff demurred; and *per Cur'*, the Plaintiff cannot have Judgment, because the Award as set forth and agreed in Pleading is void; but if the Plaintiff would have helped himself, he ought to have shewn the other Part of the Award before he had taken Issue.

ing, for which the Chief Justice reprehended *Sanders*, who excused himself by Reason of the Severity of the Award. *2 Keb. 563. S. C.*

If in Debt upon an Obligation conditioned for the Performance of an Award, the Defendant pleads *nullum fecerunt Arbitrium*; and the Plaintiff replies, and shews the Award, he must also shew the Breach, without which he hath no Cause of Action, for the Obligation is guided by the Condition, and though the Defendant can make no Answer to the Breach, Plaintiff can assign only one Breach yet

*1 Sand. 326. Veal and Warner; but the Court would not give Judgment for the Defendant, but suffered the Plaintiff to Discontinue, because they apprehended it to be only a Trick in the Pleading of the Severity. Yelv. 152. Cro. Jac. 220. 1 Sand. 102. S. P. arguendo, vide Style 429. where it is said that the*

yet it ought to appear to the Court that the Plaintiff hath Cause of Action.

<sup>1</sup> Sid. 290. But if in Debt upon Bond to perform an Award, and Oyer of the Con-  
(a) So if the Defendant pleads a Release. condition, the Defendant pleads *non submitit*, the Plaintiff (a) need not assign a Breach, for the Defendant puts the whole Strefs of his Cause upon a Matter antecedent to the alledging a Breach; for if there be no Submission there could be no Award, and consequently no Breach of it.

<sup>1</sup> Brownl. 90. Yelv. 79. If in Debt upon an Obligation conditioned for the Performance of an Award, the Defendant shews that the Arbitrators did make an Award, that the Defendant before such a Day should pay to the Plaintiff 100 l. or otherwise should procure one *A.* being a Stranger, to be bound to the Plaintiff for the Payment of 12 l. *per Annum* to the Plaintiff for his Life; and the Defendant pleads that he hath performed the said Award, and the Plaintiff replies, that the Defendant hath not paid the said 100 l. without saying, nor hath procured *A. &c.* yet this is a good Replication, for the Award as to that Part is merely void, and therefore the Plaintiff (b) need not take Notice thereof.

<sup>1</sup> Leon. 304. Owen 153. S. C. adjudged by 3 Judges against two, who held that the Plaintiff should have shewn the whole Award, and thereupon the Law would have adjudged one Part void and not to be done. <sup>1</sup> Leon. 140. S. C. (b) So if the Award be, that the Defendant, together with a Stranger, shall enter into a Bond, in the Assignment of a Breach the Plaintiff must not say that the Defendant and Stranger did not enter into a Bond, for though both did not, yet the Defendant alone might enter into Bond. *Godb.* 165. <sup>2</sup> Rol. Rep. 40.

<sup>2</sup> Brownl. 137. In an Action of Debt upon an Award, it is not (c) necessary for the Plaintiff in his Declaration to lay Time or Place where the Award or Submission were made; but if the Defendant denies either, the Plaintiff may reply, that the Award or Submission was made at such a Place.

(c) But where an Award is pleaded in Bar of a Trespass, a Place must be laid where the Submission was made. *Cro. Eliz.* 66. the Plaintiff need not set forth the *Profert* thereof in *Curia*, because it is no Deed. *Style* 459.

*Cro. Jac.* 577. By 2 Judges against the Chief, who held the Publication there, and Allegation that it was ready to be delivered at the said Shop If there be a Submission to the Award of *J. S.* so that the said Award be made under his Hand and Seal at or before the 5th Day of *September* following, ready to be delivered at the Shop of *J. N.* in the *Exchange, London*, and in an Action of Debt upon an Award made thereupon, the Plaintiff declares that the said *J. S.* under his Hand and Seal the 4th Day of *Sept.* following, *apud Castrum Eborum*, did make an Award *ad tunc & ibidem parat'* to be delivered at the Shop of the said *J. N.* in the *Exchange, London*, this is no good Declaration, for the Parties are not bound to take Cognizance of the Delivery elsewhere than at the Place appointed.

in *London*, was well enough, but it was adjourned. <sup>2</sup> Rol. Rep. 193. S. C. adjourned. <sup>3</sup> Mod. 331. S. C. cited as if adjudged. *Vide* <sup>2</sup> Lev. 68.

<sup>1</sup> Sid. 370. If in Debt upon an Obligation conditioned for the Performance of an Award, so as, *&c.* the Defendant pleads no Award made, and the Plaintiff replies, that *ante exhibitionem billæ, scilicet* the 24th of *June* (which was a Day within the Submission) the Arbitrators made an Award, *&c.* and the Defendant demurs Generally, the Plaintiff shall have Judgment, for though the Plaintiff ought to have replied, that the Arbitrators made their Award before the Day limited to them; yet this is Form only, and helped by a general Demurrer.

<sup>3</sup> Mod. 330. But for this vide Letter (F) *supra.* If in Debt upon a Bond conditioned for the Performance of an Award, so as it be made, *&c.* and ready to be delivered to the Parties, or to such of them who shall desire the same; the Defendant pleads *nullum fecerunt Arbitrium*, and the Plaintiff replies and sets forth the Award, and shews a Breach, but doth not say that it was ready to be delivered to the Defendant, yet this is a good Replication; for when the Award is made it is ready to be delivered to the Parties, or to such of them who desire it, so that it must be desired; and if denied, the Party may plead that Matter specially.

If in Debt upon an Obligation conditioned for the Performance of an Award in Writing, or by Word of Mouth, the Defendant pleads no Award made, and the Plaintiff replies, that at the Time of the Bond and Award he had an Action against the Defendant for scandalous Words, and that the Arbitrator *ore tenus* did declare and publish his Award in Manner following, *viz.* That the Defendant should pay to the Plaintiff 12 Guineas, and all such Money as he had expended *circa prosecutionem placital' Præd' &c.* this is a good Award, and well set forth, although the Award doth not mention any Suit before; for he that sets forth a Parol Award is not (a) tied to the very Words, but it is sufficient to shew the Effect and Substance of what was awarded by Word of Mouth.

2 Vent. 242.  
Harson and  
Livesey.

(a) But if  
the Award  
had been in

writing in such Form of Expression, it had not been good. 2 Vent. 242. agreed per Curiam.

A Man cannot plead generally the Award performed, but he (b) ought to set forth the Award and shew how he hath performed it.

Moor 3. pl. 9.  
(b) But if  
an Award be

to pay the Rent mentioned in such an Indenture, the Defendant in pleading Performance need not set forth the Indenture, but refer generally to it. 1 Vent. 87. But if it be to be paid in such Manner and at such Times as is express'd in the Indenture, then it must be set forth at large. 1 Vent. 87. So if an Award be to pay Money given by Will. 1 Vent. 87.

In pleading a Countermand to a Submission to Arbitration, it need not be alleged that the Party gave Notice to the Arbitrators, for without that it is no Countermand, and therefore if no Notice be given, Issue may be joined upon the Point *quod non revocavit.*

S Ct. 82.

If the Submission be by Word, though the Award be by Deed, the Party may (c) wage his Law; for though a Deed cannot be dissolved without Deed, yet a verbal Contract may be dissolved by Word only, and this in its Original is a verbal Contract.

Co Lit. 297.  
2 Sand 65.  
(c) And there-  
fore an Ac-  
tion of Debt

will not lie against the Administrator whose Intestate was Party to such an Award. Cro. Eliz. 600.

If in Debt on a Bond for Performance of an Award, the Defendant pleads no Award, and the Plaintiff sets forth an Award with a *Profert in Cur'*, and the Defendant craves *Oyer*, and then Demurs for Variance between the Award set out in the Replication and the *Oyer*, and the Variances appear material, the Defendant must have Judgment; otherwise if the Variance had been as to those Parts in which the Award was void; and though in Debt on an Award the Plaintiff (d) need not set forth more than makes for him, yet it is otherwise in Debt on a Bond, for there the Plaintiff must reply the whole Award; and if such Replication be without a *Profert*, the Defendant (e) may reply *nul tiel agard.*

1 Salk. 72.  
Foreland and  
Marygold, ad-  
judged.

(d) 1 Sid. 161.  
1 Lev. 162.  
Vide Lit. Rep.  
313.  
(e) Vide Style

459. where it is said, that the Plaintiff need not set forth a *Profert* thereof in *Curia*, because it is no Deed.

If an Award be made, that certain Buildings erected on a Wharf, which were a Nuisance to the Plaintiff, should be pulled down within thirty-eight Days from the Date of the Award, &c. and upon *nul agard* pleaded the Plaintiff sets forth an Award, but without Date; yet this is well enough, for the Date shall be computed from the making the Award, as a Deed takes its Date from the Delivery, though actually dated on another Day.

1 Salk. 76.  
Arnett and  
Bream.

## Assault and Battery.

- (A) What shall be said to be an Assault.  
 (B) What shall be said to be a Battery.  
 (C) In what Cases they may be justified, and therein of the Manner of setting forth such Justification.  
 (D) In what Manner they are to be punished.

### (A) What shall be said to be an Assault.

*Pulton 4. a.*  
*6 Mod. 173.*  
*2 Rol. Abr.*  
*545.*  
*1 Vent. 256.*  
*1 Hawk. P.*  
*C. 133.*  
*1 Mod. 3.*

**A**N Assault is an Attempt or Offer with Force and Violence to do a corporal Hurt to another, as by striking at him with or without a Weapon, or Presenting a Gun at him at such a Distance to which the Gun will carry, or pointing a Pitch-fork at him, standing within the Reach of it, or by holding up one's Fist at him, or by drawing a Sword and waiving it in a menacing Manner.

But if *A.* lays his Hand on his Sword, and says, that *if it were not Assize Time I would not take such Language from you*, this is no Assault, for it is plain he did not design to do him any Corporal Hurt at that Time, and a Man's Intention must operate with his Act in constituting an Assault.

*1 Hawk. P.*  
*C. 134.*

It seems agreed, that at this Day no Words whatsoever, be they never so provoking, can amount to an Assault, notwithstanding the many ancient Opinions to the contrary.

*Salk. 384.*  
*1 Hawk. P.*  
*C. 134.*

Every Battery includes an Assault, therefore if the Defendant be found guilty of the Battery it is sufficient.

### (B) What shall be said to be a Battery.

*6 Mod. 149,*  
*172.*  
*1 Mod. 3.*  
*3 Lev. 404.*  
*1 Hawk. P.*  
*C. 134.*

**A**NY Injury whatsoever, be it never so small, being actually done to the Person of a Man, in an angry or revengeful, or rude or insolent Manner, as by spitting in his Face, or any way touching him in Anger, or violently jostling him out of the Way, are Batteries in the Eye of the Law.

*2 Rol. Abr.*  
*546.*  
*1 Hawk. P.*  
*C. 134.*

But to lay one's Hands gently on another whom an Officer has a Warrant to arrest, and to tell the Officer that this is the Man he wants, is not a Battery.

*Dalt. cap. 22.*  
*Bro. Ceron.*  
*229.*

So if two by Consent play at Cudgels, and one happens to hurt the other, as their Intent was lawful and commendable, in promoting Courage and Activity, it does not seem to amount to Battery.

So if one Soldier hurts another by discharging a Gun in Exercise, this cannot amount to a Battery, though if it be done without sufficient Caution he is liable to an Action at the Suit of the Party injured. Hob. 134.  
2 Rol. Abr.  
548.

(C) In what Cases they may be justified, and therein of the Manner of setting forth such Justification.

IF an Officer, having a Warrant against one who will not suffer himself to be arrested, beat or wound him in the Attempt to take him, he may justify it. So if a Parent in a reasonable Manner chastise his Child, or a Master his Servant, being actually in his Service at the Time, or a Schoolmaster his Scholar, or a Gaoler his Prisoner, or even a Husband his Wife; or if one confine a Friend who is mad, and bind and beat him, &c. in such Manner as is proper in his Circumstances, or if a Man force a Sword from one who offers to kill another, or if a Man gently lay his Hands on another, and thereby stay him from inciting a Dog against a third Person; if I beat one (without wounding him, or throwing at him a dangerous Weapon) who wrongfully endeavours with Violence to dispossess me of my Land or Goods, or the Goods of another delivered to me to be kept for him, and will not desist upon my laying my Hands gently on him and disturbing him; or if a Man beat, wound or maim one who makes an Assault upon his Person, or that of his Wife, Parent, Child, or Master; or if a Man fight with, or beat one who attempts to kill any Stranger; in these Cases it seems the Party may justify the Assault and Battery. Vide 1 Hawk.  
P. C. 130.  
and several  
Authorities  
there cited.

And on an Indictment the Party may plead Not guilty, and give the Special Matter in Evidence; but in an Action on the Case he must plead it Specially. 6 Mod. 172.

In an Action of Battery the Defendant pleads that he was Master of a Ship, and that the Plaintiff being his Carpenter and Servant in the Ship, neglected his Duty, and gave him saucy Language, and that therefore moderate castigavit; Plaintiff replies non moderate castigavit, and Issue joined, and Verdict for the Plaintiff; and in Arrest of Judgment it was insisted, that moderate castigavit was not a pertinent Negative, the proper Issue being immoderate castigavit; but the Court held it well enough, especially after Verdict. 1 Sid. 444.  
2 Keb. 623.  
1 Vent. 70.  
S. C. Aubrey  
and James;  
But for this  
vide Head of  
Pleadings,  
and Yelv 89.  
Brocwnl. 205.

Godb. 251. 2 Bulst. 215. Hob. 221. Yelv. 157. Goldf. 5. Cro. Eliz. 93, 268. 1 Rol. Rep. 19. Moor 846.  
2 Lutw. 1481. Carth. 280, 491.

In an Action of Assault and Battery, and Wounding, it was laid with a mutilavit & sinistr' Brach' fregit ita quod usum sinistri brachii amisit; to this the Defendant pleaded de son Assault demesne; and on Demurrer it was shewn for Cause, that this being a heinous Battery, and amounting to a Mayhem, he should have shewed to the Court that the Assault was with such Violence, that he could not otherwise defend himself but by maiming the Plaintiff; and the Pleading should have been, that the Plaintiff Mayhemasset & vulnerasset the Defendant Nisi, &c. but the Court held the Plea good, and that it was Matter upon Evidence, whether the Assault were proportionable to the Battery; for if it were not, the Issue would be for the Plaintiff, although the Plaintiff did make the first Assault; for every Assault will not justify every Beating, but it must be such a one as may draw a probable Danger and Fear upon the Person upon whom it is made. 1 Sid. 246.  
1 Keb. 884,  
921. S. C.  
between  
Danny and  
Lucy.  
Vide Cro. Jac.  
251.  
3 Lev. 403.  
1 Lutw. 925.  
2 Inst. 316.  
2 Hawk. P.  
C. 159.

1 Lev. 282. In Assault, &c. the Defendant pleaded *son Assault Demesne*, and the  
 1 Sid. 441. Plaintiff replied, that he was standing at his Gate, and that the Defen-  
 1 Mod. 36. dant being on Horseback offered to ride over him, whereupon he *molliter*  
 2 Keb. 597. assaulted the Plaintiff in Defence of himself, *quæ est eadem*, &c. and on  
 S.C. between Demurrer to this Replication it was adjudged to be ill, because he there-  
 Jones and Tresilian. by had confessed that he had made the first Assault; for he should have  
 pleaded *molliter manus imposuit* to hinder the Riding over him.

1 Sid. 175. In Trespass for Assault and Battery, the Defendant justifies by a *Mol-*  
 1 Keb. 661. *liter imposuit manus* for due Correction of the Defendant as his Servant,  
 S. C. Bleke and Grove. and pleads over, that since that Time the Plaintiff *exoneravit & relaxavit*  
 (without saying *per scriptum*) to the Defendant the said Matter; to  
 this Plea it was demurred for Doubtfulness Specially; and the Opinion  
 of the Court was, that it was Double; for though the Release be not  
 sufficiently pleaded, yet it is pleaded so as Issue might be taken upon  
 it, which will make it double.

### (D) In what Manner they are to be Punished.

1 Hawk. P. C. 134. Is not to be held to Special Bail, unless the Battery be grievous; in which Case the Writ may be marked for Special Bail. *Carth.* 278.

EVERY Person guilty of an Assault or Battery, is subject both to an Action at the Suit of the Party, wherein he shall render Damages, &c. and also to an Indictment at the Suit of the King, wherein he shall be fined according to the Heinousness of the Offence.

An Action of Assault and Battery is within the Statute which gives no more Costs than Damages. 1 Vent. 256. For the Penalty for assaulting of a Servant of a Knight or Burgeſs in Parliament, *vide* the Statute 5 H. 4. cap. 6. For punishing those who assault any coming to Parliament, or to the King's Council. 11 H. 6. cap. 11. Concerning an Assault on a Privy Counsellor in the Execution of his Office. 9 Ann. cap. 11. For which *vide* Tit. *Felony*. For beating or challenging to fight for Money won at Play. 9 Ann. cap. 14. and Tit. *Gaming*. For the Offence of assaulting in a Church or Church-yard, see 5 & 6 E. 6. cap. 4. And that Church-wardens who whip Boys for playing in the Church, or put off the Hats of those who sit there with them on, or who gently lay their Hands on an Excommunicated Person to turn him out, are not within the Statute. 1 Sand. 13, 14. 1 Sid. 301. For Striking within the King's Palace, see 1 Hawk. P. C. 57.

# Assignment.

**A**N *Assignment* is the Transferring and Setting over to another some Right, Title or Interest in Things, in which a third Person, not a Party to the *Assignment*, has a Concern and Interest.

I. How far the Privity of Contract is destroyed by the Assignment, and what Remedies the Parties may have against each other, is set down under the Head of *Covenants*; and therefore I shall here only consider

## (A) What Things are assignable.

A Possibility, Right of Entry, or Thing in Action, or Cause of Suit, or Title for a Condition broken, cannot be granted or assigned over by Law; for if this were permitted it would promote Maintenance, and prove prejudicial to such as, being able to contend with those with whom the Original Contract was, might find themselves depressed by a Powerful Adversary.

But though a Bond being a *Chose in Action*, cannot be assigned over so as to enable the Assignee to sue in his (a) own Name, yet he has by the Assignment such a Title to the Paper and Wax, that he may keep or cancel it.

it in the Name of the Obligee, as his Attorney; but Q. Whether this can be done without an express Authority.

Also in Equity a Bond is assignable for a Valuable (b) Consideration paid, and the Assignee alone becomes intitled to the Money, so that if the Obligor after (c) Notice of the Assignment pays the Money to the Obligee, he will be compelled to pay it over again.

90. (c) 2 Vern. 540. But Payment to the Obligee without Notice of the Assignment, is good.

An Assignee must take it subject to the same Equity that it was in the Hands of the Obligee, as if on a Marriage Treaty the intended Husband enters into a Marriage-Brochage Bond, which is afterwards assigned to Creditors, yet it still remains liable to the same Equity, and is not to be carried into Execution against the Obligor.

If the Administrator of a Conuzee of a Statute extends the Lands, and a *Liberate* is returned, and before Entry or Recovery of the Possession the Administrator assigns his Interest, the Assignment is void, for by the *Liberate* he has accepted the Possession, and is estopped to say the contrary, and then by suffering the Owner of the Lands to continue in Possession, this turns his Possession into a Right, which is not assignable before the Possession be regained by Ejectment or Re-entry, or some other lawful Means.

If there be a Devise of a Term to A. for Life, Remainder to B. B. cannot in the Life-time of A. assign his Interest, because he has not a bare Possibility, for A. may outlive the Number of Years.

(a) Trustee A Personal Trust which one Man reposes in another, cannot be (a) assigned over, however able such Assignee may be to execute it. cannot assign his Trust. 4 Inst. 85. vide Head of Trust; nor a Guardian. Vaugh. 180. Whether a Pawnbroker, by reason of the Special Property he has in the Pledge, can assign it, Q. & vide 1 Bulst. 31. Owen 124.

Vide the several Heads. Several Things are assignable by Acts of Parliament, which seem not assignable in their own Nature; as Promissory Notes by 3 & 4 Ann. c. 9. Bail-Bonds by the Sheriff, by 4 & 5 Ann. cap. 16. a Judge's Certificate for taking and prosecuting a Felon to Conviction, by 10 & 11 W. 3. cap. 23. a Bankrupt's Effects by the several Statutes of Bankruptcy.

## Affise.

(b) For the Derivation and Signification of the Word, vide

**A**N (b) Affise is a Remedy which the Law hath appointed for the Restitution of a Freehold, of which the Party has been disseised, and appears to have been in Nature of a Commission to put the Disseisee in Possession by Trial at one Affises.

Co. Lit. 153. b. 154. b. 159. b. It seems to have been of Norman Extraction, vide Customier 16. and to have been introduced in the Reign of H. 2. to be a more easy and expeditious Method of recovering the Freehold, than was observed in the Writ of Entry; hence the Writ of Entry was afterwards called a Writ of Entry in the Nature of an Affise. Vide Fleta 214, 215. Glanvil says, it was *Regale Quoddam Beneficium clementia Principis de concilio Procerum Populis indultum.* Glanvil cap. 7. fol. 17.

Affises are now seldom made use of, except for the Recovery of Offices, being supplied by other Actions less perplexed, and which yield a more expeditious Remedy; but as they are still in Force it may be proper to consider the Nature of them a little, under the following Heads:

- (A) Of the Nature of an Affise, and the Form of the Proceedings on it.
- (B) In what Cases an Action lies.
- (C) What Seisin is sufficient to maintain an Affise.
- (D) How the Demandant must set forth his Title.

(A) Of the Nature of an Assise, and the Form of the Proceedings on it.

ASSISES (a) are twofold. First, An Assise of a Man's own Possession, and that was called an Assise of *Novel Disseisin*, which was a Commission to the Sheriff to reserve the Tenements with the Chattels found in them, and put them in Peace till a Jury had tried the Cause, who were by such Writ authorized to be returned at the Assises by the Sheriff; and by the Original Practice in this Assise, the Sheriff used to take the Tenements, together with the Chattels found on them, into his own Possession, till the Right was tried; but because this proved inconvenient, for that the Sheriff could not keep such Possession, and turn it to the best Advantage, especially where such an Assise was long in Dependence, therefore the Practice altered, and the Tenant was continued in Possession until Judgment; and by such Writ the Jury were impowered to inquire of Damages, because the Sheriff was to reseize the Chattels as well as the Frank-tenement; and therefore such Damages being assessed by the Jury were awarded to the Tenant that recovered, as well as the Frank-tenement.

F. N. B. 177.  
 Fleta Lib. 4.  
 c. 4. f. 222.  
 (a) For Assises in com-  
 fimo Comitatus vide Co.  
 Lit. 153, 154.  
 7 Co. 3. b.  
 7 R. 2. c. 10.  
 Kelw. 98.  
 Booth 211.

The Second Sort of Assise is an Assise of *Mordancestor*, which was, where the Father, Mother, Brother, Sister, Uncle, Aunt, Nephew or Niece died seised of the Lands, and a Stranger abated; then the Heir had such Writ, and to such Writ was required an immediate Descent, as from Father to Son, or from Brother to Sister originally; and it seems by the Statute of *Gloucester*, cap. 6. it extended to Uncles and Aunts, Nephews and Nieces; because Abatements had frequently happened upon the Death of such Relations; but the more remote Relations were left to pursue their Writ of Entry as at Common Law.

F. N. B. 195.  
 2 Inst. 308.  
 Booth 206.

The first Process in this Action is an original Writ issuing out of Chancery, directed to the Sheriff, commanding him to return a Jury (who are called the Recognitors of the Assise).

For the Form of the Writ vide Reg. 197.

*Plow.* 73, 415. *F. N. B.* 178. *Booth* 210, 267. The Demandant is to find Surety to prosecute, and this he may do before the Sheriff, or in Court, if the Sheriff returns that he hath not found Pledges. *Booth* 267.

Assises are to be taken in the King's Bench or Common Pleas, for the County in which they sit, and for all others are to be arraigned in their proper Counties, but are to be adjourned for Difficulty into the Common Pleas, as the Court which has Jurisdiction in all Civil Actions.

F. N. B. 177.  
 Booth 265.  
 (b) By Magna Charta, c. 12. Assises are appointed to be taken in

*Proprio Comitatu*; thereupon an Adjournment in *Banco propter difficultatem*, &c. is given; but it was held no Adjournment could be made by Virtue of this Act, unless the Jurors gave a Verdict; whereupon by *Westm.* 2. cap. 3. an Adjournment is given in Case of a Foreign Voucher in an Assise of *Mordancestor*, within the Equity of which are all Foreign Pleas, Demurrers, and other Pleas and Proceedings, either before or after Verdict in an Assise. 2 *Inst.* 26, 423. *Vide* 1 *Roll. Abr.* 131.

An Assise is (c) *Festinum remedium*, and to be (d) arraigned on the Day the Writ is returnable, on which Day the Demandant is to (e) Count led *Festinum remedium*.

Style Reg. 88.  
 (c) It is called  
 (e) Count led *Festinum remedium*.

1. Because the Tenant shall not be effoined. 2. Shall not cast a Protection. 3. Shall not pray in Aid of the King. 4. Shall not vouch any Stranger, except he be present, and will enter presently into Warranty; so of Recceit. 5. The Parol shall not Demur for the Nonage of the Plaintiff or Defendant. 8 Co. 50. *Booth* 262. For the Manner of arraigning an Assise, vide 3 *Mud.* 273. 1 *Keb.* 3. *Comb.* 173. (d) But where neither the Recognitors nor Plaintiff appeared on the first Day, and the Court adjourned the Assise to the next. 1 *Salk.* 82. (e) Otherwise he will be nonsuit. 1 *Salk.* 82. (3) If

(a) If there be several Defendants, and any one of them do not appear the first Day, the Assise shall be taken by Default against them. 1 Salk. 83.

(b) That the Defendant may pray Oyer of the Writ and Count, vide 2 Bulst. 160. and shall have an Impar lance to a short Day. Style's Reg. 88. But it must be on shewing good Cause. 1 Salk. 83.

Booth 214. When the Plaintiff Counts, the Defendant may plead in (c) Abatement, and (d) over in Bar, or may take the General Issue *nul Tort nul Plea* is not *Disseisin*.

peremptory, though found against him, vide Finch of Law 385. Dyer 310. 1 Jones 413. Cro. Car. 520. (d) Must plead over in Bar at the same Time that he pleads in Abatement. 1 Salk. 83.

Booth 313, 314. If the Tenant pleads a Plea, which shews that the Assise should not be taken, and such Plea is triable by a Jury, the Recognitors of the Assise may try it, and then the Assise is said *transire in Furata*, and the Assise and Record adjourned into the Common Pleas.

Booth 214. If a flat Bar be pleaded to the Assise, and Issue is joined thereupon, the Jury never inquire of the *Seisin* or *Disseisin*, but of the Matter pleaded in Bar, and of Damages if the Plea be found against the Defendant.

Vide Booth 214, 215. and for colourable Large. But if the Defendant pleads a colourable Plea, then they are to inquire of the *Seisin* and *Disseisin*, which is called the taking the Assise at

Pleas vide Head of Pleadings, and where the Assise may or may not be taken at Large. 10 Co. 90. Finch of Law 416. 1 Rol. Abr. 271 to 275.

1 Rol. Abr. 275. Also if an Infant pleads a flat Bar, and the Bar is found against him, yet the Assise shall be taken at Large, because the Law not allowing the Parol to demur in this Action, which was *festinum remedium*, the *Seisin* and *Disseisin* was inquired of, that the Infant's whole Title might appear before the Court.

Vide Booth 215, 287. 4 Co. 4. b. 2 Inst. 26. By Westm. 2. cap. 25. a Certificate of Assise is given, which is a Writ for the Party grieved, by a Verdict or Judgment given against him in an Assise, when he had something to plead, as a Record or Release, which could not have been pleaded by his Bail; or when the Assise was taken against himself by Default, to have the Deed tried, and the Record brought in before the Justices, and the former Jury summoned to appear before them at a certain Day and Place, for a further Examination and Trial of the Matter.

## (B) In What Cases an Assise lies.

2 Inst. 412. 8 Co. 47. b. (e) AN Assise lies for any Thing a *Præcipe quod reddat* may be brought for at Common Law, therefore it lies for an (e) Office.

(e) An Assise lies for the Office of Register of the Admiralty; for though their Proceedings are according to the Civil Law, yet the Right of their Offices is determinable at the Common Law. 8 Co. 47. 2 Inst. 412. S. P. Of the Mastership of an Hospital being a Lay Fee. 11 Co. 99. b. Of the Office of Filizer. Dyer 114. b. And if a Man be disseised of Parcel of the Profits of an Office, he may have an Assise of that Parcel only. 8 Co. 49. b. 2 Inst. 412. S. P. But for an Office of Charge and no Profit, an Assise does not lie. 8 Co. 47. b. 49. b. 2 Inst. 412. S. P. An Assise lies for an Office for Life as well as in Fee. Co. Lit. 47. a.

It lies for one seised of Lands, Tenements, (a) Rents in Fee-simple, Tail or for Life, and for Tenant by (b) Elegit, Statute-Merchant, Statute-Merchant, or Tenant by Recognizance in Nature of a Statute-Staple.

(a) Does not lie of an Annuity. 1 H. 4. 2. Booth 263.

8 Co. 50. (b) By the Statute of 13 E. 1. cap. 18. which see explained 2 Inst. 396, 397. and vide Head of Statutes and Recognizances.

It lies of Tithes, Pensions, and other Ecclesiastical Duties in Temporal Hands, but of a Rent issuing out of Tithes barely, no Affise lies.

Vide Co. Lit. 159. 32 H. 8. c. 7.

Vaugh. 204. vide 1 Davv. 578, 579.

There were at first but two Forms of Writs of Affise of Novel Disseisin, either an Affise (c) de Libero Tenemento, or (d) de communia Partura.

2 Inst. 411. (c) So at this Day for a Profit appren-

der the Writ must be General de libero Tenemento, and the Plaint Special. 8 Co. 47. Co. Lit. 159. Because no Special Writ is given by the Statute. Dyer 83. (d) In antient Time they held themselves strictly to the Forms in the Register; and therefore because there was no Writ of Common of Turbary, &c. it was held no Affise lay thereof. 8 Co. 48. a. b.

The Affise de Libero Tenemento did lie of Houses, Land, Rent or other Things which lay in Render, but for Profits apprender, which consisted in Capiendo, Colligendo, Habendo, Recipiendo & Exercendo, (e) no Affise lay, but a Quod permittat, in which there was great Delay, and they who had but an Estate for Life could not maintain that Writ.

2 Inst. 411. (e) But now by the Statute of Westm. 2. cap. 25.

a speedy Remedy is given in these Cases de Proficuis, &c. in certo loco Capiend', &c. An Affise does not lie of a Way over certain Land, but a Quod permittat, for it is but an Easement; but otherwise if it were appurtenant to Land. 8 Co. 46. 34 Aff. 13. For an Affise a sovent Distress, vide Keilw. 20. 2 Inst. 413, 414. F. N. B. 178.

### (C) What Seisin is sufficient to maintain an Affise.

AS the Writ of Affise restores the Party to the actual Seisin of his Freehold, for so are the Words of the Writ facias Tenementum illud seisiri, &c. consequently the Party that brings this Writ must found it upon an actual Seisin, which he has been devested of, for otherwise this Remedy is not commensurate to his Case.

Vide 2 Ro. Abr. 463.

Therefore if there be Lord and Tenant by Rent-Service, and the Lord grants the Services to another, and the Tenant attorns by a Penny, this being given by way of Attornment, is not sufficient Seisin to ground an Affise on; secus if the Penny had been given by way of Seisin of the Rent.

Lit. Sect. 565. Co. Lit. 315. 4 Co. 9. 10 Co. 127.

If the Lessor dies, and after the Lessee for (f) Years is ousted, the Heir of the Lessor shall have an Affise of Novel Disseisin, and not of Mortdancesfor, for the Lessee's continuing in Possession after the Death of the Lessor, was in Right of the Heir.

Vide 1 Rol. Abr. 270, 271. Kelw. 110. (f) If Tenant at Will be

ousted, the Lessor may have an Affise. 21 E. 3. 34.

If a Man Leases for Years, the Remainder over in Fee, and after the Tenant for Years is ousted of his Term, he in the Remainder may have an Affise, because the Freehold was in him at the Time of the Disseisin.

Kelw. 109.

The Taking of 3 d. of A. for a Capias against B. is a sufficient Seisin of the Office of Filizer de Banco.

1 Rol. Abr. 270.

T t

If

2 Lev. 108.  
Cragg and  
Norfolk.

If one by the House of Commons be committed to *A.* who before and long after was in Possession of the Office of Serjeant at Arms to the House, and the Prisoner compounds with *B.* for the Fees, and gives him twenty Shillings, this is a good Seisin of the Office by *B.* for he cannot be disseised thereof but at his Election; adjudged and held likewise, that Proving that *B.* being in the Lobby of the House of Commons, took hold of the Door of the House, and laid his Hands upon the Mace, then being in the Hands of *A.* to take it, but hindred by *A.* was good Evidence both of a *Seisin* and *Disseisin*.

1 Lev. 108.

The Serjeant of the Mace to the House of Commons, in an Action upon the Case for a Disturbance, recovered Damages; and whether this was a

(a) If a Tenant refuses to do Suit of Court, and the Lord recovers Damages against him,

sufficient Seisin, the Damages being recovered in (a) Satisfaction of the Fees, and he then being out of Possession of his Office, was doubted; some of the Judges inclining one Way, and some the other; and it was intended to have been found Specially; but the Plaintiff being unwilling to stand to it was Nonsuit.

this is a sufficient Seisin of the Suit, because the Damages are given as an Equivalent and in Satisfaction for the Suit. 4 Co. 9. b. So if a Return irrepleviable be awarded, that is a good Seisin of the Rent for which the Distress was taken, because such Return is an absolute Condemnation of the Pledges; and being given as an Equivalent for the Rent, shall be looked upon as the Rent it self. 4 Co. 9. b. 2 Rol. Abr. 464.

## (D) How the Demandant must set forth his Title.

Dyer 84.

(b) The Plaintiff in an Assise is as a Count in o-

IT is a common Learning, that in an Assise the (b) Plaintiff (c) need not be so certain as in other Writs, because the Judgment is to (d) recover *per visum recognitorum*; and if the Plaintiff be but so (e) certain that the Recognitors may put the Demandant in Possession, it is sufficient.

ther real Actions, and must set forth *Seisin* and *Disseisin* within 30 Years, pursuant to the Statute 32 H. 8. cap. Booth 212. (c) Style 30. Like Point *per Roll Ch. Just.* (d) So though by Default, and the Damages released; for by Intendment they had the View before the Assises. 2 Bulst. 159. Godb. 247. Cro. Jac. 334. (e) But a Plaintiff *de uno Tenemento* is not good. Style 77. But in an Assise the Plaintiff may be *de annuo redditu unius robe vel 20 s.* Dyer 84.

Fenk. 33.

By all the Judges of England.

In an Assise of Rent in *D.* the Tenant cannot plead that in the said County there are (f) two *D.*'s, without any Addition to distinguish them, because the Plaintiff shall recover *per visum Juratorum*.

(f) So if two *D.*'s, and none without Addition, *per Dyer 84. b.*

8 Co. 49.

Webb's Case.

In an Assise for an Office newly erected and constituted, the Demandant in his Plaintiff must shew what Fee or Profit is granted for the Exercise thereof, for this Office cannot have a Fee or Profit appurtenant to it as an antient Office may; and for an Office without Fee or Profit no Assise lies.

8 Co. 49.

But in an Assise for an antient Office, the Demandant in his Plaintiff need not shew what Fee or Profit is belonging to it, for it shall be intended there is some Fee or Profit.

Fenk. 42.

(g) Dyer 85. b. S. P.

6 Co. 56. S. P.

In an Assise for a Rent-charge or Seck, the Demandant (g) must make a Title in his Plaintiff, otherwise in an Assise of Land, for there Possession without any other Title is (b) sufficient.

(h) Where in a Writ of Entry in the Nature of an Assise the Demandant counted of a Gift in Tail to himself, and of his *Seisin* and *Disseisin*; but was compelled to declare upon a *Seisin* and *Disseisin* only, because that was the antient Form. Vide 2 And. 100.

In an Affise for a Portion of Tithes, the Demandant in his Plaint must make a Title, for the Scisin only is not sufficient, no more than in the Case of a Rent or other Profit in the Soil or Fee of another, which commences against common Right; for in all these Cases of Necessity the Commencement thereof must be alledged by him who will make Title thereto, whether he be Privy or a Stranger; for it is against Reason to charge the Inheritance or Freehold of another, without shewing some substantial Foundation thereof.

In Affise for an Office, the Demandant in his Plaint must set forth a Title.

*Dyer 58. adjudged.*  
*3 Mod. 273. Savier and Lenthall, By*

which Book it appears, that the Demandant not being ready to set forth a Title, the Affise was adjourned till the next Day, when he appeared and set forth a Title, and Process was prayed against the Defendants; but by *1 Salk. 82. S. C.* The Demandant was nonsuited the second Day for not counting, and the Court told him he might bring a new Affise. *Comb. 173. S. C.* and the Plaintiff nonsuited; *Vide Dyer 114. pl. 63, 149. pl. 81, 152. pl. 9. 3 Co. 45. b.*

## Assumpsit.

**A**N *Assumpsit* is an Action the Law gives a Party injured, by the Breach or Nonperformance of a Contract legally entred into; it is founded on a Contract either express or implied by Law, and gives the Party Damages in Proportion to the Loss he has sustained by the Violation of the Contract.

*4 Co. 92. Moor 667.*

But here it must be observed, that the Law distinguishes between a General *Indebitatus Assumpsit* and a *Special Assumpsit*; for though they come under the Denomination of Actions on the Case, and the Party is to be recompensed in Damages alike in both, yet the first seems to be of a superior Nature, and will lie in no Case but where (a) Debt will lie; but for a particular Undertaking, or collateral Promise to discharge the Debt or Duty of another, a *Special Assumpsit* must be brought.

(a) And therefore it will not lie upon a Wager,

nor against the Acceptor of a Bill of Exchange, for his Acceptance is but a collateral Engagement; but it lies against the Drawer himself, for he was really a Debtor by the Receipt of the Money. *1 Salk. 23. 6 Mod. 128.* It will not lie against a Father, at whose Request the Plaintiff lent Money to the Son. *Carth. 446. 1 Salk. 23. S. C.* But if it had been an *Indebitatus* for so much Money paid by the Plaintiff at the Request of the Defendant, unto his Son, it might have been good, for then it would have been the Father's Debt: *Per Holt, Ch. Just. Carth. 446.* If two come to a Shop, and one Buys, and the other to gain him Credit, promises the Seller, If he does not pay you I will; this is a collateral Undertaking; but if he says, let him have the Goods I will be your Paymaster, or I will see you paid, this is an Undertaking for himself, and he shall be intended to be the very Buyer. *1 Salk. 28. Vide Title Agreements,* where several Contracts and Promises are made void by the Statute of *Frauds* and *Perjuries*.

Under this Head we will consider,

- (A) In what Cases an Assumpsit is the proper Action.
- (B) What Words create sufficient Certainty in a Promise.

(C) What

- (C) What is a sufficient Consideration to create an Assumpsit.
- (D) Where the Consideration shall be said to be executed or continuing.
- (E) Where the Promise shall be void, the Consideration being against Law.
- (F) Where the Consideration and Promise shall be said to be sufficiently set forth and averred.
- (G) What may be pleaded as a good Discharge and Performance of the Promise.

(A) In what Cases an Assumpsit is the proper Action.

*Cro. Jac. 69. Kelv. 70. S. P.* **I**F *A.* and *B.* having Dealings with each other make up their Accounts, and *B.* is found in Arrear, and promises to pay the Ballance, an Assumpsit lies against him, and *A.* need not bring a Writ of Account.

*1 Rol. Abr. 7. S. P. 1 Rol. Rep. 396. Bulst. 208. Moor 354.*

*1 Salk. 9.* So if *A.* gives (*a*) Money, or delivers Goods to *B.* to Merchandize (*a*) where it therewith, and *B.* promises to render an Account, Assumpsit lies on this was objected, exprefs Promise as well as Account. that a Sum of Money given to Merchandize with, could not be demanded of the Party as a Duty, till he had neglected or refused to apply it according to the Trust, held that it was aided after Verdict. *1 Salk. 9.* If a Man receives a Sum of Money to lay out to a particular Use, and lays out Part of it accordingly, an Action only lies; but if no Part of it is laid out, an Assumpsit lies. *2 Show. 301.* Ruled on Evidence by Justice *Jones*, in the Absence of the Chief Justice. *Vide Head of Account.*

*1 Rol. Abr. 9. Bro. Account 81. Raym. 211.* So if a Tenant being in Arrear for Rent, settles an Account of the Arrears with his Landlord, and promises to pay him the Sum in which he is found in Arrear, an Assumpsit lies on this Promise.

*2 Keb. 813. Vide Style 131, 283. Cro. Jac. 602.* A Diversity where the Account was for Rent alone and where for that *inter alia*, and *vide Allen 73. Style 473. 2 Lev. 110. 1 Vent. 268.* Where it is said, that the Account alters the Nature of the Debt.

*1 Rol. Abr. 8. Hutt. 34. Cro. Eliz. 240. seems contra.* But if the Obligor in a Bond, without any new Consideration, as Forbearance, &c. promises to pay the Money, an Assumpsit will not lie, but the Obligee must still pursue his Remedy by Action of Debt.

*1 Rol. Abr. 7.* So if a Man Leases for Years, reserving Rent, an Assumpsit will not lie, because it favours of the Realty.

So though the Lease be determined. *1 Rol. Abr. 7. Q.* if there be an exprefs Promise to pay the Rent, and *vide Cro. Eliz. 359. Style 463. 1 Sid. 279. 2 Keb. 8. Cro. Car. 343. 1 Lev. 179. and 3 Lev. 150.* Where it is resolved, that on an exprefs Promise Assumpsit will lie, but not on a Promise in Law. *Vide 1 Rol. Abr. 8.* Where it is held clearly, that an Assumpsit will lie on a Promise to pay a Sum in Gross.

*1 Leon. 43.* If *A.* is possessed of a Term for Years in certain Lands, under a certain Rent, the Inheritance whereof is in the Wife of *B.* and *C.* in Consideration that *B.* will procure *A.* to assign this Lease to him, assumes and promises that he will pay the Rent to *B.* during the Remainder of the said Term, if *B.* accordingly does procure *A.* to assign, and the Rent is afterwards Arrear, *B.* upon this Promise may have an Action against

against C. in his own Right, notwithstanding the Rent grew due in the Right of his Wife.

If in an Action on the Case the Plaintiff declares *quod locasset* to the Defendant a certain Warehouse, the Defendant promised to pay 8 s. for every Week he occupied the same, and avers that he occupied the same for 27 Weeks, and had not paid, &c. the Action lies, for this is not a Rent, but a meer Promise in Consideration of the Occupation. Cro. Jac. 593.

If a Lord of a Manor assesses a Fine upon a Copyholder for his Admittance, and dies, his Executor upon the *Assumpsit* in Law may bring an Action for it, because it depends upon the Inheritance, but is *quasi* a Fruit fallen; adjudged by three Judges against Holt, Ch. Just. who said, that it being a Duty arising out of an Inheritance, Custom and Tenure, it was not fit to be thrust into a Declaration in an *Assumpsit*. 3 Lev. 261. Shuttleworth and Garret. 3 Mod. 239. Comb. 151. 1 Show. 35. Carth. 92. S. C.

An *Indebitatus Assumpsit* lies for Money by Custom due for Scavage; adjudged upon a Special Verdict, by which it was found, that the Sum demanded was due by Custom, but that there was no express Promise to pay it. 2 Lev. 174. Mayor of London and Gory. Carth.

92. S. C. cited as good Law, though the Duty might be said to be the Inheritance of the Lord Mayor: But *per Holt*, It arises out of Things in the Personalty. 1 Vent. 398. S. C. adjudged; tho' objected, the Customs of the City are confirmed by Parliament, and so this is a Duty by Record. An Assignee of Commissioners of Bankrupts may bring an *Assumpsit*, and yet the Debt is assigned by Vertue of an Act of Parliament. 1 Vent. 298. *per Cur'*, 3 Keb. 677.

If a Man by Grant of the King hath Fines *pro licentia concordandi*, and one will not pay a Fine, he may have an *Indebitatus Assumpsit* for it. 3 Leon. 179. 1 Vent. 175. S. C. cited.

Neither Debt nor a general *Indebitatus Assumpsit* will lie against the Acceptor of a Bill of Exchange, for his engaging is but a collateral Promise, on which a Special Action on the Case lies, founded on the Custom of Merchants, but Debt or a general *Indebitatus* may be brought against the Drawer, as for Money received for the Use of the Party. Hard 485, 486: And per Hale, if Debt lay an *Indebitatus* would lie. 1 Salk. 23.

S. P. 1 Mod. 285. 1 Lev. 298. 2 Keb. 695, 713, 758, 822. S. C. 2 Salk. 125. S. P. agreed. 2 Lutw. 1594. S. P. agreed.

Also if A. delivers Money to B. to pay over to C. and gives C. a Bill of Exchange drawn upon B. and B. accepts it, C. may have an *Indebitatus Assumpsit* against B. (a) as having received Money to his Use, but must not declare only on the Bill of Exchange accepted. 1 Vent. 153. (a) So if Goods are received.

1 Rol. Abr. 32. Vide Title Bills of Exchange.

The Plaintiff declared upon an *Indebitatus Assumpsit* for 20 l. *quas ei solviffe debuisset pro denar' per ipsum ad (b) jocum vocat' Chartas Pictas de Delendente per Querent' Lucrat' & acquisit'*; and whether such a General *Indebitatus* lay for Money won at play, *Dubitatur*, upon a Writ of Error in Cam. Scac. upon a Judgment by Default; and though a Case was cited wherein in B. R. 32 Car. 2. it had been adjudged that such Action lay, and the greater Part of the Justices now inclined to be of that Opinion; yet some of them said, they would give no more Incouragement to such Actions than needs must. 3 Lev. 118. Eggleton and Lewin. (b) Where an *Indebitatus* was brought for 20 l. won at a Game called Hazard, 2 Vent. 175. It was adjudged in

lay, and that it might as well as if *pro opere and labore*. Vide 1 Salk. 23. That a general *Indebitatus* will not lie, though a Special Action on the Case will; and Title Gaming.

An *Indebitatus Assumpsit* lies for 20 l. forfeited by the Ordinances and Constitutions of a Company, for not serving in the Office of Steward of the Company, according to a By-Law by them made. 2 Lev. 252. Barber-Surgeons of London and

Helson, adjudged upon Demurrer.

2 Mod. 260. If the King grants the Office of Comptroller of the Customs to *A.* and adjudged upon a Special Verdict between *Arvis* and *Stukely*. *B. durante beneplacito*, and *A.* dies; and afterwards the King grants the said Office to *C.* and yet *B.* under Pretence of Survivorship exercises the said Office, and receives the Profit thereof, *C.* may have an *Indebitatus Assumpsit* for so much Money had and received to his Use.

2 Jones 126,

127. 2 Lev. 245. S. P. between *Howard* and *Wood*, where the Defendant under Pretence of Title, received the Fees belonging to the Plaintiff, as Steward of a Court-Baron.

2 Mod. 263. So if one receives my Rent under Pretence of Title, I may have an *Indebitatus Assumpsit* against him.

said per Cur,

That where-ever an Account lies, an *Indebitatus* will lie; but *Q.*

1 Salk. 27. *Jacob* and *Allen* at *Guildhall*, contra *Trevor*; Ch. Jult.

So where *A.* took out Administration to a Person supposed to have died intestate, and appointed *J. S.* his Attorney, who received Money, &c. and paid it to the Administrator; afterwards a Will appearing, the Letters of Administration were called in, and the Executor brought an *Indebitatus Assumpsit* against the Attorney; who objected, 1. That he acting only as Attorney for him, who in Fact was Administrator, the Receipt of the Money was not his, but the Administrator's: And 2dly, That the Action ought to have been a Special *Assumpsit*, the Money being received by Special Authority, and that expressly to the Use of another; but the Court held, that the Authority being void, it was a Receipt of so much Money for the Use of the Plaintiff on an implied Contract, for which an *Indebitatus Assumpsit* well lies.

1 Salk. 28. adjudged *Holl*. 6 Ann. in B. R. *Haffer* and *Wallis*.

If a Feme Sole marries a Man, who in Truth is married to another Woman, and he makes a Lease of her Lands and receives the Rents, she may bring an *Indebitatus Assumpsit* against him for so much Money received to her Use: Adjudged after Verdict, though objected, that he having no Right to receive, the Tenant remained still liable, and he had his Remedy over against the Husband; but the Court held, that he being visibly a Husband, the Tenant was discharged, at least that the Recovery in this Action would discharge the Tenant, as it would be a Satisfaction to the true Lessor.

Comb. 430. per Holt, Ch. Jult. (a) So if the Sheriff

If a Sheriff levies Money upon a *Fieri Facias*, the Plaintiff may (a) have an *Indebitatus Assumpsit* against him for so much Money received to his Use. dies, an Action lies against his Executor. 1 Salk. 12. Vide Cro. Car. 297.

Comb. 341. *Decbery* and *Chapman*.

If *A.* takes an Apprentice and receives 30 *l.* with him, for which he is to teach him his Trade, and make him Free of the City of *London*, and being no Freeman himself, the Boy is bound likewise to a Freeman, admitting that by the Custom of *London*, the last Binding will not make him Free without actual Service, yet an *Indebitatus Assumpsit* will not lie, nor has the Party any Remedy, unless for the Cheat, or on a Special Action on the Case for not making him a Freeman.

1 Salk. 22. Ruled by *Treby*, Ch. Justice, at *Guildhall*, between *Tomkins* and *Barret*. *Skin*.

If three are bound in an Usurious Obligation, and one of them pays Part of the Money, and afterwards the Obligee brings Debt against one of the Obligors, who avoids the Bond for Usury, yet the Obligor who paid the Money cannot (b) maintain an *Indebitatus Assumpsit* for it, for he is *Particeps criminis*, and having parted with his Money freely he comes within the Rule *volenti non fit Injuria*.

411. S. C. 6 Mod. 161. S. P. Comb. 447. S. P. (b) So where one was employed as a Solicitor, and had Money given him to bribe the Custom-House Officers, which he laid out accordingly; and an *Assumpsit* being brought against the Solicitor for this Money, it was held it lay not. 1 Salk. 22. cited to have been adjudged. *Skin* 412. L. P.

But if *A.* pays Money to *B.* upon a Mistake, as thinking that there was so much due on Account, &c. he may maintain an Assumpsit for it.

*1 Salk. 22.*  
(a) *Vide*  
*Comb. 447.*  
Where a Per-

son pays Money for Fees which were not due, and where one sells Goods that were not his own.

So if a Man pays Money upon a Policy of Assurance, (b) supposing a Loss, when in Truth there was not any, he may bring an *Indebitatus Assumpsit* for so much Money received to his Use.

*Skin. 412.*  
*6 Mod. 161.*  
S. P.

Whether he parts with his Money by Mistake, or through Fraud in the Receiver, it is the same Thing.

So if *A.* gives Money to *B.* to pay *C.* upon *C.*'s delivering up Writings, &c. and *C.* will not do it, an *Indebitatus* will lie for *A.* against *B.* for so much Money received to his Use.

(b) And where  
*6 Mod. 161.*  
*per Holt, Ch.*  
Jult. who  
said, That

many such Actions have been maintained for Earnests in Bargains, &c.

If one be named a Commissioner to examine Witnesses in a Cause depending in Chancery or Exchequer, who officiates accordingly, he may bring an *Assumpsit* for his Labour and Pains, for though he is to be considered as an Officer of the Court, yet he is not compellable to attend against his Will, nor does the Trust reposed in him make his taking a Reward Bribery; for the Party is to take Care to name such as will serve, and it is but reasonable it should be at the Charge of him for whom he officiates.

*Carth. 208.*  
*Hill. 3 W. &*  
*M. Stokeld v.*  
*Collingsen*  
*Comb. 186.*  
S. C.

The Gentlemen Ushers and Daily Waiters to the King brought an *Assumpsit* against the Defendant, in which they declared, That all Gentlemen Ushers, Daily Waiters, &c. Time out of Mind, had used to have a Fee of 5 *l.* of every Person who voluntarily accepted the Honour of Knighthood, and that the Defendant (on such a Day) had voluntarily accepted Knighthood, and thereupon became indebted to them in 5 *l.* and in Consideration thereof had promised to pay the Money, which he had not performed; and upon a Demurrer to this Declaration, it was adjudged this Action would lie for this Duty.

*Carth. 99.*  
*Duppa and*  
*Geward.*  
*1 Show. Rep.*  
*78. S. C.*

Where a Man comes to buy Goods, and they agree upon a Price and a Day for the Payment, and the Buyer takes them away, an *Assumpsit* for the Money is the proper Action, for *Trover* will not lie for the Goods, because the Property was changed by a lawful Bargain, and by that Bargain the Buyer was to convert the Goods before the Money was due; but if a Man comes to buy Goods, and they agree upon a Price for present Money, and the Buyer takes the Goods away without Payment, *Trover* lies, because the Property is not altered, and therefore the Taking away the Goods without Payment of the Money, is an injurious Taking, for which the Action lies; but if a Man sell Goods on Payment of Money on a Day to come, and the Money be paid, and the Goods not delivered, *Trover* lies, because the Property is in the Buyer.

*Vide Title*  
*Trover and*  
*Conversion.*

If a Man and a Woman, being unmarried, mutually promise to marry each other, and afterwards the Man marries another Woman, by which he renders himself incapable of performing his Contract, an *Assumpsit*

*Carter 233.*  
*Dickenson and*  
*Holecroft.*

S. P. *1 Leon. 147.* S. P. *Style 295.* S. P. *1 Keb. 866.* S. P. *1 Sid. 180.* S. P. *adjudged. 6 Mod. 172.* S. P. *Vide Carth. 467.* *1 Salk. 24.* *5 Mod. 511.* Where on such a Contract the Man brought an Action against the Woman, and it was objected that it would not lie, because Marriage was no Advancement to him as it was to a Woman; but this Distinction was exploded. Such Promises are good, though the Time of Marriage be not agreed on; but in such Case it is necessary, to intitle the Party to his Action, to alledge that he offered to marry her, and that she refused. *Carth. 467.* This Action must be founded on reciprocal Promises; and therefore if the Promise be on one Side only it does not bind, being only *nudum Pactum.* *1 Salk. 24.* But if a Man of full Age, and a Female of Fifteen, promise to intermarry, and afterwards he marries another, an Action lies against him; for though such Promise may be said to be voidable as to the Infant, yet it shall be good against the Person of full Age, who shall be presumed to have acted with sufficient Caution; otherwise this Privilege allowed Infants, of rescinding and breaking through their Contracts, which was intended as an Advantage to them, might turn greatly to their Prejudice. *Trim. 5 Geo. 2.* Adjudged between *Holt* and *Ward.* *Vide Head of Infants.*

*1 Rol. Abr. 22.*

lies, in which the Woman shall recover Damages; for though Matrimonial Causes are regularly cognizable in the Spiritual Courts, yet the Contract in the present Case being Executory, and revoked by the Husband by the subsequent Marriage, could not be enforced by Ecclesiastical Censures, as a Contract *in Præsenti* may; hence therefore, there being no adequate Remedy in the Spiritual Courts, and Marriage being an Advantage, and the Loss of it a Temporal Loss, it is fit that there should be a Remedy in the Temporal Courts, otherwise there would be a Failure of Justice.

### (B) What Words create sufficient Certainty in a Promise.

*Vide* Head of Deeds.

**A**LL Promises and Contracts are to receive a favourable Interpretation; and such Construction is to be made, where any Obscurity appears, as will best answer the Intent of the Parties; otherwise a Person, by obscure Wording of his Contract, might find Means to evade and elude the Force of it. Hence it is a general Rule, that all Promises shall be taken most strong against the Promisor, and are not to be rejected, if they can by any Means be reduced to a Certainty: Therefore,

*Popb.* 148.  
*2 Rol. Rep.*  
104. S. C.

If *A.* in Consideration that *B.* will marry his Daughter, assumes and promises to give with her a Child's Part, and that at the Time of his Death he will give to her as much as to any of his Children, except his eldest Son, this is a good Promise; for though a (*a*) Child's Part in it self is altogether uncertain, yet being to give as much as to any of his Children, the Promise is certain enough, it being averred what the younger Son had.

(*a*) But if a Citizen of London promises a Child's Por-

tion, this of its self is certain enough; for by the Custom there it is known how much each Child shall have. *2 Rol. Rep.* 104. *Per Mountague*, Ch. Just. *Vide 1 Rol. Abr.* 14. S. P. *1 Rol. Rep.* 193, 266, 43. *Cro. Jac.* 417, 404. *3 Bulst.* 236. Several Cases to this Purpose.

*1 Rol. Abr.* 6.

But if there be a Discourse between the Father of *A.* and *B.* in relation to a Marriage between the said *A.* and the Daughter of *B.* and *B. tunc & ibidem* affirms and publishes to the Father of *A.* *quod daret ei qui maritaret* his said Daughter with his Consent 100 *l.* and after *A.* marries the Daughter of *B.* with his Consent; yet this Affirmance and Publication of *B.* shall raise no Promise upon which an Action upon an *Assumpsit* may be brought, (*b*) because these Words do not include any Promise.

(*b*) But by *Noy* 11. S. C.

adjudged, because the Words in the Declaration were *Afferuit* and *Publicavit*, and it was not averred or shewn to whom; and *vide 1 Rol. Rep.* 275. *Cro. Jac.* 386. *3 Bulst.* 94, 95. When a Promise *firmam facere, Anglice* to make good a Portion, amounts to a Promise to pay. *Vide 2 Rol. Abr.* 738. pl. 2.

*3 Rol. Abr.* 6.

If a Bill of Exchange be drawn on a Merchant, and he sets his Name to it, this, by the Custom of Merchants, (*c*) amounts to a Promise to pay it.

(*c*) Where to

warrant a Debt amounts to a Promise to pay it, *vide 2 Rol. Abr.* 718.

*1 Rol. Abr.*

14. 15.  
*Harvard and*  
*Simon.*

If a Man promises another, in Consideration that he will assign to him a certain Term, to pay him 10 *l.* this is a good *Assumpsit*, though the Time of Assignment and Payment be not appointed; for the 10 *l.* shall be paid in a convenient Time after the Assignment, which also must be done in convenient Time, and he shall not have Time during his Life.

So if *A.* be indebted to *B.* for certain Things to him sold, and *C.* comes to *B.* and promises him that if *A.* shall not pay him the Money, that then he himself will pay it, an Action upon the Case lies for *B.* against *C.* upon this Promise, if *A.* does not pay the Money in a convenient Time. 1 *Rel. Abr.*  
15, 27. S. C.

If *A.* is indebted to *B.* in 10*l.* and upon this *C.* promises that in Consideration that he will forbear *A.* till such a Day, if *A.* does not pay him the said Day, he himself will pay him the said Day, this is a good Promise, upon which *B.* may have an Action against *C.* for tho' *A.* had the whole Day to pay it, and so it was impossible for *C.* to pay it the same Day, if he did not pay it, yet the Substance of the Promise is to pay, and the Time limited being impossible, is void, and then it ought to be paid on Request. 1 *Rel. Abr.*  
15.

If *A.* is indebted to *B.* in 10*l.* by Obligation, and *A.* dies, and makes *C.* his Executor, and *C.* in Consideration *quod daret diem solutionis pro uno Anno*, promises Payment if *C.* does not pay it, an Action on this Promise will lie against him; (a) for though in proper Sense, a Day cannot be given upon the Bond, yet it shall be taken according to common Parlance, *viz.* deferring the Day of Payment. Cro. Eliz. 645;  
(a) The Plaintiff declared upon a Promise to assign the Shop of the Defendant,  
and *transfere negotiationem*, &c. All. 67. *Stile* 111.

If *A.* in Consideration that *B.* will marry his Daughter, assumes and promises to give to *B.* twenty French Pieces, this is a good Promise; for this, according to our usual Speech, shall be intended French Crowns, which are the common Coin of France, and here known. Cro. Cur. 194.  
Pointe and Pointe; adjudged.

If the Plaintiff declares, That whereas there was a Communication between the Plaintiff and Defendant, concerning the Bark of certain Wood, and that thereupon it was agreed that the Defendant should give to the Plaintiff two Shillings *per Seam* for all the Bark of such Wood as the Plaintiff should cut, and that thereupon the Defendant assumed and promised to have ready upon a certain Day, Articles purporting the Agreement, and an Obligation for the Performance thereof, &c. the Declaration is not good, because not said in what Sum the Obligation was to be; and a certain Sum cannot be intended, because the Number of Seams are altogether uncertain; but being (a) after Verdict upon the General Issue, it was adjudged for the Plaintiff; but *per Cur'*, upon Demurrer, or the Special Issue, it had been naught. 1 *Sid.* 270.  
Palse and Palsey.  
1 *Keb.* 776.  
S. C.  
(a) *Hob.* 69,  
70. Like Point adjudged.  
1 *Brownl.* 11.  
Cro. 651. S. P. adjudged.

But if there be an (b) Agreement to enter into an Obligation for Performance of a Thing of certain Value, without mentioning in what Sum, it shall be (c) according to the Value. 1 *Sid.* 270.  
*per Cur'*.  
(b) So upon a Covenant

to enter into a Bond that *B.* shall enjoy such Lands, it shall be intended in a Sum, to the Value of the Land. *Samon's Case*, 5 *Cc.* 78. a. *Cro. Eliz.* 432. (c) Of double the Value. *Cro. Jac.* 116. adjudged. *Hell.* 89. like Point *debitatur*.—When for Payment, of Money. 1 *Lev.* 88.

In an *Assumpsit*, the Plaintiff declared that the Defendant in Consideration, &c. six Months before the Return of King Charles the Second, assumed to pay 20*l.* to the Plaintiff, if Charles Stewart *foret Rex Anglie infra 12 Menses tum prox' sequent'*, and adjudged a good Promise; for the Words shall be taken according to the Subject Matter, *viz.* that the King that was then out of Possession, should be in Possession within six Months. 1 *Lev.* 33.  
1 *Keb.* 56.  
S. C.

## (C) What is a sufficient Consideration to create an Assumpsit.

*Hard.* 72. *Dyer* 336. b. Consideration is defined a Cause or Occasion meritorious, that requires a mutual Recompence in Fact or in Law.

*Doctour and Stud.* 211, 23, 215. *Kelw.* 50.

Therefore if a Man promises so much Money at a Day to come to (a) build a House or a Church, without Consideration, this is a naked Promise, and will not oblige.  
 1 *Rol. Abr.* 9, 10. (a) But if a Carpenter promises to mend my House before a certain Day, and he does not do it, by which my House falls, I shall have an Action upon the Case. 19 *H.* 6 49. 1 *Rol.* 9. S. C.—So if a Carpenter undertakes to build a House for me, and does it ill, an Action on the Case lies against him. 1 *Rol. Abr.* 9. *Kelw.* 78. S. P. So if a Person undertakes to remove a Quantity of Brandy from *Brook-Market* to *Water-Lane*, and by Reason of his Neglect, one of the Casks breaks, an Assumpsit lies against him, though it is not averred that he was a common Porter, or that he had any Reward. 1 *Salk.* 26. *Coggs* and *Bernard.* Vide *Title Bailment.*

2 *Bulst.* 269. Also idle and insignificant Considerations are looked upon as none at all; for where-ever a Person promises without a Benefit arising to the Promisor, or Loss to the Promisee, it is looked upon as a void Promise.

*Stile* 305. said.

*Hard.* 73. S. P. cited as to have

been adjudged.

*Stile* 330. adjudged between *Goodwin* and *Butlin.*

1 *Leon.* 297. *Cro. Eliz.* 138. Like Point cited.

*Cro. Eliz.* 67, 150. S. C. adjudged; but the Promise there was in Consideration, &c. to pay a Rent-charge.

*Cro. Car.* 70. like Point adjudged.

1 *Leon.* 103. 4 *Leon.* 31. adjudged; (a) Note; both Promises must be made at the same Instant, else they will be *nuda pacta*

*Hob.* 88. *Cro. Eliz.* 137. 2 *Jones* 168. (b) 4 *Leon.* 3. the like Point. *March* 75. like Point, *per Cur.* *Cro. Eliz.* 343. like Point adjudged, 889. like Point *per Cur.* *Hob.* 88. like Point adjudged. 2 *Mod.* 33. like Point adjudged.

If the Plaintiff declares that in Consideration the Defendant was indebted to him in 20*l.* the Defendant did assume and promise to deliver several Cattle to *J. S.* to the Use of the Plaintiff, and that the Defendant had not delivered the Cattle accordingly, &c. the Consideration is void, because it does not appear that the Debt was to be discharged thereby; and if not, the Plaintiff notwithstanding might bring his Action for the Money, so that the Promise is but *nudum pactum*.

If *A.* in Consideration that *B.* will deliver to him a Recognizance to read over, assumes and promises within six Days, to re-deliver the same to *B.* or to pay him 1000*l.* this is a good Promise, upon which *B.* may have an Action against *A.* for the Consideration is sufficient.

If *A.* demises certain Lands to *B.* rendering Rent, and *B.* assigns to *D.* after which Rent becomes due, and *D.* in Consideration that *A.* will shew him a Deed, by which it may appear that such Rent is due, assumes and promises to *A.* forthwith to pay the same, if *A.* does shew *D.* the Indenture of Lease, by which it appears that such Rent is due, *A.* shall have an Action upon this Promise against *D.* for when any Thing, though never so small is to be done by the Plaintiff, it will be a Consideration sufficient to ground an Action.

If *A.* is Lord of a Manor, and a Controversy arises between *A.* and *B.* concerning a certain Copyhold which *B.* claims to hold of the said Manor, whereupon they submit to the Judgment and Award of *J. S.* and in Consideration that *A.* (a) had promised to abide thereby, *B.* assumes and promises that if the said *J. S.* shall adjudge the Copy insufficient, that then he the said *B.* will forthwith deliver up to *A.* the Possession thereof, this is a good Consideration, the Promise being (b) Reciprocal, and to avoid Variances and Suits.

*Hob.* 88. *Cro. Eliz.* 137. 2 *Jones* 168. (b) 4 *Leon.* 3. the like Point. *March* 75. like Point, *per Cur.* *Cro. Eliz.* 343. like Point adjudged, 889. like Point *per Cur.* *Hob.* 88. like Point adjudged. 2 *Mod.* 33. like Point adjudged.

If the Father of *A.* and *B.* lying sick, declares his Intention to devise a Rent of 4*l.* per Ann. to his younger Son, during his Life, and thereupon *A.* the eldest Son, in Consideration that the Father will not charge his Lands therewith, assumes and promises to *B.* to pay the said Rent; whereupon the Father foreears to charge the Land, and dies, and the Land descends to *A.* discharged of the said Rent, this is a good Consideration.

1 Leon. 152. adjudged. Cro. Eliz. 163. S. C. adjudged.

If *B.* the Daughter of *A.* be Heir apparent to *C.* and *D.* promises to *A.* the Mother, in Consideration that she would (*a*) consent and agree that the said *B.* her Daughter, should marry his Son, that he would give to the said *A.* 100*l.* upon which *A.* consents, and the Marriage takes Effect, this is a good Consideration; for Nature has given the Power of disposing to Parents, and in Nature their Children are bound to obey them.

1 Rol. Abr. 19. Moor 857. S. C. adjudged by three against one. 1 Brocvt. 18. S. C. adjudged.

*Hob.* 10. S. C. adjudged by three against one. *Hut.* 39. S. C. cited. (*a*) In Consideration the Plaintiff would give his good Will and Furtherance to a Marriage. *Moor* 595. *Pl.* 803.—Where Marriage-Brochage Bonds, and other Considerations, to procure Marriages are made void in Equity, *vide Abr. Eq.* 89, 90. and *Tit. Marriage.*—In Consideration the Plaintiff would procure the Consent of her Master for the Defendant to have a Shop in his House, &c. a good Consideration. *Godb.* 216.—In Consideration the Plaintiff would procure the Consent of the Lessor, that the Lessee might assign his Term, &c. *Hut.* 39. adjudged a good Consideration.—In Consideration that the Mother of *A.* would permit her Son to serve him for such a Time. 1 *Rol. Abr.* 20. adjudged.

If *A.* being on a Treaty with *B.* for the Purchase of certain Lands from *B.* comes to *B.*'s Wife, and promises her in Consideration that she would not hinder the Bargain, that he would give her 10*l.* or a Riding-Suit, this is a good Consideration; and the Husband and Wife may have an *Assumpsit* on this Promise.

1 Rol. Abr. 21, 22. adjudged.

If *B.* in Consideration that *A.* at the special Instance and Request of *B.* would permit *B.* to have and hold a Messuage and Land, then in the Occupation of *B.* *una cum proficuis & commoditatibus inde provenientibus* to his own Use, promises to pay him 13*s.* at *Michaelmas* after, for Rent for the Premises; and also at the said Feast to deliver the Possession of the Premises to *A.* in as good Repair as it was at the Time of the Demise, this is a good Consideration to maintain an Action, tho' it does not appear that *A.* had (*a*) any Estate therein at the Time of the Promise, and though it appears that *B.* was then in Possession thereof.

(*a*) *Cro. Eliz.* 856. S. P. cont. but 2 *Rol. Rep.*

435. like Point adjudged. 1 *Vent.* 211, 212. like Point adjudged. *Hard.* 366. S. P. *dubitatur.* 4 *Leon.* 2. like Point adjudged. *Vide* 2 *Keb.* 81, 82. 1 *Sid.* 323. like Point adjudged. 2 *Keb.* 182. *adjorn.* 1 *Lev.* 204. adjudged, and *vide* 2 *Lev.* 33.—But upon Evidence, it must be proved what Estate the Plaintiff had, so that it may appear that there was a Consideration. 2 *Rol. Rep.* 435. but after 6 Verdict for the Plaintiff, the Court will intend it was proved. 1 *Vent.* 211. 1 *Lev.* 179.

But if *A.* in Consideration that *B.* will make an Estate at Will to him, such as Counsel shall devise, promises, &c. this is no good Consideration, for that he may presently after the Estate made determine it.

1 *Rol. Abr.* 23. *Poph.* 183. S. C. cited.

If *A.* having several young Children, lies sick, and *B.* in Consideration that *A.* after his Death, will commit the Education of his Children, and the Disposition of his Goods, during their Minority to him, assumes and promises to *A.* to procure certain customary Lands to be assured to one of the Children; whereupon *A.* appoints *B.* Overseer of his Will, and that his Goods should be under the Disposition of *B.* *A.* dies, and *B.* by Virtue thereof, takes Possession of the several Goods of *A.* if *B.* does not procure such Lands to be assured accordingly, yet shall the Executor of *A.* have no Action against *B.* for here is no Consideration, inasmuch as the Power which *B.* had given him, was only

3 *Leon.* 83. adjudged between *Smith* and *Smith.* *Vide* 3 *Leon.* 129. cont.

(a) But if one Executor, in Consideration the other would relinquish the Executorship, assumes, &c. this is good. 1 Bulst. 185. vide 1 Rel. Abr. 49.

3 Leon. 105. adjudged. If there be certain Controversies between *A.* and *B.* and they submit to the Award of *J. S.* who among other Things, is about to award that *B.* shall deliver up to *A.* two several Obligations, wherein *A.* was bound to *B.* whereupon *B.* in Consideration that upon the Request of *A.* the Clause in Relation to the Delivery up of the Obligations shall be left out of the Award, assumes and promises to *A.* to deliver them up to *A.* gratis, &c. this is a good Consideration, the Clause being omitted *ad specialem instantiam ipsius A.*

1 Rol. Rep. 215. adjudged, Carter and Lickerfon.

If *A.* pawns Goods to *B.* upon Condition of Redemption at a Day certain, and after the Day the Goods being not redeemed, *B.* says he will sell them, upon which *D.* says, if he will stay the Sale of them but for three Days, he will pay the Money and have the Goods, if *B.* does stay the Sale accordingly, *B.* may have an Action against *D.* upon this Agreement; for this was in Nature of (b) a Sale; and if *D.* had paid the Money, he might have brought *Detinue* for the Goods.

(b) So where *A.* in Consideration that

he had paid and delivered to the Defendant twenty Pieces of hammer'd Money, being twenty old Shillings, at his Request, he the Defendant promised to pay him twenty Shillings new Money; and it was objected that the Property was not altered; *sed non allocat*; for a Delivery, in Consideration of being paid the Value, is a Sale. 1 Salk. 25.

Cro Jac. 612. Parker and Brown, adjudged.

If *A.* and *B.* are both Solicitors for the Office of Under-Sheriff, and *A.* in Consideration that *B.* will desist, assumes and promises to *B.* that if he the said *A.* obtains the said Office, that he the said *A.* will pay unto *B.* 20*l.* for a Horse, &c. this is a good Consideration.

Winch 80.

*A.* has Lands in *D.* of which Parish *B.* is Rector, and *B.* in Consideration that *A.* will plant his Lands with Hops, and so better the Tithes, assumes and Promises to allow him 40*s.* for every Acre so planted; and whether this is a good Consideration, because the Tithes cannot be bettered by the Planting of the Hops, but by the growing of them, *dubitatur.*

1 Sid. 89. adjudged between Scot and Stevens.

1 Lev. 71. S.C.

1 Rol. Rep.

27. S. P. per Croke. (c) So if the Consideration be that the Plaintiff shall release an equitable Interest only. Wells and Wells, 1 Vent. 40. 1 Lev. 272.—In Consideration the Plaintiff would forbear to sue for a Legacy. 2 Lev. 3. 1 Vent. 120.

1 Lev. 257. Bolton and Fenner, adjudged.

1 Sid. 392.

S. C. adjudged.

If the Plaintiff declares that he was possessed of several Seamens Tickets for Wages due to them, and had solicited the Treasurer of the Navy to pay them, who had ordered the Defendant his Clerk to pay them, and the Defendant, in Consideration the Plaintiff would not give his said Master any further Trouble, about the Payment thereof, assumed to pay them, this is a good Consideration; for though it does not appear the Plaintiff had any Interest in the Money, or Authority to receive it; and it was objected, though he might not trouble the Master further, yet the Owners might; yet after Verdict for the Plaintiff, it was adjudged for him; for it cannot be intended but that the Plaintiff had an Interest in the Tickets, or Authority to receive the Money, else the Treasurer would not have ordered the Payment thereof.

If *A.* in Consideration that *B.* an Infant, hath promised to permit *A.* to carry away so much of his Grass, &c. assumes and promises to pay *B.* 6*l.* the Consideration is good, and *B.* may maintain an Action against *A.* upon this Promise, notwithstanding *B.* may avoid his Promise.  
 1 *Mod.* 25. adjudged between *Smith* and *Bowen.*  
 1 *Vent.* 51. S. C. ad-  
 judged. 1 *Yelv.* 134. like *Point per Cur.* 1 *Sid.* 41. 1 *Keb.* 1. S. P. vide Head of *Infants*

If *A.* and *B.* are Church-wardens of *D.* and *C.* at the Prosecution of *A.* and *B.* is excommunicated for not paying a Tax for the Reparation of the Church of *D.* and *C.* in Consideration that the Bishop, at the Request of *A.* and *B.* would absolve him, assumes and promises to pay unto *A.* and *B.* so much, if *C.* is accordingly absolved, *A.* and *B.* may have an Action upon this Promise against *C.* for it cannot be intended but the Absolution was at the Instance of *A.* and *B.* and by Reason of the Promise to pay them the Money.  
 1 *Vent.* 297. adjudged between *Cur-tis* and *Col-lingwood.*  
 2 *Lev.* 119. S. C. ad- judged, the Consideration being that the

Bishop would absolve the Mother of the Defendant at the Request of the Defendant, which the Bishop would not have done, if the Plaintiffs had not accepted the Promise of Payment.

If *B.* is indebted to *A.* in 20*l.* and *C.* is indebted to *B.* in the like Sum, and *C.* promises *A.* in Consideration that he is content to accept the said Sum by the Hands of *C.* and to stay for this for four Days, that he will pay him the said Sum, this is a good Consideration for *A.* to maintain an Action upon the Case against *C.*  
 1 *Rol. Abr.* 29. vide 1 *Danv.* 53. and the Notes there.

If *A.* is indebted 20*l.* to *B.* and dies, and his Executor in Consideration that *B.* will forbear him for a reasonable Time, promises to pay him the Debt, this is a good Consideration to have an Action, with an Averment that he forbore him for a certain Time.  
 1 *Rol. Abr.* 26. But where a Promise by an Executor or Administrator, or an Heir, to pay on Forbearance, makes a good Consideration, vide the several Titles, and 1 *Danv.* 51, 52, &c.

(D) Where the Consideration shall be said to be executed or continuing.

A Consideration altogether executed and past is not good to maintain an *Assumpsit*; but if it were moved by a precedent Request it is good, and doth amount to a Promise; for it is not reasonable that one Man should do another a Kindness, and then charge him with a Recompence; for this would be obliging him whether he would or no, and bringing him under an Obligation without his own Concurrence.  
 1 *Rol. Abr.* 11, 12. Several Cases to this Purpose.

Therefore if the Servant of *A.* be arrested in *London* for a Trespass, and *J. S.* who knows *A.* bails him, and after *A.* for his Friendship, promises to save him harmless, and *J. S.* comes to be charged, yet this is no Consideration to ground an *Assumpsit* on, because the Bailing, which was the Consideration, was past and executed before.  
*Dyer* 272. 1 *Rol. Abr.* 11. 2 *Leon.* 225. *Owen* 144. *Yelv.* 41.

(a) But it had been otherwise if the Master had before requested him to become Bail for his Servant, and the Bailing had been after.  
*Dyer* 172. 1 *Rol. Abr.* 11.

(a) *Hob.* 106. S. C. and S. P. cited and agreed, because the Promise is not naked, but couples itself with the precedent Request, and the Merits of the Party procured by that Request. 2 *Leon.* 225. S. C. cited and agreed. *Cro. Car.* 409. S. C. and S. P. cited and agreed per two Justices arguing.

1 *Rol. Abr.* 11. So if a Man requests another to labour for his Pardon, &c. and after he has done his Endeavour, if the other says, in Consideration that he has laboured for his Pardon at his own Charge, he promises to pay him so much, &c. this is a good Consideration.

1 *Leon.* 225. If *A.* serves *B.* for a Year, but has (*a*) nothing for his Service, and afterwards at the End of the Year, *B.* for his good and faithful Services, assumes to pay him 10*l.* *A.* may have an Action upon the Case, upon (*a*) But if a this Promise against *B.* for the Consideration is good.

1 *Leon.* 225. *Hutt.* 84. Servant has Wages given him, and after his Service ended, his Master *ex abundantia* promises to pay him 10*l.* more, he shall not have an Action on this Promise, because there is no precedent Consideration.

1 *Leon.* 102. If *A.* leases Lands to *B.* for a certain Term of Years, rendering Rent, and after some of the Years expired, and the Rent paid, *A.* in Consideration that *B.* had occupied the Land and paid his Rent, assumes to save him harmless against all Persons for his Occupation past and to come, if afterwards the Cattle of *B.* are distrained *Damage-feasant*, he may have an Action upon this Promise against *A.* for the Occupation, which said the Consideration, continues.

that he was in Possession, and had paid, and was to pay his Rent, was a sufficient Cause for *A.* to defend his Possession for the Time to come.

2 *Leon.* 111. If there be a Communication between *A.* and *B.* concerning a Marriage to be had between *A.* and the Daughter of *B.* upon which *B.* offers him 200*l.* with his Daughter in Marriage; but they cannot agree upon the Day of Payment, and afterwards *A.* steals away the Daughter of *B.* and marries her without the Consent or Knowledge of *B.* and after *B.* agrees thereto, and in Consideration of this Marriage assumes to pay 100*l.* to *A.* this is a good Promise, upon which *A.* may have an Action against *B.* for the (*a*) natural Affection of the Father, and the (*b*) Advancement of the Daughter makes this a Consideration (*c*) continuing.

(*a*) A good Consideration to raise an Use, but not an *Assumpsit.* *Cro. Eliz.* 756 agreed *per Cur'*, *Cart.* 141. *arguendo.* (*b*) Marriage is always a continuing Consideration. 2 *Leon.* 224. *per Anderson*, *Godb.* 31. *Cro. Car.* 409. *Hut.* 84. *Cro. Eliz.* 741. (*c*) A Serjeant at Law gives Counsel to *A.* who afterwards in Consideration thereof, assumes to pay him 20*l.* an Action lies thereupon. 2 *Leon.* 111. *per Poph.* *Cro. Eliz.* 59. said.

2 *Keb.* 99. In Consideration that he had paid Money for the Defendant, and obtained a Release of his Debt, was held a continuing Consideration, because the Benefit of it was continuing to the Party.

### (E) Where the Promise shall be void, the Consideration being against Law.

AS all Considerations are deemed insignificant and void, that are not of some Benefit to the Promisor, or Loss to the Promisee; so if they are wicked and ill in themselves, or unlawful by being prohibited by some Act of Parliament, they are void; therefore

If an Officer, who by the Duty of his Office is obliged to execute Writs, promises in Consideration of Money paid him, to serve a certain Process, an *Assumpsit* will not lie on this Promise; for the Receipt of the Money was Extortion, and the Consideration unlawful.

1 *Rol. Abr.* 16. 1 *Rol. Rep.* 313. S.P. adjudged, the Consideration being that he would serve a *Ne exeat Regnum.*

So if an Executor sues Execution by *Elegit*, and *B.* a Stranger, as a Friend to the Executor, in Consideration that the Sheriff would forthwith execute the said *Elegit*, and of 6*d.* to him by the Sheriff paid, promises to pay him 60*l.* upon which the Sheriff executes the Writ, yet no Action lies, because the Consideration is (a) against Law; for the Sheriff ought to do his Duty without Reward, and this 60*l.* is no Discharge of the Fees due to the Sheriff, being given by a (b) Stranger, and not expressed for them.

1 *Roll. Abr.* 16.  
*Cro. Jac.* 103.  
*S. C.* adjudged.  
 (a) So if a Sheriff suffer one that he has arrested to

escape, on the Promise of a Stranger, to be paid so much Money, yet no Action lies on this Promise. 1 *Salk.* 28. *vide* Head of Sheriff. (b) Otherwise where given by the Plaintiff himself. 1 *Roll. Abr.* 26.

But if a Man brings a *Capias* that he has against *A.* to the Sheriff, and prays him that he will make *J. S.* his Special Bailiff, and promises him that if he will make his Special Bailiff, that if *A.* escapes from the Bailiff, that he will bring no Action for the Escape against him, this is an *Assumpsit* upon which an Action lies, if he brings any Action against the Sheriff for the Escape.

1 *Roll. Abr.* 16.  
 1 *Le n.* 132.  
 3 *Leon.* 227.  
*Cro. Eliz.* 178.  
*Owen* 97.  
*S. C.* adjudged.  
 1 *Salk.* 28. adjudged on Demurrer, *Love's Case.*

So where the Sheriff takes Goods in Execution upon a *Fieri facias*, and a Stranger promises the Officer to pay him the Debt, in Case he would restore them, this is a lawful Consideration; for by the *Fieri facias* he may sell the Goods, and this in Effect is doing no more.

If *A.* in Consideration of some Benefit, promises not to set up or follow the same Trade with the Plaintiff in such a Town, this is a good Promise; but if the Promise were not to set up or follow the same Trade in any Part of the Kingdom, it would be void.

*Vide* 1 *Roll. Abr.* 16, 17.  
*Cro. Jac.* 326, 596.  
 2 *Bull.* 136.  
 1 *Jones* 13. *March* 77. 2 *Roll. Rep.* 201.

If *A.* being a Clerk, promises *B.* in Consideration that *B.* will procure him to be Rector of a Donative Church, with Cure of Souls, to pay 10*l.* to *B.* this is no good Consideration to maintain an Action; for this is Simony, and an Offence against the Laws of GOD and Man.

1 *Roll. Abr.* 18.  
*Cro. Car.* 337, 353, 361.  
*S. C.* 1 *Jones* 341 *S. C.* adjudged.

If *A.* levies a Plaintiff in the Court of *Stepney* against *B.* upon which a Precept is directed to *C.* the Bailiff there, to attach the Goods of *B.* and thereupon *C.* attaches certain of the Goods of *B.* and *A.* in Consideration that *C.* will deliver those Goods to him to deliver at the next Court, assumes and promises to save *C.* harmless, &c. the Consideration is void, being against Law; for the Bailiff ought not to deliver them to the Plaintiff.

*Cro. Eliz.* 230.  
*Mead* and *Bigot*, adjudged.  
 3 *Leon.* 236.  
*S. C.* adjudged.

If *A.* being seised of Lands in Fee, enters into a Recognisance to *B.* and after makes a Feoffment of those Lands to *C.* who, in Consideration that *B.* will assign to him the Recognisance, assumes and promises to pay him 80*l.* this is a good Promise; for the Consideration being to assign to the Ter-tenant, it operates by Way of Discharge, and is clearly lawful; otherwise of an Assignment to a Stranger.

*Cro. Eliz.* 551.  
*Barrow* and *Gray.*

If *A.* brings *B.* to a common Inn, of which *C.* is Host, and affirms to *C.* that he hath arrested *B.* by Virtue of a Commission of Rebellion, and in Consideration that *C.* will keep *B.* as a Prisoner by the Space of one Night, assumes and promises to save *C.* harmless, &c. if *B.* recovers against *C.* in an Action of False Imprisonment, *C.* may have an Action against *A.* upon this Promise; for though the Consideration, *viz.* the keeping of *B.* was unlawful, yet because it did not appear to *C.* to be so, the Promise to save him harmless was good.

*Hut.* 55.  
 A judged between *Fletcher* and *Harcourt.*  
*Winch* 48.  
*S. C.* adjudged; but *Hob.* said perhaps

there may be a Diversity where a publick Officer, and where a private Man (as in the principal Case) makes the Arrest; but because the Defendant had pleaded *Non Assumpsit*, which implied that the Imprisonment was lawful, he agreed Judgment should be given for the Plaintiff.

But

But if it appears that the Act which is to be done is unlawful; as if *A.* in Consideration that *B.* will beat *C.* promises to save *C.* harmless, the Consideration is void.

*Lev.* 174. like Point adjudged, where the Defendant in Consideration of 20*s.* assumed to do so, if he did not beat *J.S.* out of such a Close.

*11* *10.* 197. If *A.* is in Execution at the Suit of *B.* and *C.* in Consideration that the Gaoler will permit *A.* to go at Large, assumes and promises to (*a*) him that *A.* shall pay the Debt at a certain Day, and that he the said *C.* will save the Gaoler harmless, the Promise is void; because the Consideration is against Law.

*250.* S.C. adjudged, the Promise being to pay the Gaoler Money. *Het.* 175. S.P. 10 *Co.* 102. S.P. agreed per *Wray*, Ch. Just. and that if such Promise was not void by the Common Law, it is made void by the Statute 23 *H.* 6. *Cro. Eliz.* 199. adjudged, 3 *Leon.* 208. adjudged. (*a*) But such Promise to the Plaintiff is good, for that he may lawfully discharge him. *Cro. Eliz.* 190. adjudged.

*1* *Sid.* 152. If *A.* is arrested, and *C.* in Consideration that the Bailiff will suffer *A.* to continue in the House of *C.* till the next Morning, assumes and promises then to deliver him in safe Custody to the Bailiff, the Consideration is lawful; for it shall not be intended that the Bailiff was ever absent from *B.* so that it could be no Escape.

being to deliver him or pay 10*l.* and the Action being brought by the Plaintiff himself, who declared upon a Promise to the Bailiff *ex parte querentis*; so that if he was out of Custody, it must be intended by the Assent of the Plaintiff; because the Promise was made to the Bailiff *ex parte querentis*; and by bringing the Action he hath affirmed his Assent.

*1* *Mod.* 166. If the Father of *A.* was indebted to *B.* and *A.* promises *B.* that if he will bring two Witnesses before a Justice of Peace, who upon their Oaths shall depose that the Father of *A.* was so indebted to *B.* that then he will pay it, if *B.* does produce his Witnesses, &c. he may have an Action upon this Promise against *A.* for the Consideration is not unlawful, nor the Oath prophane; adjudged by two Judges against *Vaughan*, who held that such an Oath, illegally administered and taken, was within the Statute of prophane swearing.

*of London.* *Bret* and *Pretiman*, like Point. *1* *Sid.* 283. adjudged. *Raym.* 153. adjudged. *1* *Keb.* 26, 44. adjudged; where the Consideration was to take such Oath before a Master in Chancery. *2* *Sid.* 123. like Point adjudged; where the Oath was to be taken before a Master in Chancery; and a like Point there cited to have been adjudged, where the Oath was to be taken before a Judge of Assize.

*1* *Sid.* 212. If *A.* obtains a Judgment against *B.* in the Marshal's Court, and afterwards in Consideration of Money in hand paid, assumes and promises to assign this Judgment to *C.* this is a good Promise; for it is lawful so to do, and the Intent must be that it shall be assigned according to common Usage, *viz.* by Letter of Attorney, so that *C.* may take out Execution in the Name of *A.* which may be done without any Maintenance.

*2* *Jones* 284. If *A.* obtains a Judgment against *B.* and thereupon takes out an *Elegit*, and delivers it to the Under-Sheriff, who by Virtue thereof seises certain Goods of *B.* and afterwards the Under-Sheriff, in Consideration that *A.* will take out a new *Elegit*, and deliver it to him, he promises to cause and procure the said Goods to be found by Inquisition, and to deliver the same to such Person as *A.* shall appoint, &c. this Promise is against Law, being to do a Thing against the Duty of his Place, by which he is bound to return an indifferent Jury; and though Part of the Promise was to do a lawful Act, yet since that depended upon the other Part, which was illegal, the whole is naught.

(F) Where the Consideration and Promise shall be said to be sufficiently set forth and averred.

THE Plaintiff must set forth every Thing essential to the Gift of the Action, with such Certainty, that it may appear to the Court that there were sufficient Grounds for the Action; for if any Thing material be omitted, it cannot appear to the Court whether the Damages given by the Jury were in Proportion to the Demand, or whether the Party was at all intitled to a Verdict.

But for this vide Head of Pleadings.

Therefore in an Action upon the Case, the Plaintiff (a) cannot declare *quod cum* the Defendant was indebted to the Plaintiff in such a Sum, and that the Defendant, in Consideration thereof, *super se Assumpsit* to pay, &c. without (b) shewing the Cause of the Debt.

10 Co. 77. For this Point vide Hob. 5. Godb. 186.

*Cro. Jac.* 207, 213, 642. *Hob.* 18. *Moor* 854. *Pl.* 1167. *Hetl.* 106. *1 Rol. Rep.* 391. *1 Bulst.* 67. *3 Bulst.* 207. *Cro. Jac.* 397. *Hard.* 132. but *Palmer* 171, *per Croke* and *Chamberlain*, there is a Diversity where the Promise is to pay at a Day to come, and where not; for the Promise to pay at a Day to come, implies a Forbearance in the mean Time; and *vide 1 Rol. Rep.* 396. (a) Such a Declaration is not made good by Verdict. *Cro. Car.* 6. 31. *1 Sid.* 182. and *vide 1 Brownl.* 14. *Poph.* 31. *Fenk.* 293. (b) The Plaintiff declared that the Defendant was indebted to the Testator of the Plaintiff in 20*l.* *quas ei solviffe debuit secundum agreement' inter eos habit'.* *2 Lev.* 162. Judgment was staid after Verdict; for the Agreement might be by Deed. *Vide Carth.* 276.

So, if in an *Assumpsit* the Plaintiff declares that, in Consideration *quod procuravit* *f. s.* to surrender a Messuage, &c. the Defendant *solveret* to the Plaintiff 10*l.* the Declaration is not good; for there is no Promise laid, *super se Assumpsit*, or *agerevit* being omitted; and nothing here that imports a Promise or Contract.

1 Sid. 246. adjudged. 1 Lev. 164. S. C. adjudged *Nisi.* Raym. S. C. adjudged *Nisi.* 1 Keb. 878.

*Super se Assumpsit* on an *Insimul computasset* was left out, and a Difference was endeavour'd to be taken where the Law raises the Promise, and where it is a special Promise; and that in the first it should not be needful; but the Court held it necessary in both; for the Law does not (c) create a Promise in any Case in Pleading, but gives sufficient Evidence to a Jury to find a Promise.

2 Keb. 97. 1 Sid. 306. (c) 6 Mod. 131. S. P. per Holt. Vide Head of Pleadings.

But in this Action the Law requires no greater Certainty in the Allegations, than the Nature of the Thing requires; therefore if a Contract be made in general Terms, the Declaration may likewise be General. Hence a *Quantum meruit* for *diversa vestimenta & omnia alia materialia adinde spectantia*, is good.

So if in an *Assumpsit* the Plaintiff declares that, in Consideration the Plaintiff would find and provide for a sick Man all such Necessaries as he shall want, the Defendant assumed and promised to pay, &c. and avers that he had found him Necessaries amounting to such a Sum, &c. this is a good Declaration, without shewing in particular what those Necessaries were; for that would make the Record too prolix.

3 Bulst. 31. adjudged between Crisp and Bainton. 1 Rol. Rep. 173. S. C. adjudged,

and the rather because it was after Verdict. *Vide Tit. Error.*

If in an *Indebitatus Assumpsit*, the Plaintiff declares that the Defendant was indebted to the Plaintiff in 10*l.* for the (a) Peeding and

Hob. 5. adjudged, and affirmed upon a Writ

Z z

Agist-

of Error in *Cam. Scacc.* 1 *Rol. Rep.* S. C. adjudged and affirmed. (a) *Indebitatus* for Tithes, *Wright and Beal*, 1 *Lev.* 141. 1 *Sid.* 223 after Verdict adjudged good, and intended severed, and upon a special

special

special Con-  
tract. (a)  
So an *Inde-*  
*bitatus* lies  
*pro opere*  
*perantez*  
*facto.*  
1 Sid. 425.  
1 Vent. 44.  
2 Keb. 552.

Agistment of Beasts, and for Wheat & *aliis* (a) *mercimoniis per prædicit*  
the Defendant *habiti & recepti*, this is a good Declaration; for though  
it be not sufficient to say that he was indebted generally, because  
that may be for Rent upon Leafes or Debts upon Specialties, yet this  
is certain enough; for as well the Wares and Merchandises, as the Pa-  
sturing and Wheat, are Personal Things, for which an *Assumpsit* may be  
brought.

1 Mod. 8. adjudged.—*Pro præmio*, on a Policy of Insurance. 2 Lev. 153.

*Carth.* 276.  
adjudged  
*Pasch.* 5 W.  
& *M.* in  
B. R. be-  
tween *Hib-*  
*bert* and  
*Courtlope.*  
1 Vent. 44.  
S. P.  
1 Sid. 425.  
S. P.  
2 Keb. 552.

1 Mod. 8. S. P. (b) For Damages recovered in an *Assumpsit*, will be no Bar to an Action of Debt grounded on a Record or Specialty. *Cro. Car.* 6. 1 *Leon.* 155. *Cro. Eliz.* 242.

So in an *Assumpsit* the Plaintiff declared *pro opere & labore* generally,  
without setting forth what Sort or Manner of Work or Labour it was;  
and though it was objected that it should be set forth particularly, so  
that it may appear to the Court to be lawful Work, yet the Court held  
it well enough; and that the only Reason why the Plaintiff is obliged  
to shew wherein the Defendant is indebted is, that it may appear to the  
Court that it is not a Debt on (b) Record or Specialty, but only upon  
simple Contract; and any general Words, by which that may be made  
to appear, are sufficient.

*Moor* 854.  
adjudged,  
1 *Rol. Rep.*  
391. S. C. ad-  
judged.  
(c) So an *In-*  
*debitatus* for  
Money re-  
ceived by the Hands of *J. S.* to the Use of the Defendant. 1 *Mod.* 42. adjudged good after Verdict;  
and said they would intend it Money lent. 2 *Keb.* 615. adjudged, and *vide* 1 *Rol. Rep.* 391. *Cro. Jac.*  
690. (d) So an *Indebitatus* lies for 40*l.* *pro diversis denar' summis ei præstitis ac pro diversis denariorum*  
*summis de ead'* the Plaintiff *recepti & habiti ac pro quadam pecunia summa*, by the Plaintiff, at the Re-  
quest of the Defendant, to *J. S. soluti*, without shewing in particular how much he was indebted  
for each Cause; for that is not material, he being indebted so much *in toto*. *Cro. Jac.* 245. *Yelv.* 175.  
1 *Brownl. Ent.* 71. (e) Where the Consideration is executed, it is only Inducement, and needs not  
be precisely alledged as to Time or Place. *Cro. Eliz.* 715.

If in an *Assumpsit* the Plaintiff declares, that whereas the Defendant  
had received 24*l.* of several Persons, to the Use of the (c) Plaintiff,  
in Consideration thereof the Defendant did assume and promise to pay,  
&c. this is a good Declaration, without (d) shewing of what Persons in  
particular he received the Money, (e) because the Consideration is exe-  
cuted, and not traversable.

*Cro. Car.* 116.  
*Holms* and  
*Savil*, ad-  
judged.  
*Hell.* 106,  
113. S. C.  
adjudged.  
*Poph.* 177.  
*Latch* 141.  
*Palm.* 442.  
*Yelv.* 70  
1 *Rol. Rep.*  
396. S. P.

If in an *Assumpsit* the Plaintiff declares *quod cum* there were several  
Reckonings and Accounts between the Plaintiff and Defendant; and  
at such a Day, &c. *insimul computaverunt* for all Debts, Reckonings and  
Demands; and the Defendant upon the said Account was found to be in  
Arrear the Sum of 20*l.* in Consideration whereof the Defendant pro-  
mised to pay, &c. this is a good Declaration, without shewing it was  
*pro mercimoniis*, or otherwise, wherefore he should have an Account;  
for an Account may be for divers Causes, and several Matters and  
Things may be included and comprized therein, which *in Pede compoti*  
are reduced to a Sum certain, and thereupon being indebted to the  
Plaintiff, it is sufficient to ground an Action.

3 *Mod.* 190.  
adjudged.  
3 *Keb.* 469.  
S. P. ad-  
judged.  
*All.* 5. ad-  
judged.  
*Vide Marb.*  
100.

If in a *Quantum meruit* for Meat, &c. the Plaintiff declares upon a  
Promise, to pay so much *Quantum rationalibiter valerent*, this is a good  
Declaration, though general; and though objected that it ought to have  
been *valebant*.

If in an *Assumpsit* the Plaintiff declares, that the Defendant in Consi-  
deration of, &c. *inter alia*, did assume to pay, &c. this is no good De-  
claration, because he ought to set forth the whole Promise, which is in-  
tire.

*H. b.* 88.

If in an *Assumpsit* the Plaintiff declares, that in Consideration the  
Plaintiff had promised to deliver a Cow to the Use of the Defendant,  
the Defendant did assume and promise, &c. this is a good Declaration,  
without

without (a) any Averment of the Delivery of the Cow, (b) because there is (c) Promise for Promise.

doth aver a Performance, the Defendant can take no Issue thereupon. *Cro. Eliz.* 543. And an ill Averment will not hurt. *1 Lev.* 88, 293. (b) Where there are mutual Promises, the Plaintiff need not aver a Performance of his Part. *Yelv.* 134. *1 Mod.* 621. *1 Rol. Rep.* 336. *1 Vent.* 41. *Hard.* 102, 103. *March* 75. *Cro. Eliz.* 703. *1 Lev.* 20, 293. *Cro. Eliz.* 137. *1 Leon.* 186. *1 Salk.* 29. (c) Both these Promises ought to be made at the same Time, else they will be *nuda Pacta*. *Hob.* 88. *Cro. Eliz.* 137. *1 Leon.* 186.

(a) And if in such Case the Plaintiff  
And an ill  
Where In-  
fancy, Co-  
verture, a  
Release, the  
Statute of  
the several

(G) What may be pleaded as a good Discharge and Performance of the Promise.

**A**N *Assumpsit* is an Action founded on a Contract, the Performance of which is a Fraud and Injury to the Plaintiff; and therefore the Defendant must shew that there was no Contract, or that the Contract was void and without Consideration, or that he hath performed it, and is therefore discharged.

Limitations, or more Money lost at Gaming than the Statute allows, are good Bars, where they must be pleaded, or may be given in Evidence.

If in a *Quantum meruit* for Medicines, the Defendant pleads that he had paid the Plaintiff (d) *tot & tantas denariorum summas*, as the Medicines were worth, without shewing what Sum in (e) certain he hath paid; this is no good Plea.

Plaintiff avers that he had laid out 27 s. and the Defendant pleads that he paid all Fees and Money laid out, without shewing what he had paid. *Rob. Ent.* 56. (e) Where the Defendant may plead generally, that the Plaintiff *exoneravit eum* of the said Promise. *Cro. Car.* 383. *2 Rol. Abr.* 408. pl. 1.

If in an *Assumpsit* the Plaintiff declares that the Defendant did assume and promise to pay to the Plaintiff so much Money, and also to carry away certain Wood before such a Day; the Defendant as to the Money cannot plead that he paid it, and as to the Carriage of the Wood *Assumpsit*; (f) for the Promise being (g) intire cannot be apportioned.

was awarded. (f) *1 Brownl. Ent.* 58, 59. In an *Assumpsit* to pay 24 s. per Hoghead for Ale, &c. the Plaintiff shews, *licet* 48 s. was due to him *secundum ratam Prædicti*, &c. and the Defendant *quoad* 24 s. *de, &c.* pleads *non Assumpsit*, and as to the Residue, a Tender, and thereupon Issue is joined; and *vide Thomp. Ent.* 66. *Rob. Ent.* 40. (g) The Defendant pleads the Promise was Conditional, and traverses that it was absolute, as the Plaintiff had declared. *Thomp. Ent.* 74. *Rob. Ent.* 97.

If the Plaintiff declares upon an *Indebitatus Assumpsit*, and upon a *Quantum meruit*, and the Defendant pleads, That after the said several Promises made, and before the Action brought, the Plaintiff and Defendant came to an Account concerning divers Sums of Money, and that the Defendant was found in Arrear to the Plaintiff 30 l. and thereupon, in Consideration that the Defendant promised to pay the said 30 l. the Plaintiff likewise promised to release and acquit the Defendant of all Demands, this is a good Plea; for by the Account the first Contract is merged.

there had been but one Debt between them, the Entry into an Account for that would not determine the Contract.

March 100.  
adjudged,  
and after a  
Verdict for  
the Plaintiff  
upon non As-  
sumpsit, a  
Repleader  
2 Mod. 43, 44.  
adjudged.  
Milward and  
Ingram,  
1 Mod. 205.  
S. C. adjudg-  
ed: But  
North, Chief  
Just. there  
said, That if

<sup>1</sup> *Rol. Abr.* 32. The Defendant cannot plead that he revoked his Promise; as if *A.* is  
<sup>2</sup> *Rol. Rep.* in Execution at the Suit of *B.* and *J. S.* desires *B.* to let him go at large,  
 19, 39. *S. P.* and that he will satisfy him; to which *B.* agrees, though *J. S.* before any  
 adjudged. Thing is done in Pursuance of this Promise and Agreement, comes to *B.*  
*Cro. Jac.* 485. and tells him, that he revokes his Promise, and that he will not stand to  
 S. C. adjudged. it; yet such Revocation cannot be pleaded in Bar to the Action.

<sup>3</sup> *Lev.* 244. So if in an *Assumpsit* the Plaintiff declares, that in Consideration the  
 adjudged between *How* Plaintiff would solicit a Business for the Defendant, which he had with  
 and *Beech*, *J. S.* & *finem adinde poneret*, the Defendant did assume, &c. and that he  
 upon a Writ had solicited and employed much Care and Pains, &c. but before he could  
 of Error in *finem inde Ponere*, the Defendant countermanded him, the Action lies;  
*Cam' Scacc'* though it was objected, that such Employment is always countermand-  
 and the first able; and if the Plaintiff had bestowed Pains, and in Part done the Thing  
 Judgment before the Countermand, he might have had a *Quantum meruit* for what  
 affirmed according to he had done, but not an *Assumpsit* for the Whole; yet it was resolved by  
 the Court, that if after Part done the Defendant countermands it, the  
 Plaintiff shall have an Action for the Whole, and upon the Trial the  
 Jury ought to give as much in Damages as the Business done deserves.

*Yelv.* 22. If *A.* being possessed of a Horse, lends him to *B.* and *B.* assumes and  
*Shelbur* and promises to re-deliver the Horse to *A.* by a Day, before which Day the  
*Scotford* ad- true Owner of the Horse *contra voluntatem B.* (*a*) takes him from *B.*  
 judged. this Matter, by reason of the precedent Property, is *quasi* an Eviction of  
<sup>2</sup> *Rol. Rep.* Like Point the Horse from the Possession of *B.* and shall (*b*) discharge *B.* of his  
*Dubitatur.* Promise.

(*a*) So if the  
 Horse dies. <sup>1</sup> *Jones* 179. (*b*) If one assumes to Purchase Lands at the best Price he can, the Pro-  
 mise to Purchase is absolute; but the Price must be as reasonable as he can. <sup>1</sup> *Lev.* 3. *per Twisden.*  
 But *per Foster*, Ch. Just. he is not bound to Purchase unless the Owner will Sell.

## Attachment.

*Lamb. Eiven.*  
*lib. 1. cap. 16.*

**A**N Attachment is a Process that issues at the Discretion of the  
 Judges of a Court of Record, against a Person for some Con-  
 tempt, for which he is to be committed, and may be awarded  
 by them upon a bare Suggestion, or on their own Knowledge,  
 without any Appeal, Indictment or Information; for though by the  
 Statute of *Magna Charta*, none are to be imprisoned *Sine Judicio Parium*  
*vide = Westm.* <sup>2.</sup> *cap. 3.* *vel per Legem Terræ*; yet this summary Method of Proceeding being ab-  
 solutely necessary to the Furtherance and Execution of Justice, seems to  
 have been long Practised, and is certainly now established as Part of the  
 Law of the Land.

As several Matters relating to this Head fall more properly under  
 others, I shall only in this Place consider,

- (A) In what Cases an Attachment is to be granted.  
 (B) How the Person against whom it is granted is to be  
 proceeded against, and how to be discharged.

## (A) In what Cases an Attachment is to be granted.

ALL Courts of Record have a Discretionary Power over their own Officers, and are to see that no Abuses be committed by them, which may bring Disgrace on the Courts themselves; therefore if a Sheriff or other Officer shall be guilty of a corrupt Practice in not serving a Writ; as if he refuse to do it unless paid an unreasonable Gratuity from the Plaintiff, or receive a Bribe from the Defendant, or give him Notice to remove his Person or Effects, in order to prevent the Service of any Writ; the Court which awarded it may punish such Offences in such Manner as shall seem proper by Attachment.

But if there be no palpable Corruption, nor extraordinary Circumstance of wilful Negligence or Obstinacy, the Judgment whereof is to be left to the Discretion of the Court; it seems not usual to proceed in this Manner, but to leave the Party to his ordinary Remedy against the Sheriff, either by Action, or by Rules to return the Writ, or by an *Alias* and *Pluries*, which if he have no Excuse for not executing, an Attachment goes of Course.

Also Sheriffs and other Officers are liable to an Attachment for an oppressive or illegal Practice in the Execution of a Writ; as using needless Force, Violence or Terror, treating Persons under an Arrest basely and inhumanly, extorting Money from them, &c. or making an Arrest without due Authority, as by Colour of a Blank (*a*) Warrant, filled up without the Privity or subsequent Agreement of the Sheriff.

278. But that there may be some special Circumstances which may induce the Court to excuse it, as that the Practice was so, and that it was done to prevent the Party's having Notice of the Arrest: 2 Hawk. P. C. 143.

Also an Attachment is grantable for a corrupt Practice, in not executing a Writ effectually; as if a Sheriff having levied a Debt on an Execution imbezils the Money.

Also an Attachment is grantable in Discretion for a false Return to a Writ, but this is not (*b*) usually done without some visible Corruption, or extraordinary Circumstances of Malice, Hardship or Oppression.

(a) For an Action on the Case lies against the Sheriff; vide Tit. Sheriff.

Attornies are liable to an Attachment, and have been punished in this Manner in numberless Instances; as for Prosecuting or Defending a Suit without Directions from the Party, for base and unfair Dealings towards their Clients, in the Way of Business; as for protracting Suits by little Shifts, demanding Money for Business never done, (*c*) detaining their Clients Writings, or their Money recovered and received by them, for barely attempting to (*d*) forge a Writ, or other Matter of Record, for giving (*e*) Directions to a Sheriff what Persons he shall return on a Pa- nel, or for endeavouring to impose on the Court, &c.

(c) But may detain Money or Writings till paid his just Fees. (d) Cro. Car. (e) Moor 882. pl. 1237.

Also all other Officers of Courts of Record are in like Manner punishable for disobeying the Commands of such Courts, or for executing them oppressively, or otherwise misdemeaning themselves in their Offices.

Vide 2 Hawk. P. C. 145. And how Jurors are punishable, vide Head of Juries.

2 Hawk. P.  
C. 151. *vide*  
Title Gaol  
and Gaoler.

Gaolers are punishable in this summary Way, for gross Misbehaviours in their Offices, by the Courts to which they more immediately belong; also by disobeying a *Habeas Corpus* issuing out of a Court which has Authority to award it, and by the Court of King's Bench, for using Prisoners barbarously and inhumanly.

1 Salk. 210.  
1 Keb. 484.  
Palm. 564.  
6 Mod. 90.  
*vide* Title  
Courts.

The Court of King's Bench, as it has a Superintendancy over all Inferior Courts, may grant an Attachment against the Judges of such Courts, for oppressive, unjust, or irregular Practice, contrary to the obvious Rules of Natural Justice; as for denying a Defendant a Copy of the Declaration, or going on to Trial without giving him Notice or Time to make his Defence, or for compelling him to give exorbitant Bail, or for taking unreasonable Distresses, or for taking Money for vitious Pleading, for Proceeding after a Prohibition, *Certiorari*, &c.

1 Salk. 84.

Attachments have been granted for speaking contemptuous Words concerning the Rules of the Court, and that in the first Instance, without any Rule made on the Party to shew Cause why such Attachments should not be granted, for it would be in vain to serve him with a Second Rule, who had despised the First.

1 Mod. 21.  
1 Salk. 71.

An Attachment is the proper Remedy for Disobedience of the Rules of Court; as of those made in Ejectment, Arbitrament, &c. So where a Defendant in Account, being adjudged to Account before Auditor, refuses to do it, unless they will allow Matter disallowed by the Court before, or where one refuses to pay Costs taxed by the Master, whose Taxation the Law looks upon as a Taxation by the Court.

1 Salk. 84.

But an Attachment is not usually granted for Disobedience of a Rule of *Nisi Prius*, unless it be first made a Rule of Court; nor for Disobedience of a Rule made by a Judge at his Chamber, unless it be entred; nor for Disobedience of any Rule without Personal Service.

2 Hawk. P.  
C. 154.

Also an Attachment is proper for Abuses of the Process of the Court; as for suing out Execution where there is no Judgment, bringing an Appeal for the Death of one known to be alive, making use of the Process of a Superior Court, as a Stale to bring a Defendant within the Jurisdiction of an Inferior one, and then dropping it, using such Process in a vexatious, oppressive, or unjust Manner, without Colour of serving any other End by it.

### (B) How the Person against Whom an Attachment is granted is to be proceeded against, and how discharged.

2 Hawk. P.  
C. 141.  
1 Salk. 84.  
6 Mod. 73.  
2 Jones 178.

Attachments are usually granted on a Rule to shew Cause, unless the Offence complained of be of a flagrant Nature, and positively sworn to; in which last Case the Party is ordered to attend, which he must do in Person, as must every one against whom an Attachment is granted; and if he shall appear to be apparently guilty, the Court in Discretion, on Consideration of the Nature of the Crime and other Circumstances, will either commit him immediately, in order to answer Interrogatories to be exhibited against him, concerning the Contempt complained of, or will suffer him to enter into a Recognizance to answer such Interrogatories; which if they be not exhibited within four Days, the Party may move to have the Recognizance discharged; otherwise he must answer them, though exhibited after the four Days; but in all Cases, if he fully answer them he shall be discharged as to the Attachment, and the Prosecutor shall be left to proceed against him for the Perjury, if he thinks fit; but

if he deny Part of the Contempts only, and confess other Part, he shall not be discharged as to those denied, but the Truth of them shall be examined, and such Punishment inflicted as from the Whole shall appear reasonable; and if his Answer be evasive as to any material Part, he shall be punished in the same Manner as if he had confessed it.

## Attorney.

**A**N Attorney is one set in the Place of another, and is either Publick, as an Attorney at Law, whose Warrant is *Talis ponit loco suo talem Attornatum*; or Private, who has Authority given him to act in the Place and Stead of him by whom he is delegated, in private Contracts and Agreements; which Authority must be by Deed, that it may appear that the Attorney has pursued his Commission. Of this all Persons are capable, and therefore may be executed by Monks, Infants, Feme Coverts, Persons attainted, outlawed, excommunicated, Villains, Aliens, &c. for this being only a naked Authority, the Execution of it can be attended with no Manner of Prejudice to the Persons under such Incapacities or Disabilities, or to any other Person, who by Law may claim any Interest of such disabled Persons after their Death.

But the Person (a) here treated of is an Attorney at Law, who is appointed to Prosecute and Defend for his Client, and is considered as an Officer belonging to the Courts of Justice; concerning whom there are several Statutes and Resolutions.

- (A) Of admitting Persons to act as Attornies, and the Qualifications necessary for such Persons.
- (B) Who may appear by Attorney, and in what Cases.
- (C) Of Retaining an Attorney, what shall be an Appearance, and therein of the Warrant of Attorney.
- (D) Of the Power of an Attorney, when appointed, and the Regularity of his Proceedings.
- (E) Of the Determination of his Power, and therein of dismissing or changing him.
- (F) Of his Fees and Disbursements, and the Remedy for the Recovery of them.
- (G) Of the Privileges which an Attorney has.
- (H) Of Offences and Misbehaviours for which he is punishable, and therein of the Form of the Proceedings against him.

(A) Of

(A) Of admitting Persons to act as Attornies, and the Qualifications necessary for such Persons.

*Vide 2 Inst.* 249. 377. **B**EFORE the Statute *Westm. 2. cap. 10.* all Attornies were made by Letters Patent under the Great Seal, commanding the Justices to admit the Person to be Attorney for such a one; since which there have been several (a) Statutes and Rules made for the better Regulation of When first of Attornies.

Record, *vide*

Statute 4 H. 4. cap. 18. and 1 *Roll. Rep.* 3. (a) 3 E. 1. cap. 41. which see explained 2 *Inst.* 249. 6 Ed. 1. cap. 8. Explained 2 *Inst.* 311. 13 E. 1. cap. 10. Explained 2 *Inst.* 377. 27 E. 1. 7 Rich. 2. 14. 3 H. 7. 1. 23 H. 8. cap. 3. 29 *Eliz. cap.* 5. 31 *Eliz. cap.* 10. Relating to Cases in which Persons may prosecute or defend by Attorney; by the 4 H. 4. cap. 18. are to be inrolled, and sworn to execute their Office truly; by the 1 H. 5. cap. 4. no Under-Sheriff to Practice as an Attorney. 33 H. 6. cap. 7. For restraining the Number of Attornies in *Norfolk, Suffolk, and Norwich*, *vide 2 Inst.* 250. 32 H. 8. cap. 4. 18 *Eliz. cap.* 14. 4 & 5 *Ann. cap.* 16. Relating to the Filing of Warrants of Attorney; by the 3 *Fac.* 1. cap. 7. are to sign Bills of Fees, and produce Tickets of Money given to Council, *vide postea* Letter (F). By the 4 & 5 *Will.* 3. Must enter common Bail for his Client, *vide Title Bail*. By the 13 *W.* 3. cap. 6. Must take the Oaths; by the 12 *Geo.* 1. cap. 29. acting as an Attorney after a Conviction for Forgery or Perjury, to be transported.

*Vide the Statute, and the same Clauses with respect to Solicitors Practising in Courts of Equity.*

By the 2 *Geo.* 2. it is enacted, “ That no Person from and after the First Day of *December*, 1730. who was not duly admitted as an Attorney, pursuant to the Directions of the Statute, shall be permitted to act as an Attorney, or to sue out any Writ or Process, or to commence, carry on, or defend any Action or Actions, or any Proceedings, either before or after Judgment obtained in the Name or Names of any other Person or Persons, in any of his Majesty’s Courts of Record, unless such Person shall have been bound, by Contract in Writing, to serve as a Clerk for and during the Space of five Years, to an Attorney duly and legally sworn and admitted; and unless such Person shall have continued in such Service during the said Term of five Years, and unless such Person shall be allowed of, admitted and inrolled by a Judge of the said Courts, and shall have taken the following Oath, *viz.* *I A. B. do swear, that I will truly and honestly demean my self in the Practice of an Attorney, according to the best of my Knowledge and Ability: And in Case any Person shall in his own Name, or in the Name of any other Person, sue out any Writ or Process, or commence, prosecute or defend any Action or Suit, or any Proceedings in any of the Courts of Law or Equity, as an Attorney or Solicitor, for, or in Expectation of any Gain, Fee or Reward, without being admitted and inrolled, every such Person for every such Offence, shall forfeit and pay 50 l. to the Use of such Person who shall prosecute him for the said Offence, and is hereby incapable to maintain any Action or Suit in any Court of Law or Equity, for any Fee, Reward or Disbursements, on Account of prosecuting, carrying on, or defending any such Action, Suit or Proceeding; and that no Attorney or Solicitor shall have more than two Clerks at a Time, except the Prothonotaries and Secondary of the King’s Bench, who may have three Clerks: Also a sworn Attorney suffering any to act in his Name, shall himself be disabled to act in any Court, and his Admittance in any Court shall from thenceforth cease and be void: Provided, That an Attorney or Solicitor sworn in any one Court, may by the Consent of an Attorney or Solicitor sworn in another Court, which Consent must appear in Writing, signed by the Attorney or Solicitor, in the Name of such Attorney sue any Writ, Process, or commence, carry on, prosecute*

“ prosecute or defend any Action or Actions, or any other Proceedings  
 “ in such Court, notwithstanding such Person is not sworn or admitted  
 “ to be an Attorney of such Court.

An Attorney sworn and admitted in any of the Courts at *Westminster*,<sup>1 Vent. 11.</sup>  
 may Practice in any Inferior Court, unless such Court by Charter or<sup>1 Sid. 410.</sup>  
 Prescription is restrained to a certain Number of Attornies, and has a<sup>1 Mod. 23.</sup>  
 Power to exclude all others.

Also if an Attorney of any Inferior Court is refused the Privilege of<sup>1 Lev. 75.</sup>  
 acting, or turned out by the Judge or Steward, a *Mandamus* will lie to<sup>1 Sid. 94.</sup>  
 restore him.<sup>1 Keb. 349.</sup>

*Raym. 14.*  
*vide Tit.*  
*Mandamus.*

(B) Who may appear by Attorney, and in  
 what Cases.

THE Statute of *Westm. 2. cap. 10.* gives to all Persons a Liberty of<sup>2 Inst. 249.</sup>  
 appearing by Attorney without any Letters Patent, which it seems<sup>Co. Lit. 128.</sup>  
 they were formerly obliged to take out, otherwise they were to appear<sup>8 Co. 58.</sup>  
 each Day in Court in their proper Person; for the Command of the Writ<sup>2 Mod. 83.</sup>  
 being to appear, was always intended to be in proper Person. Of Infants<sup>Of Infants</sup>  
 appearing in Person, by<sup>Person, by</sup>

Guardian, or Attorney, *vide* Head of Infants.

But in a (a) Capital Case the Party must always appear in Person,<sup>(a) 2 Hawk.</sup>  
 and cannot plead by Attorney; also in Criminal Offences, where an<sup>P. C. 273.</sup>  
 Act of Parliament requires that the Party should appear in Person;<sup>Vide 1 Rol.</sup>  
 so in (b) Appeal, or on an (c) Attachment.<sup>Rep. 190.</sup>

312. That the Appellant and Appellee must both appear in Person. 3 Mod. 268. 4 Mod. 99. 2 Jones  
 210. (c) 2 Hawk. P. C. 141. and *vide* Title Appeal.<sup>2 Bull. 299.</sup>  
<sup>(b) 3 Inst.</sup>

On an Indictment, Information or Action for any Crime whatsoever<sup>1 Lev. 146.</sup>  
 under the Degree of Capital, the Defendant may, by the Favour of the<sup>Kelw. 165.</sup>  
 Court, appear by Attorney; and this he may do as well before Plea<sup>Dyer 346.</sup>  
 pleaded, as in the Proceedings after, till Conviction.<sup>Cro. Jac. 462.</sup>

2 Hawk. P. C. 275. *March* 113. A Clerk in Court may confess an Indictment for his Client.<sup>3 Inst. 125.</sup>  
*Rep. 18.* 6 Mod.

By the 18 *Eliz. cap. 5. Part 1.* it is enacted, “ That every Informer  
 “ upon any Penal Statute, shall exhibit his Suit in proper Person, and  
 “ pursue the same only by himself, or by his Attorney in Court, and  
 “ that he shall not use any Deputy or Deputies at all.

By the 29 *Eliz. cap. 5. Part 21.* it is recited, “ That divers of her  
 “ Majesty’s Subjects dwelling in the remote Parts of the Realm, had  
 “ been many Times maliciously troubled upon Informations and Suits  
 “ exhibited in the Courts of the *King’s Bench, Common Pleas* and *Ex-*  
 “ *chequer*, upon Penal Statutes, and had been drawn up upon Procefs  
 “ out of the Countries where they dwell, and driven to attend and put  
 “ in Bail, to their great Trouble and Undoing, and for Reformation  
 “ thereof it is enacted, That if any Person or Persons shall be sued or  
 “ informed against upon any Penal Law, in any the said Courts, where  
 “ such Person or Persons areailable by Law, or where by the Leave or  
 “ Favour of the Court such Person or Persons may appear by Attorney;  
 “ in every such Case the Person or Persons so to be impleaded or sued,  
 “ shall and may, at the Day and Time contained in the first Procefs  
 “ served for his Appearance, appear by Attorney of the same Court

B b b

“ where

“ where the Proceſs is returnable, to answer and defend the ſame, and  
 “ not be urged to Perſonal Appearance, or to put in Bail for the an-  
 “ ſwering ſuch Suits.

*Cro. Jac.* 616. If one be outlawed upon an Indictment for not repairing a Bridge, and thereupon admitted to bring a Writ of Error, he (a) muſt appear, *Sir William Read's Caſe.* and in Perſon aſſign his Error; ſo adjudged and agreed by all the Clerks (a) But if an of the Crown-Office in *Sir William Read's Caſe*; and though the Court Adminiſtrator brings Error upon greatly pitied *Sir William*, becauſe he was 90 Years of Age, and very an Outlawry inſirm, and had kept his Chamber for a Year and more, yet they held that it could not be done by Attorney, being againſt the Courſe of the of his Inte- Court, and doubted whether the King's Privy Seal would help him; and ſtate for Murder, he he was thereupon brought from his Houſe 10 Miles from *London*, in an may appear Horſe-Litter, upon Mens Shoulders, to the Bar, and came into Court by Attorney; and aſſigned his Error, and put in Bail to Proſecute. for though the Parry himſelf muſt have appeared in Perſon, that he might have ſtood *Rectus in Curia*, and answered the Matter of Fact; yet in this *Caſe*, that Reaſon fails. *March* 113. *vide* the Statute 7 *H.* 4. *cap.* 13. By which a Judge may examine into the Inability of a Perſon outlawed, to appear, and the Court diſpenſe with a Perſonal Appearance; and *Cro. Jac.* 462. where on Affidavit of Sickneſs, the Court allowed of an Appearance by Attorney; *vide* the 4 & 5 *W. & M.* *cap.* 18. That Perſons outlawed may appear by Attorney, except for Treason or Felony, and reverſe the ſame without Bail. *Vide* Title *Outlawry*.

2 *Sand.* 213. If Husband and Wife are ſued, the Husband is to make an Attorney *Bridg.* 73. for her. *Title Baron* and *Feme.* *Vide* 6 *Mod.* 86.

*Co. Lit.* 135.b. If an Ideot doth ſue or defend he cannot appear by Guardian, *Pro-* *chein Amie* or Attorney, but muſt appear in proper Perſon; but other- *2 Inſt.* 390. ways of him who becomes *Non compos mentis*, for he ſhall appear by *4 Co.* 124. Guardian if within Age, or by Attorney if of full Age. *Palm.* 520. *2 Sand.* 335. *Vide* Title *Ideots and Lunaticks*.

6 *Mod.* 16. In an Attachment of Privilege by the Marſhal, he ſhall have no Attor- ney becauſe preſent in Court.

### (C) Of Retaining an Attorney, What ſhall be an Appearance, and therein of the Warrant of Attorney.

*1 Salk.* 87. AN Attorney is not compellable to appear for any one, unleſs he *An Attorney,* take his Fee, or Back the Warrant; after which the Court will *on Sight of a* compel him to appear. *Writ againſt* Husband and Wife, undertook to Appear for them, but after would not do it; a Declaration was delivered, which he received *de bene eſſe*, and Judgment was entred for want of a Plea; and the Court ſet it aſide for Irregularity, but ordered the Attorney to be laid by the Heels; and it was ſaid, That if an Attorney undertakes to appear, and after will not do it, upon Summons before a Judge he ſhall be compelled to do it. 6 *Mod.* 86.

6 *Mod.* 42. If before a Writ be taken out, an Attorney promiſe to appear to it, *per Holt. Ch.* and after it is taken out and ſhewed to him, he ought to appear, but that *Juſt. Vide* is no actual Appearance; but if ſuch Undertaking be after Writ is ac- *Comb.* 299. tually taken out, it is an Appearance.

Where an Attorney takes upon him to appear, the Court looks no farther, but proceeds as if the Attorney had sufficient Authority, and leaves the Party to his Action against him.

1 Salk. 86.  
per Holt said  
to be the  
Practice of  
the Court.

If an Attorney appears, and Judgment is entred against his Client, the Court will not set aside the Judgment, though the Attorney had no Warrant, if the Attorney be able and responsible, for the Judgment is regular and the Plaintiff is not to suffer when in no Default; but if the Attorney be not responsible or suspicious, the Judgment will be set aside, for otherwise the Defendant has no Remedy, and any one may be undone by that Means.

1 Salk. 88.  
6 Mod. 16.  
S. P. That  
an Action  
will lie a-  
gainst an At-  
torney for

appearing without a Warrant. 5 Mod. 205; And for that Reason an Attachment denied. *infra* Letter (H). Comb. 2. vide

A Warrant of Attorney may be entred at any Time before Judgment, or before a Writ of Error brought.

1 Rol. Abr.  
290. For this  
vide 18 Eliz.

cap. 14. That after Verdict in any Court of Record Judgment shall not be stayed or reversed for want of a Warrant of Attorney; and *vide* 32 H. 8. 30. and 4 & 5 Ann. That the Plaintiff's Attorney shall file his Warrant the same Term he declares, and the Defendant's Attorney the same Term he appears, on Pain of forfeiting ten Pounds, and also suffering such Imprisonment, as by the Discretion of the Justices of the Court, where any such Default shall fortune to be, shall be thought convenient. *Vide* 1 Rol. Rep. 186. March 122. Goldf. 91. 1 Brownl. 46. Hetley 59. 1 Bulst. 21. Cro. Jac. 277. *Vide* Title Error.

No Man, though by consent of Parties, can be Attorney of both Sides, for the Consent of Parties cannot change the Law.

Farest. 47.  
per Curiam.

If the Attorney in the Original Action, acts as Attorney in the Proceedings against the Bail without any (a) new Warrant, this is Error; for though any Person may take out a *Scire Facias*, yet upon the Return a Plea commences, and a new Warrant of Attorney ought to have been entred, because this is a new Cause and different Record.

1 Salk. 89.  
Burr and At-  
wood. (a) If  
the Tenant  
makes an  
Attorney in  
Banco, and

after Conuzance of this Plea is demanded by a Franchise, and granted, the Attorney shall continue Attorney for him in the Franchise also, without other making, and he is his Attorney there *in Facto*, without other Removal; for the Conuzance is granted to hold Plea as the Justices ought if this had not been granted. 21 E. 3. 45. b. 61. *21 Aff. pl. 17. Fitz. Tit. Resceit 133. 1 Rol. Abr. 290. S. C.* So if after Conuzance granted a Re-summons be sued for the Failer of Right there in the Court where this was granted, he continues Attorney for him there also, upon the first Retainer. 1 Rol. Abr. 290. If Judgment be given *in Banco* against the Demandant, and this is reversed in B. R. for Error in the Process; the Attorney which the Tenant had in the first Plea, shall continue his Attorney now in B. R. to answer to the Original. 1 Rol. Abr. 290.

In Debt on a Bail-Bond, the Principal gave a Warrant of Attorney to appear for himself, and likewise ordered the same Attorney to appear for the Bail, who were his Neighbours; the Attorney appeared accordingly, and for want of a Plea Judgment was had against the Principal and Bail, but upon Motion set aside as to the Bail; the Principal's Order not being a Warrant to appear for more than himself, but it being by Ignorance of the Law, and not a wilful Act, the Judges discharged the Attorney as to any Contempt.

2 Show. Reps  
161.  
1 Keb. 593.

If there be a Mistake in the Attorney's Name, it may be amended by the Warrant of Attorney, for the Warrant of Attorney being precedent, will amend the Roll, and the Court will take Notice that it is the same that appeared.

Moor 711.  
But if the  
right Name  
be no where  
entred, the

Court cannot amend. 3 Bulst. 202. *Vide* 1 Salk. 88.

(D) Of the Power of an Attorney When appointed, and the Regularity of his Proceedings.

THE Authority of an Attorney, when appointed, continues until Judgment, and for a Year and a Day afterwards to sue out Execution, and for a longer Time if they continue Execution; but if not, the Judgment is supposed to be satisfied, and to make it appear otherwise, the Plaintiff must (a) again come into Court, which he either does by (a) And then *Scire Facias*, or an Action of Debt on the Judgment. a new Authority is necessary. 1 Salk. 86.

Comb. 40.  
1 Rol. Abr. 378.  
1 Rol. Rep. 366.  
Style 426.

By the 2 Geo. 2. it is enacted, " That every Writ and Process for arresting the Body, and every Writ of Execution, or some Label annexed to such Writ or Process, and every Warrant that shall be made out upon any such Writ, Process or Execution, shall before the Service or Execution thereof, be subscribed or indorsed with the Name of the Attorney, Clerk in Court, or Solicitor, written in a common legible Hand, by whom such Writ, Process, Execution or Warrant respectively shall be sued forth; and where such Attorney, Clerk in Court, or Solicitor, shall not be the Person immediately retained or employed by the Plaintiff in the Action or Suit, then also with the Name of the Attorney or Solicitor so immediately retained or employed, to be subscribed or indorsed, and written in like Manner; and that every Copy of any Writ or Process that shall be served upon any Defendant, shall before the Service thereof be in like Manner subscribed or indorsed with the Name of the Attorney or Solicitor who shall be immediately retained or employed by the Plaintiff in such Writ or Process.

For this vide 1 Salk. 402.  
6 Mod. 85,  
163.  
5 Mod. 144.  
Comb. 76,  
224.

All Warrants for confessing Judgments taken by any Sheriff or Bailiff from any Person in his or their Custody by Arrest, if not executed in the Presence of some sworn Attorney of either Court, and his Name set or subscribed thereto as a Witness, shall not be good or of any Force, and upon Oath made that the same was done, the same shall be set aside, and the Sheriff or Officer may be punished for so doing; and if Judgment be entred thereon, the same on Motion will be vacated and set aside; and if Execution thereon be executed, the Party will have Restitution awarded him.

\* Salk. 86. In *Assumpsit* the Defendant pleaded *non Assumpsit infra sex annos*, the Plaintiff replied; and for want of the Defendant's joining Issue in due Time, the Plaintiff's Attorney signed Judgment; but afterwards consented to accept the Joinder in Issue; but upon Motion to the Court to compel him to accept it, it was opposed, because the Plea was a hard Plea, and the Client had Notice of the Advantage, and ordered the Attorney to insist upon it; the Court said, That since it was a hard Plea they would not have compelled him, if he had not consented to waive the Advantage, but now they would hold him to his Consent; and for the Client, he was (b) bound by the Consent of his Attorney, and they could take no Notice of him.

(b) That the Attorney's consent to

stand to an Arbitration will bind the Client, vide *Cartl.* 412. 1 Salk. 70.

In Debt the Plaintiff by Attorney cannot enter a *Retraxit*, because that *S Co* 58. is a perpetual Bar, and in Manner of a Release. *Cro Jac.* 211. *Fenk* 283.

In Trespass in C. B. there was a Verdict for the Plaintiff, and his Attorney entered a *Remittit Damna* as to Part, and Judgment for the Rest; and it was held, that the Attorney, by his being constituted Attorney, may remit Damages, and that a *Remittitur* need not be by the Plaintiff *in Propria Persona*, as a *Retraxit* mult. 1 *Salk.* 89. *Lamb* and *Williams*.

If a Client desires his Attorney to put in a Plea, which the Attorney knows to be false, in such Case he may plead *quod non fuit veraciter Informatus*, and thereby he discharges his Duty. *Fenk.* 52. Where two brought a Writ of Error, and the Attorney for one of the Parties assigned Errors, to which the Defendant took Issue, and the other would plead in Abatement. *Vide 6 Mod.* 40. and *Tit. Error.*

(E) Of the Determination of his Power, and therein of dismissing or changing him.

BY an Order of the Courts it is provided, That no Person without Rule of Court, Order of the Judge or Secondary, and Notice to the adverse Party or his Attorney, shall change or shift his Attorney; or if done by such Order as aforesaid, such Attorney newly coming in, is to take Notice at his Peril, of the Rules in the Cause, whereunto the former Attorney was liable to take Notice, and shall also pay such first Attorney, upon Demand, all such Fees as the Secondary shall tax to be due to him. *Vide Faresb.* 50.

That where the Attorney for the Plaintiff or Defendant dies pending the Suit, and the Party whose Attorney is dead, will not retain another Attorney to manage his Cause, the Attorney against him may proceed, and is not bound to hinder his Client's Cause. *Vide Fenk.* 179. *Style's Pract.* Reg. 13.

If *A.* gives a Warrant of Attorney to one to confess Judgment in Debt to *B.* by *non sum Informatus* at Eight in the Morning, and at Ten the same Day *A.* dies before the Judgment is signed by the Secondary, yet the Judgment is regular. *Raym.* 18.

A Warrant of Attorney to confess a Judgment is not revocable, and the Court will give Leave to enter up the Judgment though the Party does revoke it, but it is determinable by the Party's Death; but if the Party dies in the Vacation, the Attorney may enter up the Judgment that Vacation, as of the precedent Term, and it is a Judgment at the Common Law, as of the precedent Term; though it be not so upon the Statute of *Frauds* in respect of Purchasers, but from the Signing, also the Attorney must bring in the Roll before the Effoin of the subsequent Term, otherwise the Court will not admit it to be filed. *Salk.* 87. *Vide Raym.* 59. *Latch* 8.

## (F) Of his Fees and Disbursements, and the Remedy for the Recovery of them.

*Vide Cro. Car. 159.* BY the 3 Jac. 1. cap. 7. it is enacted, " That no Attorney, Solicitor, or Servant to any, shall be allowed from his Client or Master, of or for any Fee given to any Serjeant or Counsellor at Law; or of or for any Sum or Sums of Money given for Copies, to (a) any Clerk or Clerks, or Officers in any Court or Courts of Record at (b) *Westminster*, unless he have a Ticket subscribed with the Hand and Name of the same Serjeant or Counsellor, Clerk or Clerks, or Officers aforesaid, testifying how much he hath received for his Fee, or given or paid for Copies, and at what Time, and how often; and that all Attornies and Solicitors shall (c) give a true Bill unto their Masters or Clients, or their Assigns, of all other Charges concerning the Suits which they have for them subscribed with his own Hand and Name, before such Time as they or any of them shall charge their Clients with any the same Fee or Charges.

*2d.* Upon an Executory Consideration to prosecute and defend Suits, and alledging a Performance. *3d.* Upon a general *Infinimul Computasset.* *Carth.* 57. (b) Therefore does not extend to Matters transacted in, or where Part of the Business was done in an Inferior Court, and Part in *Westminster.* *Carth.* 147. (c) *Vide Raym.* 245. and 3 *Keb.* 514, 118. Where this Clause of the Statute was pleaded, and held a good Plea; but where the Executor of an Attorney sued for Fees, the Court held that it was not necessary to have the Bill signed. *Comb.* 348. It may be given in Evidence upon *non Assumpsit* pleaded to an Action brought for Fees. 1 *Show.* Rep. 338.

1 *Salk.* 89.

The Executor of an Attorney brought an Action for Fees and Law Business done by his Testator; Defendant moved to refer the Plaintiff's Demand to the Master, but denied, because all the Business was done in another Court; otherwise had the Business been done in this Court, or partly in this; and besides, the Plaintiff was an Executor.

By the 2 Geo. 2. it is enacted, " That no Attorney or Solicitor shall commence or maintain any Action or Suit for the Recovery of any Fees, Charges or Disbursements at Law or in Equity, until the Expiration of one Month or more after such Attorney or Solicitor respectively shall have delivered unto the Party or Parties to be charged therewith, or left for him, her, or them, at his, her or their Dwelling-house, or last Place of Abode, a Bill of such Fees, Charges and Disbursements, written in a common legible Hand, and in the *English* Tongue (except Law-Terms and Names of Writs) and in Words at Length, (except Times and Sums) which Bill shall be subscribed with the proper Hand of such Attorney or Solicitor respectively; and upon Application of the Party or Parties chargeable by such Bill, or of any other Person in that Behalf authorized, unto the said Lord High Chancellor, or the Master of the Rolls, or unto any of the Courts, or unto a Judge or Baron of any of the said Courts respectively, in which the Business contained in such Bill, or the greatest Part thereof in Account or Value, shall have been transacted; and upon the Submission of the said Party or Parties, or such other Person authorized as aforesaid, to pay the whole Sum, that upon Taxation of the said Bill shall appear to be due to the said Attorney or Solicitor respectively, it shall and may be lawful for the said Lord High Chancellor, the said Master of the Rolls, or for any of the Courts, or for any Judge or Baron of any of the said Courts respectively, and they are hereby required, to refer the said Bill, and the said Attorney or Solicitor's Demand thereupon, (although no Action or Suit shall then be depending in such Court touching the same) to be taxed and settled by the pro-

per

“ per Officer of such Court, without any Money being brought into the  
 “ said Court for that Purpose; and if the said Attorney or Solicitor, or  
 “ the Party or Parties chargeable by such Bill respectively, having due  
 “ Notice, shall refuse or neglect to attend such Taxation, the said Of-  
 “ ficer may proceed to tax the said Bill *ex parte* (pending which Refe-  
 “ rence and Taxation, no Action shall be commenced or prosecuted  
 “ touching the said Demand) and upon the Taxation and Settlement of  
 “ such Bill and Demand, the said Party or Parties shall forthwith pay to  
 “ the said Attorney or Solicitor respectively, or to any Person by him  
 “ authorized to receive the same, that shall be present at the said Tax-  
 “ ation, or otherwise unto such other Person or Persons, or in such  
 “ Manner as the respective Court aforesaid shall direct, the whole Sum  
 “ that shall be found to be or remain due thereon; which Payment shall  
 “ be a full Discharge of the said Bill and Demand; and in Default  
 “ thereof, the said Party or Parties shall be liable to an Attachment or  
 “ Process of Contempt, or to such other Proceedings at the Election of  
 “ the said Attorney or Solicitor, as such Party or Parties was or were be-  
 “ fore liable unto; and if upon the said Taxation and Settlement it shall  
 “ be found, that such Attorney or Solicitor shall happen to have been  
 “ over-paid, then in such Case the said Attorney or Solicitor respectively,  
 “ shall forthwith refund and pay unto the Party or Parties intitled there-  
 “ unto, or to any Person by him, her, or them authorized to receive  
 “ the same, if present at the Settling thereof, or otherwise unto such  
 “ other Person or Persons, or in such Manner as the respective Court  
 “ aforesaid shall direct, all such Money as the said Officer shall certify  
 “ to have been so over-paid; and in Default thereof, the said Attorney or  
 “ Solicitor respectively, shall in like Manner be liable to an Attachment  
 “ or Process of Contempt, or to such other Proceedings at the Election  
 “ of the said Party or Parties, as he would have been subject unto if this  
 “ Act had not been made; and the said respective Courts are hereby au-  
 “ thorized to award the Costs of such Taxations to be paid by the Par-  
 “ ties, according to the Event of the Taxation of the Bill (that is to say)  
 “ if the Bill taxed be less by a Sixth Part than the Bill delivered, then  
 “ the Attorney or Solicitor is to pay the Costs of the Taxation; but if it  
 “ shall not be less, the Court in their Discretion shall charge the At-  
 “ torney or Client, in regard to the Reasonableness or Unreasonableness  
 “ of such Bills.

### (G) Of the Privileges Which an Attorney has.

Attornies have (a) Privilege not to be sued in any other Courts ex-  
 cept those in which they are sworn and admitted, because of the Prejudice that may accrue to the Business of those Courts in which their Attendance is required; neither are they to be held to Special Bail, because they are obliged to attend, and therefore are presumed to be always amenable; also as Officers of the Court they are intitled to the Process of Attachment, and may sue by Attachment of Privilege.

King's Suit. 2 *Roll. Abr.* 274. *Bro. Superfedas* 1. 9 *H. 6.* 44. nor unless there be the same Remedy in his own Court; therefore shall not have it when Money is attached in his Hands by Foreign Attachment in the Sheriff's Court in London. 1 *Sand.* 67. 2 *Keb.* 346. *Vide Comb.* 427. Nor in an Action Real against an Attorney of the King's Bench. 1 *Sand.* 67. Nor Appeal against an Attorney of the Common Pleas. 1 *Sand.* 67. Nor when he sues, or is sued *in autre droit*, as Executor or Administrator. *Hib.* 177. 1 *Salk.* 2. Nor when one Attorney sues another. 2 *Mod.* 298. 2 *Roll. Abr.* 274. Nor when he joins or is joined in the same Action with others. 1 *Vent.* 298. *Dyer* 277. *Godb.* 10. 2 *Roll. Abr.* 275.

Also

*Cro. Car.* 283, 389.  
*1 Vent.* 16, 29.  
*N. y.* 112.  
*Mar. b.* 30.  
*2 Keb.* 477, 508.  
*1 Lev.* 265.  
*1 Mod.* 13.  
*Raym.* 179.

Also if an Attorney of any of the Courts of *Westminster-Hall* be chosen Constable, he may have a Writ of Privilege for his Discharge, for his Attendance being necessary in those Courts, it is apparent that he cannot execute any Inferior Office in Person; and this Privilege he shall have, not only where there is no Special Custom concerning the Election of Constables, but also where they are chosen by a particular Custom in respect of their Estates, or otherwise, for that no such Custom shall be intended to be more antient than the Usages of those Courts, and therefore shall give Way to them.

### (H) Of Offences and Misbehaviours for which he is punishable, and therein of the Form of the Proceedings against him.

*Style* 426.  
*Cro. Car.* 52, 74.  
*6 Mod.* 16, 137.  
*4 Mod.* 367.

Attornies are Officers of the Court, and liable to be punished in a summary Way, either by Attachment, or having their Names struck out of the Roll of Attornies, for any ill Practice attended with Fraud and Corruption, and committed against the obvious Rules of Justice and common Honesty: But the Court will not easily be prevailed on to proceed in this Manner, if it appears that the Matter complained of was rather owing to Neglect or Accident, than Design, or if the Party injured has other Remedy provided by Act of Parliament, or Action at Law.

But if an (a) Attorney takes upon him to prosecute or defend a Suit for another, without any manner of Directions from him, the Court (a) Also a will grant an Attachment against him.

Person taking upon himself to prosecute or defend any Action, who is no Attorney, is liable to be punished in this Manner, whether he had any Directions or not. *2 Hawk. P. C.* 144. In strictness, is liable to be punished unless he record his Authority or Warrant of Attorney in Time. *2 Hawk. P. C.* 144.

*Rastal* 93.  
*pl.* 3.  
*2 Hawk. P. C.* 144.

Attornies are also punishable for base and unfair Dealings towards their Clients, in the way of Business, as for protracting Suits by little Shifts and Devices, and putting the Parties to unnecessary Expences in order to raise their Bills, or demanding Fees for Business that never was done, or for (c) refusing to deliver up to their Clients Writings, with which they had been intrusted in the way of Business, or Money which has been received and received by them to their Clients Use, and for other such like gross and palpable Abuses.

(c) But the Court will seldom grant an Attachment for the Detainer of such Writings or Money, without first making a Rule on the Attorney, to deliver them to the Party; also it will justify an Attorney's detaining such Writings or Money for his Security, till he be paid all his just Fees; nor will it ever interpose in this Manner, as to any Writings or Money received by an Attorney on any other Account, except only in his Way of Business as an Attorney, but will leave the Party to his ordinary Remedy by Action. *1 Salk.* 87.

*Cro. Car.* 74.  
*Dyer* 241.  
*pl.* 50. 244.  
*pl.* 58. *Fitz.*  
*Attachment*  
 3, 7.  
*16 E.* 4. 5.  
*Bro. Privilege*  
 43.  
*Moor* 882.

Attornies are punishable for disobeying the Rules of Court, of which they have Notice, either expressly or impliedly; also for forging a Writ, or any other Matter of Record, or but attempting to do it, or for taking out a *Capias* which has no Original to warrant it, or for receiving Money of a Client for suing out an Original, and also for the Fine due thereon to the King, where in Truth no Original was sued out, nor any Fine paid to the King, or for endeavouring to impose upon the Court, as by causing an Action to be brought against one in it, by Collusion, without any just Ground, in order thereby to intitle the Party to the Privilege of the Court, and

and afterwards, upon the Examination of the Matter in Court, giving a false Account of it, or for giving Directions to a Sheriff concerning what Person he should return on a Panel.

## Audita Querela.

**A**N *Audita Querela* is a Writ to be relieved against an unjust Judgment, or Execution, by setting them aside for some Injustice of the Party that obtained them, which could not be pleaded in Bar to the Action; for if it could be pleaded it was the Party's own Fault, and therefore he shall not be relieved, that Proceedings may not be endless.

(A) Who may be relieved by *Audita Querela*, and against whom.

(B) In what Cases an *Audita Querela* will lie.

(A) Who may be relieved by *Audita Querela*, and against whom.

**I**F an Infant acknowledges a Recognizance, Statute-Merchant or Staple, or Recognizance in Nature of a Statute-Staple, he cannot avoid this without an *Audita Querela* brought before his full Age, because his Non-age ought to be tried by Inspection.

10 Co. 43. S. P. adjudged. *Ncy* 16. *Yelv.* 88. *Cro. Fac.* 59. 2 *Rol. Abr.* 57. 2 *Bullst.* 320. *Vide Reg.* 149. *F. N. B.* 105. That an Infant may bring an *Audita Querela* to avoid a Statute for his Non-age, although it be not certified or returned in any Court. 1 *And.* 228. And there said, that the common Practice was so, else the Conuzor might be of Age before the Conuzee would procure it to be certified. *Vide* 3 *Bullst.* 307. *vide Title Infant.*

If *A.* being within Age becomes Bail for *B.* and after 2 *Scire Fa.* and *Yelv.* 155. *Nilil* returned, Judgment is given against *A.* &c. he may have an *Audita Querela* and avoid the Recognizance, and so the Judgment thereupon of Consequence shall be avoided.

Infant was Bail and taken in Execution, and he brought an *Audita Querela*, and moved to be inspected; and the Court, as a Matter Discretionary, refused to admit him to Bail till he corroborated his Allegation by the Oaths of Witnesses, and a Copy of the Register where he was born, was produced, and then he was discharged; but if he had brought his *Audita Querela* before he was taken in Execution, he must have a *Superfedeas* of Course. *Carth.* 278, 279.

But if *A.* being within Age enters into a Bond to *B.* who procures *C.* without any Warrant, to appear for *A.* and confesses a Judgment thereupon,

D d d

upon,

2 *Inst.* 673.  
*Dyer* 232.  
S. P.

*Moor* 75. S. P.  
adjudged.

*Vide Reg.* 149.

*Cro. Fac.* 646.

S. P.

*Vide Co. Ent.*

87, 88.

Where an

*Cro. Fac.* 694.

*vide infra*

Letter (B).

upon, yet *A.* shall not have an *Audita Querela*, but he must take his Remedy by Action of Disceit against the Attorney.

1 *Rol. Abr.*

305.

*Cro. Fac.* 85.

*Vide* 1 *Sid.* 55.

If Tenant in Tail acknowledges a Statute, and dies, the Conuzee sues Execution against the Heir, he may avoid it by Assise, without being put to his *Audita Querela*.  
But the Issue at his Election may have an *Audita Querela*, if he will. 1 *Rol. Abr.* 305. *Cro. Fac.* 85. That this is only an Equitable Action, and may be brought by a Reversioner, or him that has but *Interesse Terminii*, or might have been by *Cestui que use* before the Statute. *March* 71.

1 *Rol. Abr.*

304

*Cro. Fac.* 424.

So if a Disseisor acknowledges a Statute, and the Disseisee enters, the Conuzee extends the Land, the Disseisee is not put to his *Audita Querela* to avoid the Extent, because there is not the Appearance of Justice in this Extent; the Conuzor having only a tortious and unlawful Seisin of the Land, and consequently no Power to charge it.

*Raym.* 19.

1 *Sid.* 54.

1 *Keb.* 112,

141.

1 *Lev.* 41,

42. *S. C.*

between Day

and Guilford. *Vide infra* Letter (C).

But if *A.* be Tenant for Life, Remainder to *B.* his Son in Tail, *A.* enters into a Recognizance and dies, *C.* brings a *Scire Facias*, and *B.* is returned Heir and Tertenant, and warned, but makes Default; he can have no *Audita Querela* to avoid this Execution, because he had a Day given him in Court to set aside the Recognizance, and it was his Folly not to appear when warned.

48 *E.* 3. 12. *b.*

1 *Rol. Abr.*

312.

If a Statute be acknowledged to two, of which one is an Infant, and they make a Defeazance, and after sue Execution contrary to it, an *Audita Querela* shall be brought against both; for it does not appear within the Deed that he is an Infant; also the Deed of an Infant is only voidable, and peradventure he will affirm it.

48 *E.* 3. 12.

1 *Rol. Abr.*

312.

If a Statute be made to Baron and Feme, and they make a Defeazance, and sue Execution contrary to it, the *Audita Querela* shall be brought against both, although the Defeazance be void as to the Wife; for this Action is in Lieu of an Answer of the Execution, which is sued by both; and this is all one as if the Baron alone had made the Defeazance, which would have been a sufficient Discharge.

11 *E.* 4. 8. *b.*

1 *Rol. Abr.*

312.

If a Statute be acknowledged to a Feme Sole and *J. S.* and after the Feme takes Husband, and *J. S.* Releases, and after Execution is sued, the *Audita Querela* may be brought against the Baron and Feme and *J. S.*

21 *E.* 3. 13. *b.*

*Co. Ent.* 89.

1 *Rol. Abr.*

312.

If two Executors sue Execution for Damages recovered by the Testator, where one hath released, an *Audita Querela* lies against both.  
That no *Audita Querela* lies against the King. *Noy* 26. 2 *Bull.* 325. *Jenk.* 129.

## (B) In what Cases an Audita Querela Will lie.

*Cro. Eliz.* 40.

1 *And.* 133.

1 *Rol. Abr.*

315.

*Co. Lit.* 265,

291.

IF a Conuzee of a Statute releases to the Tertenant all Right, Interest and Demands, together with all Suits and Executions, and afterwards sues Execution, the Tertenant shall have an *Audita Querela* to set aside this Execution.  
But it may be demanded, How a Statute, which has the Force and Solemnity of a Judgment, can be avoided by an Act of less Notoriety than it self; as a Release, which is an Act *in Pais*, must be confessed to be; which overthrows the established Rule *unumquodque solvi eo Ligamine quo Ligatur*. The Answer to this is, that notwithstanding the Release, &c. from the Conuzee, the Statute still continues in Force; but the Law with Reason construing all Mens Deeds most strongly against themselves, by this Act precludes the Conuzee from Execution; but this must be by bringing an *Audita Querela*; for without this, nothing appears to the Court destructive of the Statute, that the Words of the Release must be comprehensive enough. *Vide Cro. Eliz.* 551. and the Authorities *supra*.

So in Trespafs or other Action, if it be found for the Plaintiff by *Nisi* 1 Rol. Abr. 397. Noy 26. Cro. Jac 646. Hob. 102. Yelv. 125. *Prius*, and after, before the Day in Bank, the Plaintiff releases to the Defendant, and after Judgment is given for the Plaintiff, the Defendant shall have an *Audita Querela* upon this Matter; because he could not plead the Release at the Day in Bank.

been in the Case of the King, the Defendant at the Day in Bank might have pleaded it; because an *Audita Querela* lies against the King. *Noy 26.* If there be Judgment against the Defendant for Debt and Damages, and before Execution the Money is paid to the Plaintiff, who thereupon releases the Defendant, and afterwards takes him in Execution within the Year, yet he shall not have an Action for this Vexation, but must bring an *Audita Querela.* 4 Mod. 14.

If a Conuzee of a Statute gives a Deed of Defeasance to the Conuzor, and afterwards sues Execution, contrary to the Form of the Defeasance, the Conuzor may have an *Audita Querela*, because the Defeasance precludes the Execution, if the Terms or Condition of it be performed by the Conuzor; and the Conuzor may have the *Audita Querela*, though the Condition be not performed according to the Defeasance, if Execution was sued before the Condition broken, because the Conuzee extended before his Time; and therefore the Execution being unjustly sued, must consequently be an Injury to the Conuzor. 1 Rol. Abr. 307. F. N. B. 105. Vide 1 Danv. Abr. 633.

In *Audita Querela*, the Case was this; The Conuzee gave a Defeasance, that if he sued Execution of the Lands the Conuzor had in *Kent*, the Statute should be void; the Conuzee, contrary to his Defeasance extended the Land in that County; and it was adjudged this Writ well lay to avoid the Execution and vacate the Statute; for the Defeasance was no way repugnant to the Statute, because the Conuzee might still extend the Lands of the Conuzor in any other County, and take his Body and Goods. Moor pl. 1097.

If *A.* enters into a Statute to *B.* and pays the Money at the Day assigned, upon which the Statute is cancelled, and after *B.* forges a new Statute in the Name of *A.* in this Case *A.* may relieve himself by *Audita Querela*; for the forged Statute having all the Essentials of a true one, the Court was obliged to look on it as such till the contrary appeared, which the Conuzor could not set forth before Execution, having no Day to appear judicially in Court, and therefore is put to this Writ to avoid the Execution founded on the Injustice of the pretended Conuzee. F. N. B. 106.

If the Conuzee of a Statute, upon Agreement with the Conuzor, delivers up the Statute in Lieu of an Acquittance, and after sues Execution, and the Conuzor prays a Re-extent, because that the Land was extended too low, and has it granted him, he shall never avoid the Extent by *Audita Querela*; because by his praying the Re-extent, he admits the Statute good and Executory. 1 Rol. Abr. 313.

If upon an *Elegit* the Sheriff takes an Inquisition, and there are several Lands found subject to the Extent, and several Values found, and the Sheriff returns, that he has delivered some of the Lands in particular for the Moiety, where it appears according to the Values found, that an equal Moiety is not delivered to the Party who recovered, but more than a Moiety; yet this is not void, nor is it a Disseisin by the Entry, but only voidable by *Audita Querela.* 1 Rol. Abr. 305.

If a Man in Execution upon a Judgment for Debt or Damages, be delivered out of Execution by the Sheriff or Gaoler who hath him in Execution, with the Assent of him at whose Suit he is in Execution, and after, by Colour of this Judgment, he takes him again and puts him in Prison, an *Audita Querela* lies upon this Matter, and thereupon he shall be delivered. 1 Rol. Abr. 307. So if the Plaintiff consents that one Defendant only shall be de-

livered out of Execution. *Style 387.* So if that one of the Bail shall be delivered out of Execution, he shall not take the other. 3 Leon. 250. Style 117.

*Vide Title Execution, and 1 Rol. Abr. 307. Hob. 60. Cro Eliz. 555. Moor 57. 2 Leon. 118.* But if *A.* be in Execution at the Suit of *B.* and after *A.* escapes with the Consent of the Sheriff, and after *A.* returns to the Prison, and the Sheriff keeps him in Prison upon the said Execution. *A.* shall not be discharged by *Audita Querela*, for *B.* has it still in his Election to have him in Execution at his Suit, and shall not be compelled to take his Remedy against the Sheriff for this voluntary Escape, who perhaps may be worth nothing.

*Vide Head of Bail, and 1 Rol. Abr. 308.* If the Principal be taken in Execution upon a Judgment, and after a *Scire Facias* returned according to the Course of the Court, Judgment is given against the Bail, and thereupon he is taken in Execution; and after the Principal is delivered upon an *Audita Querela*, because the Recoveror had acknowledged Satisfaction, &c. in this Case, though the Recognizance was forfeited by the Bail, by not bringing in the Principal at the Time appointed by Law; yet in as much as the Judgment and Execution against the Bail depends upon the Judgment against the Principal, and he was but a Security for the Payment of the Money, of which the Recoveror is satisfied, the Bail shall be discharged.

*3 Co. 86. Blomfield's Case. 1 Rol. Abr. 308. S. C. Q.* If there be a Diversity where the Plaintiff recovers against the Sheriff in Debt, and where in Case. *Vide 1 Mod. 170. 1 Danv. Abr. 635.* If *A.* and *B.* are bound in an Obligation jointly and severally, and Judgment given against each on several Actions brought, and both taken in Execution, and after *A.* escapes, yet *B.* shall not be delivered upon an *Audita Querela*; for though the Obligee may have an Action against the Sheriff for the Escape, yet till he is actually satisfied, the other shall not have an *Audita Querela*, for perhaps the Sheriff is worth nothing.

*1 Rol. Abr. 304. Cro. Jac. 424. 477. S. C. between Harrington and Garroway.* If *A.* Leases Black-acre for Years to *B.* and then acknowledges a Statute to *C.* and afterwards another to *D.* then *C.* takes a Lease of the Reversion, and the Rent from *A.* by which he has suspended the Execution of the Statute during the Term, and consequently laid the Land open to the Extent of *D.* the second Conuzee, who sues Execution; if therefore *C.* should extend the Reversion and Rent during his own Lease, *B.* the Lessee is not obliged to pay him the Rent, but may avoid the Extent by Plea without *Audita Querela*, because *C.* hath suspended the Execution of his Statute, the first in Date, by the Acceptance of the Lease from the Conuzor.

*1 Rol. Abr. 305.* If upon an *Elegit* the Sheriff takes an Inquisition, and there are several Lands found subject to the Extent, and several Values found, and the Sheriff returns, that he has delivered some of the Lands in particular for the Moiety, where it appears according to the Values found, that an equal Moiety is not delivered to the Party who recovered, but more than a Moiety; yet this is not void, nor is it a Disseisin by the Entry, but only voidable by *Audita Querela*.

*Cro. Eliz. 233, 319, 310. 1 Leon. 229. Owen 142. Dyer 35. pl. 27.* If a Statute is erroneously acknowledged, as before one that has no Authority; or if a Statute-Merchant hath but one Seal, an *Audita Querela* (*a*) lies, and not a Writ of Error, for this is no Record; but if a Statute is well acknowledged, and the Execution erroneous, a Writ of Error lies.

(*a*) That it lies where a Man ought not to be charged, and yet without any Default in himself hath no other way of avoiding it. *Kelw. 25.* That it must be founded upon a Suggestion not contrary to, but admitting the Verdict. *Sav. 69, 70.* Where a Judgment in a Copyhold Court reversed upon Petition to the Lord, and the Party restored to his Damages by *Audita Querela*. *Hob. 54.* Where after Judgment the Trespass was discharged by an Act of Indemnity. *2 Mod. 37. Raym. 89. 1 Keb. 634.* Where the Party must bring a *Scire Facias*, and cannot be relieved by *Audita Querela*, *vide Title Scire Facias.* And where a Writ of Error, *vide Title Error*, and *Carth. 282. 4 Mod. 314.* And where the Party may be relieved on Motion. *1 Salk. 93.*

*F. N. B. 104. 1 Rol. Abr. 308. Q.* If a Statute be delivered to *B.* to be kept in an indifferent Hand, upon certain Conditions between the Conuzor and Conuzee; if *B.* before the Conditions

Conditions performed, delivers it to the Conuzee, and he sues Execution, the Conuzor at his Election may either have an *Audita Querela* upon this Matter, or a Writ of *Disceit* against *B.*

If the Conuzor is taken in Execution upon a Statute, and the Conuzee covenants to discharge him from the Statute, the Conuzor shall not thereupon have an *Audita Querela*, but must take his Remedy by Action of Covenant.

*Cro. Jac.* 218.  
So upon a Promise to Discharge, &c. an Action upon

the Case only lies. *1 Bulst.* 152.

If a Man makes a Feoffment, upon Condition to re-infeoff him, and after the Feoffee, to the Intent to deceive him, falsely and by Covin between him and *B.* acknowledges a Recognisance to *B.* and after re-infeoff him, the Feoffee may have an *Audita Querela* upon this Matter; for this is grounded upon the Matter of Record as well as upon the Matter of Deceit, which is Matter *in Pais.*

*1 Rol. Abr.* 310.

If a Man acknowledges a Statute, which is usuriously entred into, and the Conuzee sues Execution, the Conuzor shall have an *Audita Querela* upon this Matter.

*1 Rol. Abr.* 310.

An *Audita Querela* lies

upon a Suggestion that a Statute was made by *Durefs* of Imprisonment. *Vidian Ent.* 107. So upon a Suggestion that it is forged. *F. N. B.* 104.

*1 Rol. Abr.* 310. *Owen* 147.

If *A.* hath Lands in several Counties, and enters into a Recognisance to *B.* and after acknowledges a Statute to *C.* upon which *C.* extends the Lands in one County, and after *B.* sues Execution upon the Recognisance, and hath the Moiety of the same Lands delivered to him, but sues no Execution of the Moiety of the Lands in the other County, *A.* hath no Reason to complain, because *B.* hath taken in Execution only a Moiety of his Lands, but *C.* may have an *Audita Querela* against *B.* because it is prejudicial to him.

*2 And.* 170.  
*Felo.* 12.  
*Noy* 47.

If the Conuzor infeoffs several Men of several Parts of the Land, and after the Conuzee sues Execution of the Statute against one, he shall have an *Audita Querela* (*a*) upon this Matter.

*1 Rol. Abr.*

(a) But whether there-

upon the Execution shall be avoided, or the Party only have Contribution, *vide* *3 Co.* 14. b. *2 Inst.* 396. *Mo.* 537. *Dyer* 331. *Bulst.* 15, 17. but now *vide* 16 & 17 *Car.* 2. made Perpetual by 22 & 23 *Car.* 2. cap. 2. by which no Extent upon any Statute, Judgment or Recognisance shall be avoided or delayed, because Part of the Lands extendable are omitted, saving to the Party, whose Lands are extended, his Remedy for Contribution; but *note*; no Statutes, unless conditioned for Payment of Money only, not Extents, unless within Twenty Years after Judgment, &c. had, are within this Act.

If *A.* brings an *Audita Querela* against *B.* and declares, that whereas *B.* had recovered against *A.* 200*l.* Debt, &c. and thereupon the said *A.* was outlawed, and upon a *Capias Utlagatum* taken, and in Execution at the Suit of the said *B.* and after from the said Execution was deliver'd and suffer'd to go at Large, &c. and yet *B.* hath taken out Execution upon the said Judgment, and endeavours, &c. the Defendant may plead and shew, how that after the said Enlargement, and before the Purchase of the *Audita Querela*, the Outlawry was set aside and made void, and so conclude *Quod non habetur tale recordum.*

*8 Co.* 141.  
*Dr. Drury's* Case, *vide* *1 Mod.* 111.  
*3 Keb.* 291.  
*Rob. Ent.* 157.

If *A.* hath Judgment against *B.* for Costs and Damages, and releases to *B.* all Executions, and after *B.* brings a Writ of *Error*, and thereupon the Judgment is affirmed, and further Costs given for the Delay of Execution, and *A.* takes *B.* in Execution for the whole, upon an *Audita Querela*, *B.* shall be discharged *quoad* the Damages and first Costs, but not *quoad* the second Costs.

*Cro. Jac.* 337.  
*1 Rol. Rep.* 11.  
*S. C.* *quod vide.*

2 Sand. 148. If *A.* as Administrator recovers Damages in Trover against *B.* and after his Administration is repealed and granted to another, upon a Surmise that *A.* intends and endeavours to sue Execution, *B.* may have an *Audita Querela*; for by the Repeal of the Administration the Power of *A.* is absolutely determined.

For this vide  
 1 Brownl. 29, 91. Yelv. 125. Noy 15. Style 417. Dyer 203. Cro. Jac. 394. and vide Tit. Executor and Administrator, and 17 Car. 2. cap. 8. revived and made perpetual, 1 Jac. 2. cap. 17. by which the Administrator *de bonis non* is enabled to take out Execution upon a Judgment obtained by the Executor or former Administrator, and note, this *Audita Querela* was brought only against the first Administrator, and does not discharge the Judgment, but the Execution at his Suit only. Vide Co. Ent. 91. a. An Executor, *durante minori etate*, obtains Judgment, and the Infant comes of Age, &c. *Quare* if an *Audita Querela* lies. Vide 3 Leon. 278. Godb. 104.

## Authority.

- (A) Where an Authority shall be said to be given, and therein of the Construction of the Words that create it.
- (B) Who are capable of executing an Authority.
- (C) Where an Authority is well pursued and executed.
- (D) Where an Authority cannot be transferred.
- (E) When it shall be said to be determined and revoked.

(A) Where an Authority shall be said to be given, and therein of the Construction of the Words that create it.

11 H. 4. 71.  
 2 Rol. Abr. 8.  
 Co. Lit. 52.  
 Vide Head of Power, and Power to make Leases, Head of Leases.

Co. Lit. 48. b.  
 2 Rol. Abr. 8.  
 Salk. 96.  
 Vide infra Letter (C.)  
 1 Brownl. 94.

**T**HAT Power of Acting which one Man has, being transferred to another, is called an Authority, and this the Law allows of; for as a Contract is no more than the Consent of a Man's Mind to a Thing, if such Consent or Concurrence appears, it would be very unreasonable to oblige him to be present at the Execution of every Contract, since it may be as well performed by any other Person delegated for that Purpose.

But such Delegation or Authority must be by Deed, that it may appear that the Attorney or Substitute had a Commission or Power to represent the Party; also that it may appear that the Authority was well pursued.

If *A.* by Letter of Attorney constitutes and appoints, and in his Stead and Place puts *B.* to surrender a certain Copyhold, this Authority is sufficient, and as full as if said for him and in his Name, &c.

If a Man signs and seals a Lease of *Ejectment* indented, but does not deliver it, and at the same Time seals and delivers a Letter of Attorney, in which he recites, *Whereas by Indenture of Lease, bearing such a Date, &c. hath demised to B. such Land Habendum: Now these Presents witnejs that he makes J. S. his lawul Attorney to deliver the said Indenture upon the Land as his Deed*; though according to the proper Signification of the Words, the Lease ought to be taken to be delivered by him, and so this Letter of Attorney void, to deliver it again; for this cannot be an Indenture if it was not delivered; yet all Parts of the Letter of Attorney being laid together, and the Intent of the Parties, and Proof being made that the Lease was not delivered, but only signed and sealed, it appears that this was only an improper Expression of his Intent, by calling it an Indenture and a Demise; for if he had intended that this was an Indenture sealed and delivered, this Letter of Attorney to deliver it upon the Land, need not have been made.

1 Rol. Abr. 328. *Emerg* and Cook

If the Authority in a Letter of Attorney be *ad petend'*, *recipiend'* & *recuperand'* a certain Debt, it is sufficient to Arrest, &c. because necessary in order to recover.

1 Rol. Rep. 390. *Palm.* 394. *Godb.* 359.

If a Steward makes a Deputy *hac vice* to take a Surrender of a Copyhold, & *ulterius ad faciend' quantum in se est*; by Virtue of these last Words the Deputy may take a conditional Surrender.

*Cro. Eliz.* 48:

An Authority may be delegated by Deed indented, though the Attorney be not Party to the Deed; because the Attorney takes nothing by the Deed, but has only a naked Authority delegated to him; and therefore, since a Man may take an Estate in Remainder, though he is no Party to the Deed, *a fortiori* one not Party to the Deed may receive a naked Authority or Power by it.

2 Rol. Abr. 8, 9. *Sheph. Touchstone* 217.

(B) Who are capable of executing an Authority.

THERE are few or no Persons excluded from exercising a naked Authority to which they are delegated; and therefore Monks, Infants, Feme Coverts, Persons Attainted, Outlawed, Excommunicated, Villains, Aliens, &c. may be Attornies; for the Execution of a naked Authority can be attended with no Manner of Prejudice to the Persons under such Incapacities or Disabilities, or to any other Person, who by Law may claim any Interest of such disabled Persons after their Death.

*Co. Lit.* 52. a. *Perk. Sect.* 187.

A Feme Covert may be an Attorney to deliver Seisin to her Husband; and so may he in Remainder be an Attorney to make Livery to the Tenant for Life.

*Co. Lit.* 52. a. *Perk. Sect.* 148, 199.

So if *Cestui que Use* had devised that his Wife should sell his Land, she might sell it to a second Husband; for she did it *in Auter Droit*, and the Vendee was in by the Devisor.

*Co. Lit.* 112. *Vide Lit.* 9. 10, 39, 134. 1 *Jones* 137. *Noy* 80.

(C) Where

## (C) Where an Authority is Well pursued and executed.

*Co. Lit.* 181, 112, 113. **H**ERE it is necessary to take Notice of a Difference in the (a) old Books, between a naked Authority and an Authority coupled with an Interest; for if a Man devise that his Executors shall sell his Land, this gives but a naked Authority; and the Lands, till the Sale is made, descend to the Heir at Law; and in this Case all must join in the Sale; and if one die, it being a bare Authority cannot survive to the Rest.

(a) But it has been held in Equity, that if a Man devises that his Lands shall be sold for the Payment of his Debts and Legacies, that though one of the Parties who was impowered die, the Survivor and Heir at Law must join in a Sale. *Hard.* 204. So if Lands are devised to be sold, and no Person is named for that Purpose, the Heir must do it. *1 Chan. Ca.* 177. *1 Chan. Rep.* 283. S. P.

*Co. Lit.* 113. b. 181. b. S. P. **B**ut if a Man by Will give Land to Executors to be sold, and one of them die, the Survivors may sell; for the Trust being coupled with an Interest shall survive together with it.

*Vide Cro. Eliz.* 856. *Co. Lit.* 112. b. Also if Lands be devised to *A.* for Life, and that after his Decease his Lands shall be sold by his Executors, and he makes three or four Executors, and during the Life of *A.* one of the Executors dies, and then *A.* dies, the surviving Executors may sell, because the Land could not be sold before, and (b) the plural Number of Executors remains.

(b) So if there had been but one Executor living. *Cro. Car.* 382. *1 Jones* 352. *Vide 1 And.* 145. *Moor* 61.

*Co. Lit.* 113. But it is said, that if a Will had given such Power to certain Persons, naming them by their Names; as to *J. S. J. N. J. D.* and one of them died, the Survivors could not sell; for the Words of the Will in that Case could not be satisfied.

*2 And.* 59. *Townsend and Wales.* *Owen* 155. *Moor* 341. *Cro. Eliz.* 524. S. C. If *A.* being seised in Fee of a Reversion in Twenty Acres expectant upon an Estate for Life, and of other Twenty Acres in Possession, and for the Performance of his own and his Father's Will, devises all his Lands and Tenements to his Executors, and Wills that they should take the Profits thereof for Ten Years, and that after the Expiration thereof, the same should be sold by his Executors, or by one of them, and dies, and after the Tenant for Life dies, and then one of the Executors dies, the other two may sell the Twenty Acres; for as they may perform his Will, so they may sell in order thereto.

*Co. Lit.* 113, 181. At Common Law, if one of the Executors who were impowered to sell Lands refused, the others could not sell; but now, by *21 H. 8. cap. 4.* notwithstanding Part of those to whom such Power is devised refused, the rest may sell; and so may such of those to whom Land is devised to be sold, who are willing, though the others refuse, by a favourable Construction of that Statute; but they cannot in either Case sell it to the Executor that refused; for he is Privy to the Will, and Executor still.

*Co. Lit.* 113. My Lord *Coke* observes, that it is safest in giving such Power by Devise, to limit it to the Survivors or Survivor, or those that prove the Will, &c. and when an Estate is devised to Executors to be sold, it is adviseable to appoint that the Profits taken by them before the Sale shall be Affets; for otherwise they shall (c) not.

(c) But *vide* Head of Power and Trust; and that they are now considered only as Trustees, shall have no more than their Costs and Charges.

If a Man devises Lands to his Executors to sell, and dies, the Executors may sell Part of the Land at one Time, and Part at another Time, as he can find Purchasers. *Co. Lit. 113.*

*A.* by Indenture demised to *B. habend' a die datus* (which was the Tenth of June) Indenture *prædict'* for his Life, with a Letter of Attorney to make Livery, the Attorney makes Livery the Twenty-third of July following; and the Livery was held to be void, because the Estate for Life being by the Indenture to commence the Tenth of June, the Attorney had no Authority to change the Commencement of the Estate; and therefore having not pursued his Authority, by not giving Livery, to let the Freehold commence according to the Deed, what he did afterwards was without any Authority, and consequently void; but in this Case, if the Deed had not been delivered till after the Day of the Date, and the Attorney had given Livery at the Time of the Delivery of the Deed, this had been a good Livery, because the Deed of Feoffment was to govern the Livery, but the Deed itself had no Effect till the Delivery; and therefore the Attorney making the Livery at the Time the Deed of Feoffment began to operate, which was to govern it, seems to have well enough executed his Authority. *Cro. Jac. 153. Mo. Pl. 876. Cro. Eliz. 873. Lit. Rep. 144.*

If a Letter of Attorney be to make Livery upon Condition, so as to make a conditional Feoffment, and the Attorney delivers Seisin absolutely, the Livery is not good; because the Attorney had no Authority to create an absolute Fee-simple; and therefore such absolute Feoffment shall not bind the Feoffor, because he gave no such Authority. *11 H. 4. 3. 2. Rol. Abr. 9. And hence the Attorney in some Books is called a Dis-*

*seisor. Co. Lit. 258. Perk. Sect. 188.*

But if the Letter of Attorney had been to make Livery absolutely, and the Attorney had made it upon Condition, this seems a good Execution of his Power, and the Feoffment good; because when the Attorney had once delivered Seisin, he has fully executed his Power; and the Condition annexed to it being without Authority is void; and therefore shall not destroy the Operation of the Livery. *26. Aff. 39. 2. Rol. Abr. 9. Co. Lit. 258. Steph. Touchstone 218. Perk. Sect. 188.*

If a Warrant of Attorney be given to make Livery to one, and the Attorney makes Livery to two, or if the Attorney had Authority to make Livery of Black-Acre, and he made Livery of Black-Acre and White-Acre, though the Attorney has in these Cases done more, yet there is no Reason that should vitiate what he has done pursuant to his Power, since what he did beyond it is a perfect Nullity and Void. *Perk. Sect. 189. But if the Attorney were to deliver Seisin, to two, and he had made*

Livery only to one, that had been void, because he had no Authority to deliver the whole Possession to one exclusive of the other; and therefore it is void for the whole. *Perk. Sect. 189.*

If a Letter of Attorney be given to two Jointly to take Livery, and this Feoffor makes Livery to one in the Absence of the other, in the Name of both, this is void; because they being appointed jointly to receive Livery, and to be considered but as one. *Co. Lit. 49. b. 2. Rol. Abr. 8.*

But if a Feoffment be made to *A.* and *B.* and the Feoffor gives a Letter of Attorney to deliver Seisin, and *J. S.* gives Livery to *A.* in the Absence of *B.* in the Name of both, this is a good Livery; for though the intire Possession be delivered to one only, yet they being Jointenants by the Deed of Feoffment, such Livery to one makes no Alteration or Change in the Possession; because if the Livery had been made to both, each had been placed in the whole Possession; besides that, every Man being presumed to accept a Gift for his Advantage, *A.* is looked upon as the Attorney of *B.* to receive the Possession for him; and therefore the Livery to *A.* enures to the Benefit of *B.* till he disagrees to it. *Co. Lit. 49. 2. Rol. Abr. 8.*

*Dyer* 62.  
1 *Roll. Abr.*  
329.  
*Co. Lit.* 181.  
1 *Roll. Rep.*  
299.  
*Yelv.* 26.

But if a Letter of Attorney be made to three *conjunctim & divisim*, and two only make Livery, this is not good, because not pursuant to their Authority; for the Delegation was to them all three, or to each of them separately; yet if the third was present at the Time of the Livery made by two, though he did not actually join with them in the Act of Livery, yet the Livery is good; because when they all three are upon the Land for that Purpose, and two make Livery in the Presence of the third, there is his Concurrence to the Act, though he did not join in it actually, since he did not dissent to it.

*Co. Lit.* 52.  
2 *Roll. Abr.* 9.

If *A.* be disseised of Black-Acre and White-Acre, and gives a Letter of Attorney to enter into both, and make Livery, if the Attorney enters into one Acre only, and makes Livery *secundum formam Chartae*, this is not good, because the Attorney has not pursued his Authority; for the Estate of the Disseisor cannot be defeated without an Entry into both Acres; and till the Estate be defeated the Attorney cannot execute his Power in the Manner it was delegated; and therefore what he did in this Case was void.

*Co. Lit.* 52.  
*Pop.* 103.  
*Dyer* 131. *a.*  
340. *a.*  
But *per Roll.*  
it is the  
safer Way  
for the Feof.  
for to insert

If a Letter of Attorney be given to *A.* to make Livery of Lands already in Lease, the Attorney may enter upon the Lessee in order to make Livery; because whilst the Lessee continues in Possession, the Attorney cannot deliver Seisin of it; and therefore to execute the Power given him by the Letter of Attorney, it is necessary he should have a Power to enter upon the Lessee.

a Clause in the Letter of Attorney for the Attorney to enter *& omnes alios inde expellend'*. 2 *Roll. Abr.* 8. that an Attorney cannot make Livery within View. *Vide Co. Lit.* 52. 2 *Roll. Abr.* 9.

11 *Co.* 92.  
1 *Roll. Abr.*  
328, 329.

If the King grants a Warrant to four Officers of the Exchequer, by which he authorises them, or any of them, to pay out of the King's Treasure the Costs and Expences of any Man who shall be employed in the Service of the King; and two of the four give a Warrant for the Payment of a certain Sum to *J. S.* this is a good Warrant, though neither all four nor one only did it.

5 *Co.* 91.  
1 *Roll. Abr.*  
328.

So if a Judgment be assigned to the King in Satisfaction of a Debt due to the King, with a Proviso, that if the Barons of the Exchequer, or any two of them revoke it, that it shall be void; and after three of the Barons revoke it (there being four in all) this a good Revocation.

5 *Co.* 91.  
1 *Roll. Abr.*  
328.

But if the Words had been that if the Barons, or any two of them, jointly or severally revoke it, *&c.* there three of them could not revoke it; for this is neither jointly nor severally.

*Co. Lit.* 181.  
*Palm.* 52.  
2 *Roll. Rep.*  
137.

But if a Sheriff makes a Warrant to four or three, on a *Capias* jointly or severally to arrest one, two of them may arrest the Party, for the greater Expedition of Justice.

*Pop.* 202. *Cro. Eliz.* 913. *Noy* 47. *Yelv.* 26. 3 *Bull.* 209. 1 *Roll. Rep.* 406. 1 *Roll. Abr.* 329. But a Commission directed to Six, Four or Two, cannot be executed by Three, because that is a Judicial Act. *Yelv.* 26. *Noy* 47. 2 *Inst.* 380.

*Vide* 9 *Co.* 76. Where a Person is authorised to do a Thing, it is most (a) regular to do it in the Name of him who gave the Authority.

*Godb.* 389.  
1 *Roll. Abr.* 331. *Moor* 70. *Pl.* 191, 318. *Pl.* 110. *b.* (a) But if Executors have Power to sell Lands, they may do it in their own Names. 1 *Roll. Abr.* 331. So if a Deputy Steward makes an Attorney, or appoints an Under-Deputy to take a Surrender of a Copyhold Estate, and he does it accordingly, without reciting his Power, this is good; for where a Man does such an Act as he cannot do, so as to be effectual any otherwise than by Virtue of his Authority, that shall be taken to be in Execution of his Authority. 1 *Salk.* 95, 96. But where a Man has an Interest and Authority, and does an Act without reciting his Authority, it shall be taken to be done by Virtue of his Interest. 1 *Salk.* 96. For this *vide* 6 *Co.* 18. *a.* Sir Edward Cleer's Case. *Cro. Eliz.* 878. *Cro. Jac.* 31. *Co. Lit.* 111. *b.* *Jenk.* 201, 215. *Cro. Car.* 335. 1 *Jones* 327. *Noy* 80. *Latch.* 9, 10, 39, 134. 1 *Jones* 137. 1 *Roll. Abr.* 330.

If the Lord gives Licence to a Copyholder for Life, to lease the Copyhold for five Years, the Copyholder may lease it for three Years; for this is comprehended within the Licence, inasmuch as he hath given him Licence to lease for more Years.

1 Rol. Abr. 330. For Authorities that are to be strictly pursued, vide Head of Power, and Moor 43. Godb. 39. 2 Rol. Rep. 6. Owen 73. 1 Bulst. 104. 2 Mod. 318. Kelw 43. Lit. Rep. 141. One who hath Power to make a Lease for Ten Years, makes a Lease for Twenty, decreed good in Chancery for Ten Years. 1 Chan. Ca. 23. vide Head of Leases.

So if the Lord gives Licence to a Copyholder for Life, to lease the Copyhold for five Years, if the Copyholder *tandiu vixerit*, and he leases it for five Years generally, without Limitation, this is a good Execution, and pursuant to the Licence; for the Lease is determinable by his Death, by a Limitation in Law; and therefore as much is implied by Law as if he had made an actual Limitation.

Where the Mayor and Commonalty of London had constituted their Bailiff to receive their Rents, and to make Demand of them, and to make Entry, such general Authority is not sufficient to authorise a Bailiff to take Advantage, and demand a Rent accrued due after the Authority given; for it is a new Right attached, and there ought to be a special Authority for this Purpose.

(D) Where an Authority cannot be transferred.

ONE who has an Authority to do an Act for another, must execute it himself, and cannot transfer it to another; for this being a Trust and Confidence reposed in the Party, cannot be assigned to a Stranger whose Ability and Integrity were not so well thought of by him for whom the Act was to be done; therefore an (a) Executor having Authority to sell, cannot sell by Attorney.

So if Lessee for Life hath Power to make Leases, rendring the antient Rent, he cannot make them by Letter of Attorney.

If A. lends B. a Horse to ride to York, B. cannot let his Man ride him; for the Licence is a Matter of Pleasure annexed to the Person of B. and cannot be transferred; adjudged upon a Demurrer, in an Action of Trespass, for immoderately riding the Plaintiff's Mare; where the Defendant pleaded that the Plaintiff *licentiam eidem dedit equitare*; and that the Defendant and his Servant *alternatim* had rid upon the said Mare.

of the Horse; for in that Case he hath an Interest in the Horse, and may let his Servant ride him. So if B. for Money hires a Horse to A. to ride to York. 1 Mod. 210.

(E) When

## (E) When it shall be said to be determined and revoked.

*Vide Head of Revocation.*  
*2 Rol. Abr. 9.*  
*Co. Lit. 52.*  
*Perk. Sect. 188.*  
**T**HE Authority given by Letter of Attorney, must be executed during the Life of the Person that gives it; because the Letter of Attorney is to constitute the Attorney my Representative for such a Purpose, and therefore can continue in Force only during the Life of me that am to be represented; and hence it is, that if *J. S.* make a Letter of Attorney to deliver Seisin after my Death, it is void; because he cannot deliver Seisin during my Life; for that were plainly without any Authority from me; nor can he do it after my Death, for the former Reason.

*14 H. 8. 3.*  
*11 H. 7. 19.*  
*Co. Lit. 52.*  
*2 Rol. Abr. 12.*  
 But if any Corporation aggregate, as a Mayor and Commonalty, or Dean and Chapter make a Feoffment and Letter of Attorney to deliver Seisin, this Authority does not determine by the Death of the Mayor or Dean, but the Attorney may well execute the Power after their Death; because the Letter of Attorney is an Authority from the Body aggregate, which subsists after the Death of the Mayor or Dean, and therefore may be represented by their Attorney; but if the Dean or Mayor be named by their own private Name, and die before Livery, or be removed, Livery after seems not good.

*Co. Lit. 52. b.*  
*(a)* So if the Lessor grants over his Estate, yet the Lessor may alien.  
*Cro. Jac. 103.*  
*Co. Lit. 52. b.*  
 If the Lessor by Deed licenses his Lessee for Years or Life to alien, who is restrained by Condition not to alien without Licence, and the Lessor (*a*) dies before the Lessee aliens, yet this is no Countermand of the Licence; for the Licence exempts the Lessee out of the Penalty of the Condition, and it was executed on the Part of the Lessor as much as could be.

*Co. Lit. 52. b.*  
 If the King gives licence to alien in Mortmain, and dies, yet it may be executed after.

*1 Sid. 6, 7.*  
 So if the King licenses *J. S.* to sell Wines, and dies.

## Bail in Civil Causes.

**B**AIL and Mainprize are often used promiscuously in our Law-Books, as signifying one and the same Thing, and (a) agree in this Notion, that they save a Man from Imprisonment in the Common Gaol, his Friends undertaking for him before certain Persons, for that Purpose authorized, that he shall appear at a certain Day, and answer whatever shall be objected to him in a legal Way.

and *2 Hawk. P. C. 88* That the chief Difference is, that a Man's Mainpernors are barely his Sureties, and cannot imprison him themselves to secure his Appearance, as his Bail may, who are looked upon as his Gaolers, to whose Custody he is committed, and therefore may take him up upon a Sunday, and confine him till the next Day, and then render him. *6 Mod. 231. per Cur.*—Against him that is mainprized *de die in diem*, no Bill can be filed; otherwise against him that is bailed. *4 Inst. 180.*—Also it seems that before the *23 H. 6. cap. 10.* the Sheriff was not upon an Arrest obliged to take Bail, unless the Party sued out a Writ of *Mainprize*; but for this *vide 2 Rol. Abr. 112.* Title *Mainprize.*

The putting in Bail in Personal Actions seems to be in Imitation of the Civil Law, which requires that Cautions should be put in either by *Pignora* or *Fidejussores*, and the *Idoneus fidejussor* was *ex arbitrio judicis approbatus vel litigantium consensu acceptus*; for formerly in these Actions, if the Defendant did not appear on the Summons, the Process was an *Attachment*, and the Sheriff might attach him either by his Goods or by Pledges; and if he attached him by his Goods, by his Non-appearance his Goods were forfeited; if by Pledges, and the Party did not appear, they were amerced.

Under this Head I shall consider

(A) What Persons are authorized to take Bail.

(B) In what Cases Special or Common Bail are required. And herein,

1. What the Debt must amount to for which there must be Special Bail.
2. Where the Demand is uncertain, and sounds only in Damages.
3. Whether Bail be required in Actions on Penal Statutes.
4. Of Persons that are not required to put in Special Bail.
5. Where Special Bail is required on removing a Cause out of an inferior Jurisdiction before Judgment.
6. Of putting in Bail on bringing a Writ of *Error*.
7. Common Bail in what Cases necessary.

(C) Where Bail shall be said to be put in regularly: And herein,

1. Of the Manner of putting in, excepting to, and justifying Bail.
2. To what Time it shall have relation.
3. Where a different Action is prosecuted from that to which Bail was given.
4. What Defect or Irregularity may be amended.

(D) Of the Proceedings against the Bail, and what they may plead in their Discharge.

### (A) What Persons are authorized to take Bail.

2 Sand. 59.  
1 Vent. 55,  
85.  
1 Mod. 33.  
1 Salk. 99.  
6 Mod. 122.

WHEN the Sheriff arrests any one, he is not only authorized, but obliged to take Bail, otherwise an Action on the Case lies against him.

*This the Sheriff is obliged to by the 23 H. 6. cap. which enacts, " That Sheriffs, Coroners, &c. shall let to Bail Persons by them arrested, or in their Custody, by Force of any Writ, Bill or Warrant, in any Personal Action, or because of any Indictment of Trespass, upon reasonable Sureties (having sufficient within the County) to keep their Days in such Place, &c. as the Writ, &c. require (such as are in Ward by Condemnation, Execution, Capias Utlagatum or Excommunication, Surety of Peace, or committed by Command of the Justices; and Vagabonds refusing to serve according to the Statute of Labourers, only excepted.)*

But though the Sheriff is obliged to take Bail, yet if the Plaintiff dislikes the Security, and does not take an Assignment of the Bail-Bond, he may have him brought up; for the Sheriff having arrested the Party, (a) must return a *Cepi Corpus*, on which Return it is a Breach of Duty in him not to bring him up, for which the Court amerces him as one of their Officers.

(a) 1 Vent.  
85.  
1 Mod. 33,  
51, 244.  
Vide Tit.  
Sheriff.

But if the Writ be not returned, and the Court makes an Order that the Sheriff shall return his Writ in four Days, as is usual, there the Disobedience is to the pronounced Order of the Court, and consequently a Contempt of the Court, for which an Attachment lies.

1 Rol. Abr.  
807, 808.  
Cro. Eliz.  
824, 852.  
Noy 39.  
(b) That it  
is usual at  
this Day to  
serve the  
Sheriff with

If the Sheriff returns *Cepi* on a *Mesne Process*, & *paratum habeo*, he shall be only (b) amerced, if he does not bring in the Body, tho' he shall be attached if he does not return his Writ; and the Reason is, because the Sheriff is bound to bail the Party; and therefore if the Sheriff is mistaken in his Sureties, he is not to suffer in his Liberty; and the returning his Writ is in his own Power; but it may not be in his Power to bring in the Body which he was obliged to bail.

a Rule to bring in the Body before you move to amerce him. 1 Salk. 99. — If the Sheriff returns a *Cepi Corpus* and *Paratum habeo*, or *Languidus*, where the Defendant is at Large, without any Bail taken, he is not aided by the Statute; but an Action for a false Return lies against him. Noy 39. 1 Rol. Abr. 807.

1 Salk. 99.  
6 Mod. 122.

And if the Plaintiff takes an Assignment of the Bail-Bond, the Sheriff is not amerlicable; for by accepting of the Bond, the Plaintiff has waived the Benefit of the Amercement, and he may now sue it in his own Name; though formerly he could only sue in the Sheriff's Name; and

and if the Sheriff released the Action, his Remedy was in a Court of Equity.

But now by 4 & 5 Ann. for Amendment of the Law, it is enacted,  
 “ That if any Person shall be arrested by any Writ, Bill or Procefs, out  
 “ of any of her Majesty’s Courts of Record at *Westminster*, at the Suit  
 “ of any common Person, and the Sheriff or other Officer takes Bail  
 “ from such Person against whom such Procefs is, the Sheriff or Officer,  
 “ at the Request and Costs of the Plaintiff in such Action or Suit, or  
 “ his lawful Attorney, shall assign to the Plaintiff in such Action the  
 “ Bail-Bond or other Security taken from such Bail, by indorsing the  
 “ same, and attesting it under his Hand and Scal, in the Presence of  
 “ two or more credible Witnesses, which may be done without any  
 “ Stamp, provided the Assignment so endorsed be duly stamped before  
 “ any Action be brought thereon; and if the said Bail-Bond, or other  
 “ Security taken for Bail, be forfeited, the Plaintiff in such Action, af-  
 “ ter such Assignment made, may bring an Action and Suit thereupon,  
 “ in his own Name; and the Court where the Action is brought, may  
 “ by Rule or Rules of the same Court, give such Relief to the Plain-  
 “ tiff and Defendant in the original Action, and to the Bail upon the  
 “ said Bond or other Security taken from such Bail, as is agreeable to  
 “ Justice and Reason; and that such Rule or Rules of the said Court  
 “ shall have the Nature and Effect of a Defeasance to such Bail-Bond or  
 “ other Security for Bail.

If the Plaintiff accepts of an Assignment of the Bail-Bond, the De-  
 fendant may put in the same Bail to the Action that were Bail to the  
 Writ; and the Plaintiff (a) cannot except against them.

*Vide* 1 Salk.  
 97, 99.  
*Farell*. 62, 117.  
 (a) But *vide*

6 Mod. 122. where *per Holt*, if the same that were bail to the Writ become bail to the Action, and he except against them, and they do not justify, he may go on with his Amercements.—And note; by the Rules of the Court, the Plaintiff may now except to such Bail, where the Condition of a Bail Bond was that the Defendant should appear on such a Day, and he appeared before the Day, and was discharged for Want of Prosecution, held a good Performance of the Condition. *Comb*. 4. The Defendant ought to put in Bail the same Term the Writ is returnable, but may do it at any Time before the *Effoin* Day of the subsequent, and till then it is irregular to proceed upon the Bail-Bond; but one in the mean Time may take an Assignment upon it, and take out a Warrant. 6 Mod. 226. By a Rule of the King’s Bench, no Bail-Bond shall be put in Suit till four Days after the Return of the Writ, if the Arrest be in *London* or *Middlesex*, and not till six Days after the Return of the Writ, if the Arrest be in the Country.

By the 4 *W. & M. cap.* 4. “ The Judges in each, or any two of them,  
 “ whereof the Chief to be one, may by Commissions under the Seals  
 “ of their respective Courts, appoint Commissioners to take Recogni-  
 “ fances of Bail in Suits depending before them, and upon Affidavit of  
 “ the true Taking of them, such Recognifances shall be as effectual as  
 “ if they were taken before themselves; the Cognizors, unless they live  
 “ in *London* or *Westminster*, or within ten Miles, may justify before the  
 “ Commissioners in the Country.

Before this Statute, Bail was always taken *de bene esse* before a Judge, as it may, and must be still, if the Cognizors live within ten Miles of *London* or *Westminster*; the Commissioners are obliged by Rule of Court to keep a Book wherein are the Names of the Plaintiff and Defendant, and Bail, and the Person who transmits the same, and who makes Affidavit that the Recognifance was duly acknowledged in his Presence; on such Affidavit, the Judges make a conditional *Allocatur*, and the Bail are to stand absolute; unless the Plaintiff except against them within twenty Days; and if he except the Bail may justify by Affidavit taken before the Commissioners in the Country.

*Cro. Car.* 196. If one is arrested in *London* by a Serjeant of the Mace, upon a Plaint  
*1 Rol. Abr.* of Debt entred in any of the Counters, the Serjeant cannot take Bail,  
 561. S. C. (a) but the Judge in Court must.  
*1 Jones* 226. S. C.

(a) *Cro. Eliz.* 77. S. P. agreed, and like Point agreed, where an Arrest was upon a Plaint in the Court of *Nottingham*, and the Defendant in Gaol under Custody of the Mayor, and not of the Serjeant, and *Cro. Eliz.* 168. it is said, that in all Corporation Courts the Mayor, who is Judge, is Gaoler also.—Bail being a Matter of Record cannot be found before any but the Judge of the Court, and not before the Serjeant, though alledged *secundum consuetudinem ville*; but Bail for Appearance only, may be taken by the Serjeant. *Cro. Jac.* 94.

## (B) In what Cases Special or Common Bail are required.

*The Head of Sheriff, vide post, where upon bringing a Writ of Error, and where upon reversing an Outlawry,* Title *Outlawry* and *Carth.* 459.  
 HERE it must be first observed that regularly, after Judgment, no Bail is to be taken; for the Plaintiff having ascertained his Right, and proved his Demand, the Defendant must pay the Condemnation Money; for which Purpose a Writ of Execution issues, to which the Sheriff can take no Bail.

But one in Execution brings an Attaint, (b) he may have (c) a Writ to the (d) Justices, commanding them to let him to Mainprize.  
*F. N. B.* 106. *2 Rol. Abr.* 112.

(b) *Cro. Eliz.* 5. *per Wray*, the Court doth not usually bail; for the Verdict is intended true till reversed; but in some Cases upon good Consideration they will bail. (c) *Reg.* 123. a. (d) *Lyer* 193. Pl. 29. though at first it was doubted whether it lay to the Justices de B. and a Case cited *cont.* where it was commanded to the Warden of the Fleet to have the Body in Court *quolibet die, &c.*

If an *Audita Querela* is founded upon a Release or Record, the Plaintiff may be bailed.  
*Dyer* 365. Pl. 31. *1 Rol. Rep.* 132. said *per Coke*, S. C. but such Bail must be taken in open Court. *1 Bulst.* 140. *Latch* 113.

But if upon (e) a Surmise of a Matter of Fact only, it is otherwise.  
*1 Rol. Rep.* 132. *per Coke*, Ch. Just. *1 Rol. Rep.* 384. S. P. *per Coke*, who said that in the Time of *Dyer* and *Wray*, and all his Time, the Practice had been never to bail, where grounded on a Matter of Fact only; but where upon a Matter of Writing in Discharge, the Plaintiff had used to be bailed, the Defendant being call'd to know whether he could deny it. *Vide 1 Sid.* 286. *Dyer* 285. Pl. 41. 339. Pl. 46. and *vide 11 H.* 6. cap. 10. *2 Rol. Abr.* 113. (e) yet *vide* in such Cases where the Plaintiff was bailed, *Cro. Jac.* 29, 67.

If in an *Homine Replegiando* an *Elongatus* is returned, and the Defendant taken upon a *Witbernam*, though this is no Execution, yet the Defendant shall not be bailed unless he will confess the taking and having the Party in Custody.  
*Raym.* 475. *vide 3 Mod.* 121. *1 Sid.* 210.

But if in an Action for a false Return of an *Elongatus* against the Sheriff, it is found for the Plaintiff, he may be bailed.  
*Raym.* 475. As to the Cases in which Special or Common Bail are required, I shall consider,

### 1. What the Debt must amount to for which there must be Special Bail.

The old Rule in the *Compleat Attorney* is, that if the Defendant be arrested by Mesne Process, as *Capias*, *Alias* or *Pluries*, and the Plaintiff holdeth him not sufficient to answer to Debt or Damages contained in the Writ, the same amounting to 20*l.* or upwards, that in this Case

the Plaintiff, upon the Return of the Writ, by entering a *(a) Ne recipiatur* with the Philacer, out of whose Office the *Capias* did issue, may have Special Bail to be put in to his Action, which the Defendant must put in before some Judge of the Court where the Cause depends, who will accept of such Bail as the Validity or Weight of the Cause doth require, or in his Discretion shall be thought fit.

*(a) The Ne recipiatur is entered by the Attornies as Officers of the Court, after which no*

Appearance is to be received till Bail is filed with the Judge.

This was the Rule that both the Courts of King's Bench and Common Pleas went by, but was afterwards sunk to 10*l.* which has been long the standing Rule of the Courts.

And now by the 12 *Geo. i. cap. 39.* it is enacted, "That where the Cause of Action shall not amount to the Sum of 10*l.* in a superior Court, or 40*s.* in an inferior Court, the Plaintiff shall only serve the Defendant with a Copy of the Procefs, and shall not arrest his Person; and that in all Cases where the Plaintiff's Cause of Action shall amount to the above Sums or upwards, Affidavit shall be made and filed of such Cause of Action, and the Sum or Sums specified in such Affidavit, shall be indorsed on the Back of such Writ or Procefs; for which Sum or Sums so indorsed, the Sheriff or other Officer shall take Bail, and for no more.

*Vide the Statute, and 1 Geo. 2.*

In an Attachment of Privilege, which is a *Capias* in the first Procefs, the Defendant is held to Bail for any Sum though never so small; for this being a *Capias* in the first Procefs, without Summons, does not arise from a Supposition of a *Nihil* returned, but arises from a Debt due to the Officers of the Court, by the Acts of the Court; and therefore another Officer ought not to appear without seeing a Security given for such Debt.

*Vide Title Privilege. 1 Sid. 63.*

## 2. Where the Demand is uncertain, and sounds only in Damages.

Where the Action is only for Damages, there regularly the Party is not to be held to Special Bail; for there is no certain Sum for which Bail can be ascertained.

*Vide 13 Car. 2. cap.*

But in Actions of *Affault* and *Battery*, *Scandalum Magnatum*, and for other Personal Wrongs, in which it is apparent the Damages will exceed the Sum of 10*l.* the Court, or any Judge of the Court may do, on good Cause shewn, give Leave to the Plaintiff to sue out a Writ with the Clause of *Acetiam bille*, to hold the Defendant to Special Bail.

*1 Sid. 307. 1 Rol. Abr. 335. 1 Lev. 39. 1 Brownl. 90. 1 Sid. 183. Raym. 74.*

So upon an Affidavit of a great *Mayhem*, and that he intended to declare in *Trespafs*, the Court ordered a Special *Latitat*, with an *Acetiam*, and that so there should be Special Bail.

*1 Sid. 276. Special Bail ordered per Cur. in*

Case of a notorious *Battery*. *1 Sid. 307.*—So in Case of a foul *Battery* against a Man and his Servants. *Comb. 57.*—But this seems to be discretionary in the Court; therefore *vide 1 Mod. 2.* Special Bail denied for putting an Arm out of Joint; and *vide 1 Rol. Abr. 335. Pl. 14.*

In Debt upon a *(a) Bond*, for Performance of Covenants, the Court will order Bail according to the *(b) Breaches* assigned.

*1 Sid. 63. (a) So Special Bail in*

*Account, secus* in Debt upon an *Account*. *2 Rol. Rep. 53. (b) Noy 28. 1 Lev. 300.*—And the Measure of that shall be taken from the Plaintiff's Oath. *1 Salk. 100.*

In an Action of Debt on a Bond, though the Defendant says it was by *Dress*, or on an Usurious Contract, yet there shall be Special Bail; for the Merits of the Cause shall not be determined on Motion; neither

*1 Salk. 100.*

will the Court put a Slur upon the Plaintiff's Cause, which ought to come down fairly to Trial, without Prejudice.

*1 Salk. 100.* So in an Action for Money won at Play, if the Contract be lawful, *Vide Head of Gaming.* as being under 100*l.* the Defendant must put in Special Bail.

### 3. Whether Bail be required in Actions on Penal Statutes.

*2 Lev. 53.*  
*2 Brownl. 293.* On a Penal Statute, the Defendant is not held to Bail, because the Penalty on a Statute is in the Nature of a *Fine* or *Amercement* set on the Party, for an Offence committed, and therefore no Person ought to suffer any Inconvenience by Reason of such Law, till he is convicted of the Offence.

### 4. Of Persons who are not required to put in Special Bail.

*2 Brownl. 293.*  
*3 Eulst. 316.* An Heir, Executor or Administrator, (*a*) shall not be held to Special Bail; for the Demand is not on the Persons, but on the Assets of the Deceased; and it would be unreasonable to subject their Persons to an Execution for the Debt of another.  
*(a)* So tho' an Attorney was Plaintiff, and it was pretended he was intitled to have Special Bail by his Privilege. *1 Sid. 63. S. P. per Cur'.*

*Cro. Jac. 352.*  
*Cro. Car. 39.*  
*Lit. Rep. 2, 3.* So if there be a Judgment against an Executor for the Debt *de bonis Testatoris*, and for the Damages only *de bonis propriis*, he may bring *Error*, and have a *Superfedeas*, without giving Sureties according to *3 Jac. 1. cap. 8.* For though the Words of the Statute are General, yet it must be intended where Judgment is against the Defendant himself, upon his own Bond, or where the Judgment is general against the Executors; for it would be unreasonable they should find Sureties to pay the whole out of their own Estate.

*2 Lev. 204.*  
*1 Sid. 418.*  
*1 Lev. 245,*  
*268. 2 Fenes 82. 1 Salk. 98. S. P. cont. Lit. Rep. 81.* Neither is an Executor, Administrator or Heir, upon the Removal of a Cause out of an inferior Court, obliged to put in Bail.

*1 Lev. 145.*  
*1 Sid. 63.*  
*1 Salk. 98.* But if there be a *Devastavit* suggested, which can only be on an Action of Debt on a Judgment, they must find Special Bail.  
*Vide Head of Executors and Administrators.*

*1 Mod. 10.* An Attorney or other Officer, whose Attendance is required in the Court to which he belongs, shall not be held to Special Bail.  
But for this *vide Title Attorney.*

*Vide Title Baron and Feme, and Goldf. 127.* If Baron and Feme are sued, the Husband must put in Bail for both; but if the Husband does not appear upon the Arrest, the Wife must file Common Bail before she can be discharged; for otherwise the Plaintiff could not proceed to obtain Judgment.  
*Cro. Jac. 445.*

*Stile 475. 1 Mod. 8. 6 Mod. 17, 105. Faresl. 10* — And where one Partner must put in Bail for another. *1 Mod. 45.*

5. Where Special Bail is required on removing a Cause out of an Inferior Jurisdiction before Judgment.

Upon the Removal of a Cause by *Habeas Corpus* out of any Inferior Court into the Courts above, though the Sum be under 10*l.* the Party (a) must file Special Bail; so that the Plaintiff may not be in a worse Condition than he was in the Court below; and the Reason hereof is, that those Inferior Jurisdictions being confined, they cannot follow the Debt out of their own Jurisdiction; and therefore it is requisite that they should be Bail who live within their Precincts.

the Court above will consider the *Quantum* of the Sum in which Bail ought to be taken. 1 *Salk.* 101, 102. 6 *Mod.* 242. S. P.

If a Cause be removed by *Habeas Corpus* out of the *Marshalsea*, or any other Inferior Court, and the Bail there offer to be Bail to the Action in the Court above, the Plaintiff is compellable to take them, because he might, but did not except to them below.

But it is otherwise where the Cause comes out of *London*, for the Sufficiency of the Bail there is at the Peril of the Clerk, and he is responsible to the Plaintiff; so that the Plaintiff had not the Liberty of excepting against them, and the Clerk is not responsible for their Deficiency in the Court above, though he was in *London*.

If a Cause is removed out of an Inferior Court by *Habeas Corpus*, and new Bail found, and after in the same Term it is remanded by *Procedendo*, the old Bail shall stand; for when a Cause is remanded the same Term in which it was removed, no Record is made thereof.

that *Brook*, *Mainprize* 96. and *Procedendo* 16. is so to be understood. *Moor* 836. S. C. adjudged. 2 *Bullf.* 286, 287. S. C. adjudged. 1 *Rol. Rep.* 64. S. C. adjudged, notwithstanding the old Bail was discharged, and new put in, the new Bail being taken off the File and made void the same Term, while the Record was in the Breast and Power of the Court. *Vide Cro. Jac.* 203. S. P. cont. and *Yelo.* 120. S. P. adjudged cont. But *per Curiam* it is there said, If the *Procedendo* was delivered, &c. before Bail given into the Superior Court, it should have been a *Superfedeas* to the *Habeas Corpus*, and the old Bail should have stood.

Otherwise where it is remanded in another Term.

*pl.* 1128. 1 *Rol. Rep.* 64. 2 *Bullf.* 286. S. C. and S. P. *per Cur'*, and *Skin.* 244. S. P. Where it seems agreed generally, that upon such Removal the Bail below are discharged, for they declare *de novo*.

But where a Replevin by Plaint was sued in the Sheriffs Court of *London*, and Pledges there found *de retorno habend' si, &c.* and this Plaint was removed according to their Custom into the Mayor's Court, and after into the *King's Bench* by *Certiorari*; and there *Oyer* of the *Certiorari* being demanded, the Party declared in *B. R.* and upon this a Return awarded; and upon an *Elongat'* returned a *Scire Facias* went against the Pledges in the Sheriffs Court of *London*: The Question was, Whether this Case being removed by *Certiorari*, the Pledges in the Inferior Court were discharged; and it was held that they were not.

6. Of putting in Bail on bringing a Writ of Error.

By the 3 *Fac.* 1. *cap.* 8. it is enacted, " That no Execution shall be stayed or delayed, upon, or by any Writ of Error, or *Superfedeas* thereupon, to be sued for the Reversing of any Judgment given, or to be

(a) The 13<sup>th</sup> Car. 2. Stat. 2. cap. 2. Par. 9. enacts in like Manner, That no Execution shall be stayed after Verdict and Judgment, in Actions for not setting out Tithes, Actions on the Case on any Promise for Payment of Money, Trover, Covenant, Detinue, and Trespass: The 16<sup>th</sup> & 17<sup>th</sup> Car. 2. cap. 8. Par. 3. extends to Writs of Error on Judgments after Verdict, in Dower and Ejectment. (b) On this Statute it hath been adjudged, that Judgment on an *Insimul computasset* was not an Action founded on such a Contract as comes within the Statute; 2 *Bullst.* 55. *Yelv.* 227. So of a Debt due by Arbitration. *Ibid. per Cur.* Judgment on a Demurrer, on a Bottomree Bond, for Payment of Money, and Performance of Covenants not within any of the Statutes. 1 *Shew.* 14. *Comb.* 105.

*Cro. Fac.* 94. *per Cur.* If *A.* becomes Bail for *B.* in an (c) Inferior Court, and there Judgment is given for *B.* and thereupon the Plaintiff brings a Writ of Error, (c) *A.* became Bail for *B.* in the *Portmote* Court of the City of *Chester*, and that Judgment is reversed, and Judgment given for the Plaintiff against *B.* the Bail is liable; for when the first Judgment is reversed, it is as if that Judgment had never been, and as if at the first the Principal of the City had been condemned in the Inferior Court. and Judgment was there given for *B.* and upon a Writ of Error before the Justices of the Great Sessions of the County of *Chester*, that Judgment was reversed; and after upon a Writ of Error in *B. R.* both Judgments were reversed; and it was adjudged, that the Plaintiff should recover 50 *l.* Damages, &c. and it was urged, that *A.* was not liable; for by the Reversal there is no Judgment in the Inferior Court against *B.* and took a Difference where the Judgment of the Inferior Court is affirmed, and where reversed. 2 *Jones* 96. *Adjournatur.*

*Cro. Fac.* 402. *Anstey* and *Monk*, adjudged without Argument. *Moor* 853. *pl.* 1165 *S. C.* and *S. P.* adjudged *per totam Curiam.* But 3 *Bullst.* 191. *S. C.* and 1 *Rol. Rep.* 392. *S. C.* Upon this Point the Court were divided, but gave Judgment for the Plaintiff because of a Defeat in the Plea. *Vide* 3 *Mod.* 87. *Jenk.* 129.

1 *Rol. Abr.* 335. *Cro. Fac.* 636. *S. P.* adjudged. *Noy* 18. *Cro. Eliz.* 587. If Judgment be affirmed upon a Writ of Error in the Exchequer-Chamber, (d) no Execution shall go against the Bail in the Original Action for the Cost *occasione Dilationis Executionis*, and the Party might have compelled the Defendant in Error to put in Bail, pursuant to the Statute 3 *Fac.* 1. (d) In a *Scire Facias* upon a Recognizance against Bail, the Defendant pleaded a Writ of Error brought by the Principal; and *per Cur.* This is no Plea, for the Writ of Error upon the Principal Judgment doth not affect the Recognizance: But *per Holt*, Ch. Just. I have known an Attachment against a Town-Clerk for Proceeding in an Inferior Court, after a Writ of Error here; but I never took it to be right. *Comb.* 295.

1 *Salk.* 97. *Tilly* and *Ridgwayson.* In Debt on a Bond in *C. B.* and Judgment for the Plaintiff, Error was brought in *B. R.* and Bail put in according to the Statute, and Judgment affirmed

affirmed thereupon, Error was brought in (a) Parliament, and the Clerk of the Errors refused to allow the Writ, unless the Party would give a new Recognizance. It was objected, that it was not required by 3 Jac. 1. But *per Cur'*, The first Recognizance does not include Payment of Costs to be assessed in the House of Lords, and these Costs ought to be paid, and therefore a new Recognizance ought to be given within the Intent of the Statute; and it is not the Business of this Court to examine whether Bail was put in upon the first Writ; for the want of that does not hinder the Process of the Writ of Error, but only makes it no *per se* *perfedeas*.

(a) Vide 2 Bullf. 162. That one in Execution is not to be Bailed on bringing a Writ of Error in Parliament, because of the Uncertainty how long the Parliament may continue.

If there is a Judgment in *B. R.* and the Defendant is taken in Execution, and after brings Error in the Exchequer-Chamber, and the Record is removed, he (b) cannot be bailed in *B. R.* because there is no Record there, nor can he be bailed in the Exchequer-Chamber, for they have Authority only to affirm or reverse the Judgment.

Cro. Jac. 108. Cro. Eliz. 731. (b) By a Rule of B. R. every Attorney who shall sue out

any Writ of Error in any Judgment of this Court, returnable in the Exchequer-Chamber, shall forthwith allow such Writ of Error with the Clerk of the Errors of this Court for the Time being, and in Case where Special Bail shall be required, if the Plaintiff upon such Writ of Error, do not within four Days after Allowance thereof, put in Special Bail thereon, the Plaintiff in the Action may proceed to take out Execution notwithstanding such Writ of Error, and where Special Bail is put in, the Plaintiff or his Attorney must forthwith give Notice thereof to the Defendant in Error, or his Attorney; and if the Defendant in Error do not except against such Bail within twenty Days after such Notice given, such Bail shall be allowed.— By a Rule in *C. B.* *Mich. 6 Geo. 2.* in all Cases where Bail shall be filed on Writs of Error, such Bail shall be Perfected within four Days after Exception taken thereto; or in Default thereof, the Clerk of the Errors of this Court shall Non-Pross such Writ of Error.

Upon a Writ of Error of a Judgment in *Ireland*, the Record being removed in *B. R.* the Court took Bail here, and sent Directions to have the Defendant set at Liberty there.

Palm. 286.

### 7. Common Bail, in what Cases necessary.

The Filing of Common Bail is necessary, that it may appear that the Court had Conuzance of the Cause.

But where the want of it is Error, vide Title Error, and Hob. 264.

If a Prisoner be discharged for want of being declared against within (c) two Terms, or upon Non-prossing the Plaintiff, or if he surrender himself in Discharge of his Bail, and is not charged within two Terms; in all these Cases he must file common Bail, that it may appear by the Acts of the Court that he was actually in Court when discharged.

Vide 1 Salk. 98, 99. and the Statute 4 W. & M. (c) Formerly three Terms. Cro. Jac. 620.

By the Rules of *B. R.* no Attorney shall be compelled to appear or file common Bail for any Defendant, unless such Attorney hath by a Note in Writing under his Hand undertaken so to do, and such Note produced by the Plaintiff's Attorney; but if any Attorney hath accepted a Warrant to appear for the Defendant (which Warrant be in no wise revoked) or hath subscribed the same, and do not cause Bail to be filed accordingly, such Attorney shall be compelled to file common Bail of the (d) proper Term, and take a Declaration and plead to the same, or in Default of Pleading Judgment may be entred by Default, if Rules for Pleading have been given; for that the Default of the Defendant or his Attorney shall not tend to the Plaintiff's Prejudice.

(d) By the 5 & 6 W. & M. cap. 21. The Defendant shall

cause an Appearance or common Bail to be entred or filed within eight Days after the Return of the Process, on Penalty of 5 *l.* to be paid to the Plaintiff, for which the Court shall immediately award Judgment, and the Plaintiff may take out Execution. *Vide 5 Met. 392.*

- 1 *Salk.* 99. In an Action upon a Replevin Bond, common Bail shall be filed.  
 2 *Show.* 249. A Judgment in Ejectment against the casual Ejector is erroneous, unless a *Latitat* was sued out, and common Bail filed for him.  
 and such a Judgment usually set aside.

(C) Where Bail shall be said to be put in regularly: And herein,

1. Of the Manner of putting in, excepting to, and justifying Bail.

**B**Y the printed Rules of the Courts, every Attorney who shall appear for any Defendant in any Action, in which Special Bail is not required, shall duly file common Bail for such Defendant, of the Term of which he appears, and give Notice thereof to the Plaintiff or his Attorney; and that where Special Bail is required and put in (a) *de bene esse*, before any Judge or Commissioner on a *Cepi Corpus*, the Defendant's Attorney shall forthwith give Notice thereof in Writing to the Plaintiff or his Attorney, and of the Names of such Bail, with their Additions and Places of Habitation; and if no Exception be taken to such Bail, and entred in the Judge's Book within (b) twenty Days after such Notice, then upon Oath thereof made, for which no Fee is to be taken, such Bail shall be filed; and if Special Bail shall be put in before any Judge *de bene esse*, on any Writ of *Habeas Corpus* or *Certiorari*, and no Rule for better Bail, or Exception taken, or entred in the Judge's Book, against the Bail so put in, within twenty-eight Days after putting in such Bail; that then such Bail shall be filed by the Defendant's Attorney after the End of the said twenty-eight Days.

1 *Salk.* 98.  
 6 *Mod.* 24, 25.  
 (a) At the Expiration of the twenty Days without any Exception, the Bail is filed in Court; but if the Defendant except and gives Notice thereof, the Defendant's Attorney must bring up the Bail-Piece, and the Bail must justify in Court; and *Note*, That in the Common Pleas the Bail-Piece remains with the Philacer till the twenty Days are expired, but in the King's Bench it is left with the Judge, because Judges of that Court determine all Matters relating to their Prisoners. And for the Difference of the Manner of taking Bail, and the Form of the Recognizances in each Court, *vide Cro. Fac.* 449, 645. *Cro. Car.* 481. 2 *Bull.* 232. 1 *Rol. Rep.* 387. 2 *Show.* 335. 2 *Salk.* 564.  
 (b) The like Time to except where the Plaintiff puts in Bail upon bringing a Writ of Error.  
 1 *Salk.* 98.

6 *Mod.* 24, 25. It is said, That after Exception to Bail there is no set Time to justify or exchange them for better, but it must be in convenient Time.  
 But *Q.* and *Vide a Rule*

3 & 4 *Geo.* 2. in *C. B.* If Special Bail put in by the Defendant be excepted to, the Defendant shall perfect his Bail within four Days after such Exception taken, in Default whereof the Plaintiff may proceed upon the Bail-Bond: And if insufficient Bail be put in several Times, the Court will order Execution. *Farell.* 50.

*Comb.* 263. If the Plaintiff accepts the Bail, he may take away the Bail-piece from the Judge's Chamber, and file it for his own Expedition; but after twenty Days then it becomes absolute, and the Defendant takes it away and files it.

2. To what Time it shall have Relation.

1 *Rol. Abr.* 333. In *B. R.* though the Bail of the Defendant be taken and entred the last Day of the Term, and the Bill be put in at any Time the same Term, this is well enough by the Course of the *King's Bench*; though in strictness of Law the Defendant is answerable but from the Bail as in *Hob.* 70. *S. C.* *adjudged.* *Cro. Fac.* 384. *S. C.* *adjudged*; because *Custodia Marcellii*, and not before.  
 the Bill, whensoever filed, hath Relation to the first Day of the Term.

If in Trover commenced in *Hillary* Term, the Conversion is alledged to be the 3d of *February* in the same Term, and Bail is filed the last Day of the Term (a), yet this is well enough, for the Action shall not be said to be depending until the Bail is filed.

1 Vent. 135. adjudged. (a) So the Statute of Limitations may be

pleaded, if the Time be elapsed before the Day wherein the Bail is filed, though not before the first Day of the Term wherein the Action is brought. 1 Vent. 135.

Bail is put in one Term, and new Bail is added the next Term after; and the Question was, If this should be Bail of the first Term, or only of the Term when added; about which the Clerks differed; but the Court was of Opinion, That it was only Bail of that Term when the additional Bail was put in, for they said it was not Bail till (b) compleated and accepted, and making the additional Bail to be Bail of the first Term, might do a (c) Wrong to a third Person, who might be a Purchaser after the First, and before the additional Bail was put in.

1 Salk. 100. (b) It seems now to be the established Practice, that every

Bail taken before or upon the Continuance Day, shall be a Bail, and filed of the precedent Term, and every Bail taken after the Continuance Day shall be a Bail, and filed of the subsequent Term, and not otherwise; but where any new Bail is added to any other, but so as aforesaid taken on or before the Continuance Day, the same shall be taken and filed as of that Term in which the Bail was first put in. (c) For this *vide Cro. Jac.* 449. 2 Salk. 564.

### 3. Where a different Action is prosecuted from that to which the Bail was given.

If there be an Original and *Capias* in one County, and Bail thereupon filed, and the Plaintiff after declares in another County, and thereupon obtains Judgment, by this Variation the Bail are discharged, and not liable to the Damages upon this Declaration.

3 Lec. 235. Yates and Plaintiff, adjudged, and agreed by

the Prothonotaries, though by the Course of the Court the Plaintiff might declare in another County, and the Judgment would be good.

If *A.* arrests *B.* in an Action of 200 *l.* and Bail is put in thereto, and afterwards *A.* delivers two Declarations, one for 200 *l.* and another for 500 *l.* the Bail shall be only liable for the 200 *l.*

2 Show. 335. Resolved on Motion; but how far the

Bail have been held liable in other Actions at the Suit of the same or other Persons, *vide Cro. Jac.* 449, 451. *Style* 464 2 *Sid.* 163. 2 *Jones* 188. 1 *Mod.* 5, 15, 16.

*A.* brings a Bill of *Middlesex*, with an *Acctiam* for 40 *l.* and recovered 100 *l.* and the Court held, that the Bail should not be liable for more than the *Acctiam*, which was the Measure of his Undertaking: And *per Holt*, Ch. Just. He is not liable at all, for his Recognizance is to answer the Condemnation, and since that cannot be, he is bound to nothing; and *Clerk*, Secondary, affirmed, That there was a (d) Rule of Court, that where the Plaintiff recovers a greater Sum than is laid in the Action, the Bail shall not be chargeable *in Ip̄a actione*.

1 Salk. 102. (d) That no Person being Bail in Court, or before

a Judge upon a *Habeas Corpus* or *Cepi Corpus*, shall upon a Recovery against the Defendant be answerable for any greater Sum or Sums than are mentioned in the Writ on which such Defendant was arrested, or in the Return of the *Habeas Corpus*, but shall be liable for such Sum that shall be recovered against the Defendant or Defendants, for whom he is Bail as aforesaid.

### 4. What Defect or Irregularity may be amended.

If Bail in Debt is entred in this Manner, *viz. sub p̄na executionis in Cro. Jac.* 372. *adjudicatione*, where it ought to have been *sub p̄na condemnationis*; (e) For Bail (e) yet it shall stand as well for the Judgment as Execution, adjudged Part, *viz.* the Execution and not the Judgment, no more than for Part of the Debt. 1 *Bull.* 107. upon

cannot be taken for

upon a Writ of Error, and it was ordered to be amended; and made *sub pœna executionis Judicii* as well as for the Execution.

*Latch* 182.  
So ruled on  
Motion.  
*Vide Cro. Eliz.*  
459.

If two are arrested on a *Latitat*, and one puts in Bail in *Michaelmas* Term, and the other of the Term subsequent; the Court will allow the Bail put in on the *Michaelmas* Term to be filed as put in of the subsequent Term; for otherwise it would be Error to proceed in a joint Action on Bail put in at different Terms.

6 *Mod.* 309.  
*per Cur'*, *Bernardiston* and  
*Vic. Middlesex*,  
*vide Title*  
*Amendment.*

If a Writ be taken out in the Name of *A.* and the Officer takes a Bail-Bond to appear at the Suit of *B.* and after there is a *Reddidi se*, by the same Name, though this be *vitium Scriptoris* in not making the Bail-Bond according to the Writ, yet it cannot be amended, for the Bail must be according to the Bail-Bond, and not according to the Writ.

### (D) Of the Proceedings against the Bail, and what Matters they may plead in their Discharge.

THE Act of the Court in delivering the Defendant to Bail being of Record, intitles the Plaintiff to a *Scire Facias*, when it appears that the Defendant has not satisfied the Judgment; hence it appears, that there must be a (a) *Capias* returned against the Principal before the *Scire Facias* is to issue against the Bail.

(a) 1 *Rel.*  
*Abr.* 308, 333.  
*Moor* 432.  
*Cro. Eliz.* 597.

But this being resolved and admitted in so many Books, that it seems needless to cite them. *Vide* 1 *Lev.* 225. That it must Issue and be returned, but may be filed at any Time after; — and that it must be awarded within the Year, else not till a *Scire Facias* against the Principal. 2 *Fones* 96. — And Note, That every *Capias ad Satisfaciendum* to warrant a *Scire Facias* against Bail, must have seven Days at the least exclusive betwixt the *Teste* and the Return thereof; and every such *Capias* is to be delivered and left with the Sheriff, to whom it is directed, four Days exclusive at least before the Return. *Vide* Head of *Writs*, and 2 *Salk.* 602. That there ought to be eight Days between the *Teste* and Return.

1 *Salk.* 101.  
And for the  
general Un-  
derstanding  
at what Time  
the Bail may  
bring in the  
Principal,

*vide* 1 *Rel.*  
*Abr.* 333, 334.  
*Cro. Jac.* 109,

But though on the Return of the *Capias* the Plaintiff is intitled to *Scire Facias*, and the Recognizance in strictness is forfeited, yet if the Defendant render himself at any Time before, or on the Day of the Return of the second *Scire Facias* against the Bail, where two *Nibils* are returned, or on or before the Day of the Return of the first (b) *Scire Facias*, where a *Scire Feci* is returned *sedente Curia*, and Notice of such Render is given to the Plaintiff or his Attorney, the Bail shall be discharged.

1 *Rel. Abr.*  
600, 897.  
1 *Fones* 29.  
*Winch* 61, 62.  
*Godb.* 354.  
*Raym.* 14.

2 *Show.* 77. 1 *Salk.* 101, 600. *Carth.* 515. 6 *M.d.* 132.

If the Defendant dies (a) before the (b) Return of a *Capias ad Satisfaciendum* against him, his Bail pleading the same may be discharged. 1 Rol. Abr. 336.

1 Jones 29.  
*Winch* 61, 62. *Cro. Jac.* 97. *Godh.* 354. *Moor* 175. *Popb.* 186. *Hut.* 47. *Style* 324. 2 *Mod.* 28. S. P.  
 (a) They may plead that the Principal died before any Judgment against him, because they cannot have a Writ of Error to reverse that Judgment. *Cro. Eliz.* 199. adjudged. But 2 *Leon.* 101. the whole Court, except *Wray*, inclined otherwise. And *vide Godh.* 377. 1 *Rol. Abr.* 742. 2 *Mod.* 308. (b) But if he dies after the Return of the *Capias*, this will not excuse the Bail. 1 *Rol. Abr.* 336.—And where the Defendant pleaded that the Principal died before the *Scire Facias* brought, and without more, it was adjudged no good Plea. *Cro. Jac.* 163. *Hutt.* 47.

If A. as Bail, enters into a Recognizance that B. upon eight Days Warning *comparebit* to any Action that shall be brought by C. *necon* that if B. shall be condemned in the said Action, and does not pay, &c. that then he will answer the Condemnation, and C. does bring an Action against B. and he is condemned, and does not pay, &c. in Debt upon this Recognizance, it must be averred that he gave B. eight Days Warning to appear, &c. for A. is bound only to answer the Condemnation in such Action, upon which eight Days Warning was given, for that is the Foundation of the Whole; and there is no Reason that B. by his voluntary Appearance without Warning should prejudice his Bail. Cro. Jac. 45. and Tele. 52 S. C. by three Judges against two in both Books, and the Plaintiff accordingly discontinued his Action.

If a Defendant gives Judgment with a Stay of Execution until a certain Day, the Plaintiff may, notwithstanding such Stay of Execution, sue forth a *Capias ad Satisfaciendum* to the Sheriff of the County where the Action is laid, and returnable before the Day, to make out a *Testatum* against the Defendant; but no such *Capias ad Satisfaciendum* shall be sued forth to warrant a *Scire Facias* against the Bail, (c) because it is to the Prejudice of a third Person. (c) Where there was a Contrivance

between the Plaintiff and Principal, to free and discharge the Principal, and charge the Bail. 1 Bullst. 43.

If the Plaintiff does not declare against the Principal within two Terms after Bail put in, the Bail will be discharged, as likewise the Principal on filing common Bail. Cro. Jac. 620. Salk. 98, 99. Comb. 295.

But if after Bail put in, and before the Plaintiff hath declared, the Defendant obtains an Injunction, and this is continued for several Terms, and after dissolved, and the Plaintiff soon after declares and gets Judgment, and brings a *Scire Facias* against the Bail, they cannot plead that no Declaration was delivered or filed against the Principal within two Terms after the Action commenced and Bail entred, for there was no Default in the Plaintiff that he did not declare sooner. 3 Mod. 274. adjudged between Doe and Dawson.

J. S. acted as Attorney for the Plaintiff in the original Action, and after Judgment in that Action took out a *Scire Facias*, and proceeded to Judgment against the Bail without any new or second Warrant; on a Writ of Error, as well of the Principal Judgment, as upon that against the Bail, the Court held, That any Body might have taken out the *Scire Facias*; but as to the further Proceedings they were irregular, the Attorney's Authority determining with the first Judgment, and therefore reversed the Judgment. 1 Salk. 89. Bur and Atwood adjudged, and said by the Chief Justice, that upon this Writ of Error the Record of the

Judgment against the Principal ought not to have been certified. *Cartb.* 447. S. C. and only said, That the Writ of Error was quashed, *quoad* all that related to the principal Judgment. 5 *Mod.* 397. S. C. said in general that it was quashed. And *vide Style* 174. *Cro. Car.* 481. 1 *Jones* 396. 1 *Rol. Abr.* 749.

If Judgment be given against the Principal, and after, upon a *Scire Facias* against the Bail, Judgment be also given against them, these Judgments are several, and they shall not join in a Writ of Error no more Cro. Car. 300. 1 Jones 325. Godh. 440. S. C. adjudged between Lancafter and Keyleigh. Hob. 72. Cro. Jac. 384. 1 Rol. Rep. 294. Cro. Car. 408, 574. 1 Jones 360. 1 Bullst. 123. Lit. Rep. 93. 1 Lev. 157. Com. 108. S. P.

than Tenant for Life, and he in Reversion, or the Tenant and Vouched may join.

*Skin.* 100.  
adjudged.

(a) Where  
the Bail may  
plead Pay-

ment by the Principal, and how such Plea is to be pleaded, *vide* 1 *Rol. Abr.* 335, 336. 2 *Lev.* 212. *Cro. Eliz.* 235. *Style* 324. 2 *Leon.* 213. *Cro. Eliz.* 132. Where a Release to the Principal discharges the Bail. 1 *Rol. Abr.* 336.

2 *Show.* 147.  
*Cresley* and  
*Darling*, ad-  
judged *Niff.*

But if in a Joint Action against two, *J. S.* is Bail for one of them, and there is Judgment against the Principals, in a *Scire Facias* against *J. S.* the Bail, it is sufficient to alledge, that the Defendant, for whom he was bound, did not pay the Money, and if the other had paid it, he should have pleaded it.

1 *Rol. Abr.*

334, 335.  
*Moor* 853.  
*Pl.* 1165.

*Cro. Jac.* 402.

3 *Bulst.* 191.

1 *Rol. Rep.*

392.

*Raym.* 100.

2 *Mod.* 87.

*Farest.* 77,

97, 98.

*S. P. Latch* 149. 3 *Bulst.* 331, 332. *Noy* 82. *Popb.* 186. *S. C.*

1 *Rol. Abr.*

337.

*Moor* 888.

1 *Leon.* 58.

2 *Bulst.* 260.

(b) Where

the Principal

was in actual

Execution, and a

*Committitur* entred,

yet after two

*Scire Facias*'s returned,

and Judgment thereupon,

the Court would not set it

aside on Motion, for the

Bail ought to have pleaded it.

*Skin.* 120.—So

where the Principal

surrendered himself before

the Return of the

*Capias*; yet the Plaintiff

having had no Notice,

and there being no

Discharge of the

Bail-piece, or

*Exoneratur* entred;

and the Plaintiff

having proceeded to

Judgment against

the Bail, the Court

would not relieve

them on Motion,

but put them to

their *Audita*

*Querela.* 1 *Salk.* 101.

(c) But if through

want of Notice he

is at further

Charge against

the Bail, that shall

not vitiate the

Surrender, and a *Committitur* entred, yet after two *Scire Facias*'s returned, and Judgment thereupon, the Court would not set it aside on Motion, for the Bail ought to have pleaded it. *Skin.* 120.—So where the Principal surrendered himself before the Return of the *Capias*; yet the Plaintiff having had no Notice, and there being no Discharge of the Bail-piece, or *Exoneratur* entred; and the Plaintiff having proceeded to Judgment against the Bail, the Court would not relieve them on Motion, but put them to their *Audita Querela.* 1 *Salk.* 101. (c) But if through want of Notice he is at further Charge against the Bail, that shall not vitiate the Surrender; but yet the Bail shall not be delivered till they pay such Charges. 6 *Mod.* 238.

Execution, and a

*Committitur* entred,

yet after two

*Scire Facias*'s returned,

and Judgment thereupon,

the Court would not set it

aside on Motion, for the

Bail ought to have pleaded it.

*Skin.* 120.—So

where the Principal

surrendered himself before

the Return of the

*Capias*; yet the Plaintiff

having had no Notice,

and there being no

Discharge of the

Bail-piece, or

*Exoneratur* entred;

and the Plaintiff

having proceeded to

Judgment against

the Bail, the Court

would not relieve

them on Motion,

but put them to

their *Audita*

*Querela.* 1 *Salk.* 101.

(c) But if through

want of Notice he

is at further

Charge against

the Bail, that shall

not vitiate the

Surrender; but yet

the Bail shall not

be delivered till they pay such Charges. 6 *Mod.* 238.

1 *Salk.* 98.

*per Cur.*

If *A.* sues *B.* in three

Actions, and *B.* puts in

three several Bails,

the Plaintiff recovers in

all, and the Defendant

renders himself, in

which one of the Bail

only enters an

*Exoneratur*, though the

Rendering is a

Discharge in *Posse* as

to all, yet it is not

(d) compleat and

actual as to

all, till an

*Exoneratur* entred

upon all.

(d) Where

after a Sur-

render at a

Judge's Chamber

the Principal

escaped from the

Tipstaff. 6 *Mod.* 238,

239. *Farest.* 77.

*Latch* 149.

*Noy* 82.

*Popb.* 185.

*S. C.*

If the Bail plead a

Render of the

Principal, they (e)

must conclude

their Plea *prout*

*patet per*

*recordum*; for this

is not to be tried

*per Pais*, but

by the Record.

*Hob.* 210. *Moor* 888.

*pl.* 1249. 1 *Keb.* 761,

815. *S. P.* adjudged.

1 *Sid.* 216. *Dubitatur*,

and said there

were Precedents both ways; but *vide* 1 *Lev.* 211. 2 *Keb.* 189, 206. Like Point adjudged. (e) So if in a *Scire Facias* against Bail upon a Writ of Error, according to the Statute of 3 *Jac.* 1. They plead the Plaintiff prosecuted the Writ of Error with Esteem, and thereupon the Judgment was reversed; they must conclude *prout patet per recordum.* *Raym.* 50.

Also in pleading a Render of the Principal, the Bail must say *quod venit hic in (a) Curia & in (b) eadem Curia reddidit se & per eandem Curiam commissus fuit*, but it being here laid to be done the 2d of February, (being Candlemas-Day, and so *dies non Juridicus*) it judicially appears there could be no Court that Day, and so the Render and Commitment void.

*quod adhuc remanet in Custod', &c.* for if in Prison without Render or Commitment it is not material. (a) Vide Style 330, 331. (b) The Render must be made in that Court where the Record is at the Time. Cro. Fac. 98. 1 Rol. Abr. 334.

In a *Scire Facias* against Bail, they cannot plead that the Plaintiff hath arrested the Principal in the *Stannery Court*, *per quod* they could not have his Body, for they might have removed him by *Habeas Corpus*.

So in a *Scire Facias* against Bail, they cannot plead that before the return of the second *Scire Facias* the Plaintiff prosecuted a *Testatum Capias* against the Principal, directed to the Sheriff of, &c. who took the Principal in Execution upon the said Judgment, *& adhuc habet & detinet*; for the Recognizance was forfeited before.

## Bail in Criminal Causes.

**B**AIL in Criminal Causes is regularly to be allowed in all such Cases wherein it seems doubtful, whether the Person accused be guilty of the Offence or not; in which Case, according to another General Rule, it may be allowed and taken by that Person who has Cognizance of the Crime, and therefore being Judge of the Offence, may, if he thinks fit, Bail the Offender.

- (A) In what Cases it is grantable by a Sheriff.
- (B) Where by a Justice of the Peace.
- (C) Where by Justices of Gaol-Delivbery.
- (D) Where by the Court of King's Bench.
- (E) Where by the other Courts of Westminster.
- (F) What shall be said to be sufficient Bail.
- (G) The Offence of taking insufficient Bail.
- (H) The Offence of granting it where it ought to be denied.
- (I) The Offence of denying, delaying or obstructing it, where it ought to be granted.
- (K) In what Form it is to be taken.
- (L) What shall forfeit the Recognizance.

(A) In

## (A) In what Cases it is grantable by a Sheriff.

*Vide 2 Hawk. P. C. 93.* **B**Y the Common Law, according to some Opinions, the Sheriff with-  
 (a) That a Constable had the like Power, *vide 2 Hawk. P. C. 93.* And how far this Power is taken away by those Statutes which empower Justices of the Peace to admit Persons to Bail on an Accusation of Felony, and particularly prescribe in what Manner they shall do it, *vide Ibidem 93.* (b) But this Power is now taken away by 1 E. 4. cap. 2. by which it is enacted, That the Sheriff shall not proceed on such Indictment, but shall remove it to the next Sessions of the Peace. H. P. C. 106. 2 Hawk. P. C. 93.

*Co. Bail and Mainprize, cap. 10. 2 Hawk. P. C. 93. 1 Hawk. P. C. 76.* Also Bail is grantable by a Sheriff by Virtue of the following Writs.  
 1. By that of *Odio & Atia*, by which a Person committed for the Death of a Man, might on an Inquest taken by the Sheriff, if he were found to have done the Fact by Misadventure or *se Defendendo*, be mainprized by 12 Men, upon the Writ *de Ponendo in Ballium*; but this Writ seems obsolete at this Day.

*Register 269. H. P. C. 103. 104. 2 Hawk. P. C. 93.* 2dly, By Writ of Mainprize, which of late has been disused, but seems still in Force, and may be brought by Persons Bailable, as those who are imprisoned for a slight Suspicion of Felony, or indicted of Larceny, before the Steward of a Leet, or of a Trespas before Justices of the Peace, &c.

*F. N. B. 66. Register 78. 79. Vide Head of Writs.* 3dly, That of *Homine replegiando*, whereon if he return that the Plaintiff is esloigned, he may by *Capias* of *Withernam* imprison the Defendant, whether he be a Peer or Commoner, till the Plaintiff shall be replevied.

By *Westm. 1. cap. 15.* it is enacted as followeth; “ For as much as  
 “ (c) Sheriffs and others, who have taken and kept in Prison Persons de-  
 “ tected of Felony, and Incontinent, have let out by Replevin such as  
 “ were not replevifable, and have kept in Prison such as were replevifa-  
 “ ble, because they would gain of one Party and grieve the other; and  
 “ for as much as before this Time it was not determined which Persons  
 “ were replevifable and which not, but only those that were taken for  
 “ the (d) Death of a Man, or by (e) Commandment of the King, or  
 “ of the (f) Justices, or for the (g) Forest: It is provided, and by the  
 “ King commanded, That such Prisoners as before were (h) outlawed,  
 “ and

I  
 not strictly within the Purview of the Statute, yet they will always in their Discretion pay a due Regard to the Rules prescribed by it; and not admit a Person to Bail who is expressly declared by it to be irreplevifable, without some particular Circumstances in his Favour. 2 Hawk. P. C. 113, 114. — And by the 1 & 2 Ph. & M. Justices of the Peace shall not Bail any Person for Offences declared irreplevifable by this Statute, *vide infra.* (d) For this *vide 2 Hawk. P. C. 95.* and the Statutes of *Glouc. cap. 9. 3 H. 7. 1.* (e) This Exception is not to be applied generally to every Command of the King, but only to such as proceed from him in Person, or from his Privy Council. 2 Hawk. P. C. 95. (f) This is not to be understood of ordinary Commitments by such Justices for safe Custody, but of Imprisonments by their absolute Command, by way of Punishment, as for Contempts, and such like Matters, which lie rather in their Discretion than in their ordinary Power. 2 Hawk. P. C. 96. S. P. C. 73. *Dalt. ch. 114. F. N. B. 251. 24 E. 3. 33. pl. 25. 1 Rol. Rep. 151.* (g) They must be Forests, strictly such, and not Parks or Chases; but it is not material whether the Forest be the King's, or a Subject's. *Register 77. 4 Inst. 314. Co. Lit. 2. a. 233. a. F. N. B. 67. Plov. 124. Vide the 1 E. 3. cap. 8. and 7 R. 2. cap. 4. That no Man shall be Imprisoned by any Officer of the Forest without due Indictment, or being taken with the Manner, or Trespassing in the Forest:* For the Explanation of which *vide 2 Hawk. P. C. 97.* And for what shall be said a Taking in the Manner, *vide Carth. 77, 78.* (h) Yet the King's Bench may in Discretion Bail a Man upon an Outlawry of Felony; as where an Error is alledged in the Proceedings, &c. 19 H. 6. 2. a. 2 Hawk. P. C. 98. *Vide*

“ and they which have abjured the Realm, (a) Provers, and such as be taken with the (b) Manner, and those which have broken the (c) King’s Prison, Thieves (d) openly defamed and known, and such as be appealed by Provers, so long as the Provers be living (if they be not of good Name) and (e) such as be taken for House-burning feloniously done, or for false Money, or for counterfeiting the King’s Seal, or Persons (f) excommunicate, taken at the Request of the Bishop, or for (g) manifest Offences, or for Treason touching the King himself, shall be in no wise replevisable by the common Writ, nor without Writ, but (h) such as be indicted of Larceny by Inquests taken before Sheriffs or Bailiffs by their Office, or of light Suspicion, or for Petit Larceny, that amounteth not above the Value of Twelve Pence, if they were not accused of some other Larceny afore-time, or accused of (i) Receipt of Thieves or Felons, or of Commandment, or Force, or of Aid in Felony done, or accused of some other Trespass, for which one ought not to lose Life or Member, and a Man approved by a Prover after the Death of the Prover (if he be no common Thief nor defamed) shall be henceforth let out by sufficient Surety, whereof the Sheriff will be answerable, and that without giving ought of his Goods.

Title *Out-lawry.*  
 (a) For this *vide 2 Hawk. P. C. 204.*  
 Head of *Approver.* (b) Or rather *Mainprizer*, that is with the Thing stolen as it were in their Hands. *H. P. C. 101.*  
*2 Hawk. P. C. 98.*  
 (c) Also they who have broken any other Prison. *2 Inst. 188.*  
*2 Hawk. P. C. 98.*  
 (d) The Judgment whereof must be

left to the Discretion of the Person who hath Power to Bail them. *2 Hawk. P. C. 98.* (e) Persons taken for Arson, or for false Money, or for falsifying the King’s Seal, or for Treason which touches the King himself, are in respect of the Heinousness of their Offence excluded from Replevin, especially if they be in actual Custody; but yet such, according to the Circumstances of their Cases, may be Bailed in the King’s Bench. *2 Hawk. P. C. 99.* (f) But if a Person appear to be Imprisoned for an Excommunication, in a Cause whereof the Spiritual Court hath no Cognizance, he may be delivered either by *Habeas Corpus* or by Quashing, or superseding the Writ of *Excommunicato capiendus*. *2 Hawk. P. C. 98.* (g) Must be intended of inferior Crimes of an enormous Nature, under the Degree of Felony; the Judgment whereof seems to be left to Discretion. *Vide 2 Hawk. P. C. 99.* (h) But how far it must appear that those excepted out of the Statute are of good Reputation, and innocent of the Fact, *vide 2 Hawk. P. C. 101.* And that it must be left to the Discretion of the Person who has the Power of Bailing them. (i) This is to be understood of Accessories before and after to Capital Offences, with these Restraints, that the Persons so accused are of good Reputation, and under no violent Presumptions of Guilt. *2 Hawk. P. C. 102. and 31 Car. 2. cap. 2. Part 21.*

(B) Where by a Justice of the Peace.

IT seems clear, that where-ever Justices of the Peace have Power to hear and determine any Offence which isailable within the Statute *Westm. 1.* any one of such Justices seems consequently to have Power to Bail any Person indicted at the Sessions for such Offence; because every such Justice is a Judge of the Court which is to determine it.

*H. P. C. 105.*  
*Coke, Bail and Mainprize, chap. 6.*  
*Lamb. 347.*  
*2 Hawk. P. C. 103.*  
*2 Hawk. P. C. 103.*

Also every Justice of the Peace has a Discretionary Power of admitting Persons to Bail who have given a dangerous Wound.

But the Power of Justices of admitting to Bail, is chiefly regulated by Acts of Parliament, to which Purpose it is recited by *1 R. 3. cap. 3.* “ That divers Persons had been daily arrested and imprisoned for Suspicion of Felony, sometime of Malice, and sometime of a light Suspicion, and so kept in Prison without Bail or Mainprize, to their great Vexation and Trouble; and thereupon it is enacted, That every Justice of the Peace in every Shire, City or Town, may by his or their Discretion, let such Prisoners and Persons so arrested to Bail or Mainprize, in like Form as though the same Prisoners or Persons were indicted thereof of Record before the same Justices at their Sessions.

But this Statute, so far as it gives such Power to a single Justice, is repealed by *3 H. 7. cap. 3.* which enacteth, “ That Justices of the Peace, or two of them at the least, whereof one to be of the *Quorum*, have

“ Power to Bail any Person Mainpernable by Law, to their next General Sessions, or to the next General Gaol-Delivery, as well within Franchise as without; and that the same Justices, or one of them, shall certify the same to such Sessions or Gaol-Delivery, on Pain of 10 *l.*

But these Statutes having been often abused by Justices of the Peace bailing Persons in the Name of two Justices, where one only was present, and for Offences not bailable;

It is enacted by 1 & 2 *Pb. & Mar. cap. 13.* “ That no Justice shall Bail any Person for Offences declared to be irreplevifable by *Westm. 1.* and that no Person arrested for Manslaughter or Felony, or Suspicion thereof, shall be let to Bail or Mainprize by any Justices of the Peace, if it be not in open Sessions, except it be by two Justices at the least, and one to be of the *Quorum*, and the same Justices to be present together at the Time; which Bailment or Mainprize they shall certify in Writing, subscribed or signed by them at the next General Gaol-Delivery; and such Justices before such Bailment for Felony, shall take the Examination of the Prisoner, and the Information of them that bring him, of the Fact and Circumstances thereof, and shall put in Writing so much thereof as shall be material, before they make the Bailment, and shall certify such Examination and Bailment to the next General Gaol-Delivery, and shall have Authority to bind all such by Recognizance or Obligation, as do declare any Thing material to prove the said Offences, to appear at the next General Gaol-Delivery, and to give Evidence, &c. and shall certify the said Evidence and Bonds, &c. before the Time of the Trial; and if any Justice of *Quorum* shall offend against this Act, he shall be fined in Discretion by the Justices of Gaol-Delivery, or Proof by Examination before them, &c. *But it is Provided,* That Justices in *Middlesex*, and in Cities, Boroughs, and Towns Corporate, shall have Authority to Bail Prisoners in such Manner as was before accustomed, and also shall take Examinations and Bonds as aforesaid, upon every Bailment, and certify the Bailment-Bond and Examination at the next General Gaol-Delivery.

2 *Hawk. P.*  
C. 105.

The Authority given to one Justice of the Peace by 1 *R. 3.* to admit Persons to Bail for Felony, being repealed by 3 *H. 7.* and 1 & 2 *Pb. & Ma.* one Justice of the Peace cannot admit Persons to Bail, unless it be for an Offence directly tending to the Breach of the Peace, the Restraint whercof is the chief End of his Office, or for an Offence by Statute put under the Conuzance of one Justice, or for an Offence indictable at the Sessions.

2 *Hawk. P.*  
● 105.

But though the Statute of *Pb. & Ma.* has prescribed the Statute of *Westm. 1.* as a Pattern for Justices to follow in relation to Bail, and it therefore follows, that a Person under an actual Arrest for any Crime, declared to be irreplevifable by that Act, cannot be bailed by any Justice; yet if a Person at large be only accused of any such Crime on a slight Suspicion, before a Justice of the Peace, it seems that the Justice ought not to commit him, but ought to take Surety from him to appear before a proper Court.

2 *Hawk. P.*  
C. 105.

1 *Rel. Rep.*  
268.  
*H. P. C. 99.*  
*Dalt. c. 114.*  
*Lamb. 346.*  
2 *Inst. 314.*

Also the Statute of 1 & 2 *Pb. & M.* expressly mentioning the Bailing of Persons for Manslaughter, as well as for other Felonies, it is clear, that Justices of the Peace, may by Force thereof safely Bail any Person imprisoned on a slight Suspicion of a Fact, appearing to be no higher an Offence than Manslaughter; and much more if it appear to amount to no more than Homicide by Misadventure, or in Self-defence; but the Justices ought to be cautious the Offence does not amount to Murder; also that there be no violent Presumptions that the Party did the Fact; for if any such appear, the Party ought not to be Bailed, though the Offence amount to no more than Homicide by Misadventure or Self-defence.

(C) Where by Justices of Gaol-Delivery.

Justices of Gaol-Delivery not being within the Restraint of the Statute *Cromp. 154. a.*  
*Westm. 1.* may bail Persons convicted before them of Homicide by *H. P. C. 101*  
 Misadventure, or Self-defence, the better to enable them to Purchase *F. N. B. 246.*  
 their Pardon. *S. P. C. 15.*

Also it seems that in Discretion they may Bail a Person convicted be- *2 Hawk. P.*  
 fore them of Manslaughter, upon Special Circumstances; as if the Evi- *C. 106.*  
 dence against him were slight, or if he had purchased his Pardon. *H. P. C. 101.*  
*Cromp. 153.*

Also if an Appellee plead an Excommunication in Disability of the *2 Hawk. P.*  
 Plaintiff, it seems they may bail him till the Plaintiff shall be absolved; *C. 106.*  
 for otherwise the Appellee might lie in Prison for ever, without having an *1 Salk. 61.*  
 Opportunity of coming to his Trial. *S. P. C. 72.*

And where such Justices have Power to admit Persons to Bail, it seems *2 Hawk. P.*  
 that they may do it after their Sessions is over, as well as during their *C. 106.*  
 Sessions. *2 Hawk. P.*  
*C. 106.*

(D) Where by the Court of King's Bench.

THIS Court by the Plenitude of its Power, may in Discretion ad- *Vingb. 157.*  
 mit Persons to Bail, though committed by other Courts for Crimes *6 Mod. 73.*  
 notailable by those Courts, on Consideration of the Nature and Cir- *2 H. P. C.*  
 cumstances of the Case. *112.*

But here it must be observed, that with respect to the Nature of *Raym. 381.*  
 Offence, although this Court is not tied down by the Rules prescribed by *2 Inst. 185,*  
 the Statute of *Westm. 1.* yet it will in Discretion pay a due Regard to the *186, 189.*  
 Rules prescribed by it, and not admit a Person to Bail who is expressly *H. P. C. 104.*  
 declared to be irreplevisable, without some particular Circumstances in *1 Salk. 61.*  
 his Favour. *3 Bulst. 113.*

And therefore if a Person be attainted of Felony, or convicted thereof *2 Hawk. P.*  
 by Verdict General or Special, or notoriously guilty of Treason or Man- *C. 113, 114.*  
 slaughter, &c. by his own Confession or otherwise, he is not to be ad- *5 Mod. 454.*  
 mitted to Bail without some special Motive to induce the Court to *Kelynge 90.*  
 grant it. *Dyer 79.*

As where a Person taken by a *Capias Utlagatum* on an Appeal of Felony, *1 Bulst. 87.*  
 by the Name of *J. S. Gentleman*, pleads that his Name is *J. S. Yeoman*, *2 Hawk. P.*  
 and not Gentleman, and so he is not the same Person that was outlawed; *C. 114.*  
 in which Case, the Court in Discretion may Bail him, for until the Plea *So for any*  
 be determined, it appears not whether he were the Person intended or *other Error*  
 not. *in the Out-*  
*lawry, espe-*  
*cially if it*

be an apparent one. *Vide 5 H. 7. 16. pl. 7. 2 Inst. 188. H. P. C. 101. 1 Sid. 316.*

So if a Man is convicted of Felony upon Evidence, by which it plain- *Cromp. Justice*  
 ly appears to the Court that he is not guilty of it; in which Case even *154.*  
 the Justices of Gaol-Delivery may bail him. *2 Hawk. P.*  
*C. 114.*

Or where a Prosecution is unreasonably delayed, or where the Prisoner *5 Mod. 455.*  
 may be in Danger of losing his Life, either by Famine or dangerous Di- *1 Sid. 78.*  
 stemper, &c. unless he bailed. *1 Bulst. 85.*  
*Palm. 558.*

*1 Keb. 305. Latib 12. Cro. Jac. 356 Co. Lit. 289.*

5 *Mod.* 73. The Court of King's Bench hath always admitted Persons to Bail imprisoned by the King's Special Command, or by Order of the Privy Council, where the Commitments expressed the Crime or Cause for which the Party was committed, on the like Circumstances, on which in Discretion it will grant Bail on other Commitments.

1 *Sid.* 143.  
*Palm.* 559.  
 Also where it hath appeared that Persons have been committed by Colour of an Authority claimed under any illegal Patent, this Court hath always discharged the Persons so committed without Bail. 1 *Leon.* 70. 1 *And.* 297. 2 *Hawk. P. C.* 107:

(a) 33 *H.* 6. But it was formerly (a) holden by many, and at Length adjudged in 28. b. (b) Sir *John Corbet's* Case, that Persons committed by the special Command of the King, signified by Warrant from the Lords of the Privy Council, were notailable without the King's Consent, unless there appeared some extraordinary Circumstances in the Case; it being to be presumed that the King could not exert his Prerogative in such a Manner, without some good Reason for the Safety of the State, not fit to be divulged; but this being thought to be a great Strain of the Prerogative, and to make the Liberty of the Subject precarious, and contrary to the Purport of *Magna Charta*, and many other Statutes, which declared, That no Man shall be imprisoned but by due Process of Law, &c. occasioned the Petition of Right, 13 *Car.* 1. and the 16 *Car.* 1. cap. 10. By which it seems now established, That where Commitments by the Privy Council do not with convenient Certainty express the Crime alledged against the Party, he ought to be bailed.

The great Regard which is so justly due, and which has always been paid to the Proceedings of either House of Parliament, who are the Guardians of the Liberty of the Subject, makes it somewhat doubtful in what Cases the Court of King's Bench will Discharge or Bail a Person committed by either of those Houses.

Hence no Precedent can be found, where the Court of King's Bench has bailed a Prisoner sitting the Parliament, on a Commitment, which on the Return of it stands indifferent whether it be strictly legal or not.

And therefore in the Lord *Shaftsbury's* Case, who upon his *Habeas Corpus* in the *King's Bench* was returned to have been committed by the House of Lords, for a High Contempt committed against the House; the Court would not take Notice of any Exceptions against the Form of the Commitment; as that it was too general, and did not express the Nature of the Contempt, or in what Place it was committed, &c. for that it shall be presumed that it was such, for which the Lords might lawfully make such an Order, and no other Court shall prescribe to them in what Form they ought to make it.

But a Person committed for a Contempt by the Order of either House of Parliament, may be Discharged by the Court of *King's Bench* after a Dissolution or Prorogation of the Parliament, whether he were committed during the Sessions or afterwards; for that all the Orders of Parliament are (c) determined by a Dissolution or Prorogation, and all Matters before either House must be commenced a-new at the next Parliament, except only in the Case of a Writ of Error; and if the Subject should be deprived of his Liberty till the next Parliament, which perhaps may not meet again in many Years, no one could say when his Imprisonment would end.

(c) But *Q.* for though the Prorogation of the Parliament was the chief Reason why the Earl of *Danby* was bailed; yet the binding him to appear at the next Sessions of Parliament, was an Affirmance of the Commitment, and a plain Proof of the Opinion of the Court at that Time, that the Commitment was not avoided or discharged by the Prorogation of the Parliament. *Cartb.* 132, 133. *Vide Skin.* 56. That Earl of *Danby* was not bailed.

And though the Court of King's Bench may in their Discretion bail a Lord upon an Impeachment of High Treason, after a Dissolution or Prorogation of the Parliament, yet may they refuse it, not as a Matter out

*Raym.* 381.  
 Lord *Stafford's* Case.

out of their Power, but as a Thing which they are not bound to do, and improper on Consideration of the whole Circumstances of the Affair.

The Earl of *Salisbury* was Impeached for being Reconciled to the *Cartb.* 131, Church of *Rome*, by the Convention that was turned into a Parliament 132. 1 *W. & M.* and lay in the *Tower* till the next Parliament, which being 1 *Shoc.* 100. adjourned for two Months, he moved to be Discharged on the Act of S. C. Earl of *Oblivion*, wherein neither his Crime nor his Person were excepted, but *Salisbury's* clearly within the Act of Pardon, or that he might be bailed; but as to the Act of Pardon, the Court held, that it should be (a) pleaded with (a) For which proper Averments, which could not be done here, because there was are cited nothing before the (b) Court upon which to ground such Plea; and that *Ploc.* 484, as to the Bailing him, this being a short Adjournment, the Application 401. 8 Co. 68. 4 H. 7. 8. *Rast. Err.* for that Purpose should be to the Parliament.

665. (b) But the Reporter makes a *Quare*, Whether he might not plead it in Discharge of the Matter returned by the *Habeas Corpus*, and enter it as the same Roll. *Cartb.* 132.

In former Days, and particularly at the Time when Sir *Edward Coke* was Chief Justice, several Persons committed to the *Fleet* by the Lord Chancellor, were bailed by the Court of King's Bench, upon Exceptions to the (c) Generality of the Form of the Commitments.

(c) As not shewing the Time of the Commitment. 1 *Rol. Rep.* 192.— Or setting forth only the Command of the Lord Chancellor as the Ground of the Imprisonment, without mentioning any Crime at all. *Moor* 839. 1 *Rol. Rep.* 219.— Or mentioning the Crime in general Terms; as for a Contempt to the Court of Chancery; without mentioning what the Contempt was. 1 *Rol. Rep.* 192, 218.

Also one *Glanvil*, who was generally committed by the Command of the Lord Chancellor, without setting forth any Cause of such Command, 1 *Rol. Rep.* 111, 219. seems to have been bailed upon Examination of the Merits of the Decree, *Moor* 838. for disobeying whereof he was in Truth committed; whereby it appeared, 2 *Bullst.* 301. that the Decree related to a Matter before adjudged at the Common 3 *Cro. Jac.* 343. Law; which was thought contrary to the Purport of 27 *E. 3. cap. 1.* 1 *Rol. Rep.* 277. *Vide* and 4 *H. 4. cap. 23.* But this Proceeding being resented by the Lord *Dalison* 81. Chancellor, the said *Glanvil* was afterwards recommitted by him for the 3 *Leon.* 18. same Matter, and yet was afterwards on another *Habeas Corpus* bailed the second Time by the Court of *King's Bench*.

But as there have been no such Proceedings of late Days, the Disuse of them has certainly lessen'd, if not wholly removed the Force of these Resolutions, especially as it is now established, that a Court of Equity can give Relief after a Judgment at Law; for otherwise it would have no Power of moderating the Rigour of the Law, it being in many Cases very doubtful what the Law is before it be determined; the Superior Courts therefore will put the (d) most favourable Construction on one another's Proceedings, and not intend that they acted beyond their Jurisdiction.

(d) A Commitment from Chancery for Disobedience to a Decree, is good without shewing what the Decree was. 1 *Mod.* 155. adjudged. *Moor* 340. S. P.

The Court of King's Bench having the Supreme Controul of all Inferior Courts, may in Discretion admit Persons to Bail committed by such Courts, upon Consideration of the whole Circumstances of the Case, as the (e) Length of the Imprisonment, the (f) Enormity, or dangerous Tendency, or Notoriety, or small Consequence of the Offence, or Obstinacy of the Offender, or the (g) Dignity of the Court by which he was committed, and other such like Circumstances; of which the Court will receive (f) 1 *Rol. Rep.* 218, 337. 2 *Bullst.* 140. *Latib* 12. (g) 1 *Bullst.* 48 to 54.

M m m

(g) For this *vide* 2 *Hawk. P. C.* 112. *Vangb.* 139. 2 *Bullst.* 139. *Cro. Jac.* 219. *Cro. Car.* 579. 1 *Sid.* 144.

144, 286, receive Information by Suggestion or Affidavit, being (a) consistent with the Return of the *Habeas Corpus*.  
320.

*Silk.* 348.

5 *Mod.* 19. *March* 52. (a) That no one can in any Case controvert the Truth of the Return to a *Habeas Corpus*, or plead or suggest any Matter repugnant to it; yet a Man may confess and avoid such Return, by admitting the Truth of the Matters contained in it, and suggesting others not repugnant, which take off the Effect of them. 1 *Sid.* 287. 5 *Mod.* 323, 454. 2 *Jones* 222. 2 *Hawk. P. C.* 113.

### (E) Where by the other Courts of Westminster.

2 *Inst.* 53, 55,  
615.

4 *Inst.* 290.

*Vaugh.* 154.

2 *And.* 297.

*Dalison* 81.

3 *Leon.* 18.

2 *Jones* 13, 14.

2 *Mod.* 198.

2 *Hawk. P. C.* 115.

THE Courts of Common Pleas and Exchequer, at any Time during Term, and the Chancery, either in Term or Vacation, may by the Common Law award a *Habeas Corpus* for any Person committed for a Crime under the (b) Degree of Felony or Treason; and thereupon discharge him, if it shall plainly appear by the Return that the Commitment was illegal, or bail him if it shall appear doubtful.

(b) That in some Cases the Chancery may by the Common Law bail Persons for Felony. 2 *Hawk. P. C.* 115.

*Vide infra*  
Letter (1).

And by the *Habeas Corpus* Act, any of the said Courts in Term-time, and any Judge of the said Courts, being of the Degree of the Coif, in the Vacation, may award a *Habeas Corpus* for any Person bailable within the Intent of that Act, for any Crime under the Degree of Felony.

### (F) What shall be said to be sufficient Bail.

2 *Hawk. P. C.* 88.

*H. P. C.* 97.

*Dalt. cap.* 14.

That former-

ly none un-

der the De-

gree of Sub-

sidy Men

were admit-

ted to be

Bail for any

Person.

*Dalt. c.* 70,

and 114.

2 *Hawk. P.*

*C.* 89.

NO Person shall be bailed for Felony by less than two, and it is said not to be usual for the *King's Bench* to bail a Man on a *Habeas Corpus*, on a Commitment for Treason or Felony, without four Sureties; the Sum in which the Sureties are to be bound, ought to be never less than 40*l.* for a Capital Crime; but it may be higher in Discretion, on Consideration of the Ability and Quality of the Prisoner, and the Nature of the Offence; and the Sureties may be examined on Oath concerning their Sufficiency, by him that takes the Bail; and if a Person be bailed by insufficient Sureties, he may be required either by him who took the Bail, or by any other who hath Power to bail him, to find better Sureties, and on his Refusal may be committed; for insufficient Sureties are as none.

But Justices must take care, that under Pretence of demanding sufficient Surety, they do not make so excessive a Demand, as in Effect amounts to a Denial of Bail; for this is looked upon as a great Grievance, and is complained of as such by 1 *W. & M. Sess.* 2. by which it is declared, that excessive Bail ought not to be required.

(G) The Offence of taking insufficient Bail.

IF the Party bailed by insufficient Sureties, do not appear according to the Condition of the Recognizance, the Justice, &c. who bailed him is Fineable by the Justices of Assise; but if he appear, it seems that the Person who bailed him is excused.

S. P. C. 333.  
H. P. C. 97.  
2 Hawk. P.  
C. 89. Vide  
infra Letter

(H). And that if a Justice admits a Person to Bail by insufficient Sureties, whom he knows not to be bailable by Law, corruptly for Lucre or Reward, the Court of King's Bench will grant an Information against him, vide Title Informations; or it is such an Offence for which he may be indicted, vide Title Indictments.

(H) The Offence of granting it Where it ought to be denied.

THE Bailing a Person not bailable by Law, is punishable at Common Law, as a negligent Escape, or as an Offence against the several following Statutes.

2 Hawk. P.  
C. 89.  
S. P. C. 33.  
Vide Title  
Escape.

By the Statute of *Westm. 1. cap. 15.* it is enacted, "That if the Sheriff or any other let any go at Large by Surety that is not replevisable, if he be Sheriff or Constable, or any other Bailiff of Fee, which hath keeping of Prisons, and be thereof attainted, he shall lose his Fee and Office for ever; and if the Under-Sheriff, Constable or Bailiff of such as have Fee for keeping of Prisons, do it contrary to the Will of his Lord, or any other Bailiff, being not of Fee, they shall have three Years Imprisonment and make Fine at the King's Pleasure.

Also it is enacted by *27 E. 1.* commonly called the Statute *de Finibus levatis, cap. 3.* "That the Justices assigned to take Assises, &c. when they Deliver the Gaols, &c. shall inquire if Sheriffs, or any other, have let out by Replevin Prisoners not replevisable, or have offended in any Thing contrary to the Form of the said Statute of *Westm. 1.* and whom they shall find guilty they shall chasten and punish in all Things according to the Form of the said Statute.

And it is further enacted by *4 E. 3. cap. 2.* "That at the Time of the Assignment of Keepers of the Peace, Mention shall be made, that such as shall be indicted or taken by them, shall not be let to Mainprize by the Sheriffs, nor by none other Ministers, if they be not Mainpernable by Law, nor that none who are indicted shall be delivered but by the Common Law; and that the Justices assigned to deliver Gaols, shall have Power to inquire of Sheriffs, Gaolers and others, in whose Ward such Persons indicted shall be, if they make Deliverance, or let to Mainprize any so indicted, which be not mainpernable, and to punish the said Sheriffs, Gaolers and others, if they do any Thing against the said Act.

And it is enacted by *1 & 2 Ph. & M. cap. 13.* "That no Justice or Justices of the Peace shall let to Bail or Mainprize, any Person or Persons, which for any Offence or Offences by them or any of them committed, be declared not to be replevised or bailed, or be forbidden to be replevised or bailed by the above-mentioned Statute of *Westm. 1. cap. 15.* And that the Justices of Gaol-Delivery of the Place where such Justices of the Peace shall be guilty of such Offence, upon due Proof thereof, by Examination before them, shall for every such Offence

"fence

“ fence set such Fine on every such Justice, as the same Justices of Gaol-Delivery shall think meet.

Poph. 96.  
Dalt. c. 114.  
2 Hawk. P.  
C. 90.

Justices of the Peace, before they bail a Man under Commitment, must at their Peril inform themselves of the Cause for which he was committed; for if he were in Truth committed for a Cause not bailable by Law, it is no Excuse that they did not know that he was committed for such Cause.

### (1) The Offence of denying, delaying or obstructing it Where it ought to be granted.

14 H. 7. 7.  
pl. 19.  
H. P. C. 97.  
Dalt. 114.  
2 Hawk. P.  
C. 90.

IT is clearly agreed to be an Offence by the Common Law as well as by Statute, and punishable by Indictment as well as by Action, to deny or delay, or obstruct Bail where it ought to be granted.

But it seems also clear, that he who has Power to bail another, is not bound to demand of him to find Sureties, and to forbear committing him till he shall refuse to find them, but may well justify his Commitment, unless the Party himself shall offer his Sureties.

H. P. C. 97.  
2 Hawk. P.  
C. 90.

The principal Statutes relating to this Offence, are the above-mentioned Statute of *Westm. 1. cap. 15.* and the Statute *de Finibus cap. 3.* and *31 Car. 2. cap. 2.* commonly called the *Habeas Corpus Act*; by the First whereof it is enacted, “ That if any with-hold Prisoners releasable after that they have offered sufficient Surety, he shall pay a grievous Amercement to the King; and if he take any Reward for the Deliverance of such, he shall pay double to the Prisoner, and shall also be in the great Mercy of the King. ” And by the latter of the said Statutes it is enacted, “ That Justices of Assise shall inquire if Sheriffs, or any other have offended in any Thing contrary to the said Statute of *Westm.* and whom they shall find guilty, they shall punish in all Things according to the Form of the said Statute.

*Habeas Corpus Act.*

Also it is recited by the above-mentioned Statute of *31 Car. 2.* “ That great Delays had been used by Sheriffs, Gaolers, and other Officers, to whose Custody the King’s Subjects had been committed for Criminal, or supposed Criminal Matters; in making Return of Writs of *Habeas Corpus*, by standing out an *Alias* and *Pluries*, and sometimes more; and by other Shifts to avoid their yielding Obedience to such Writs, contrary to their Duty and the known Laws of the Land; whereby many Subjects had been detained in Prison in such Cases, where by Law they were bailable, &c. And thereupon it is enacted, That wheresoever any Person shall bring any *Habeas Corpus* directed to any Person whatsoever, for any Person in his Custody, and the said Writ shall be served upon the said Officer, or left at the Gaol or Prison with any of the Under-Officers, Under-Keepers, or Deputy of the said Officers, or Keepers or Deputies, shall within three Days after such Service thereof (unless the Commitment were for Treason or Felony, plainly and specially expressed in the Warrant of Commitment) upon Payment or Tender of the Charges of bringing the said Prisoner, to be ascertained by the Judge or Court that awarded the same, and endorsed on the said Writ, not exceeding *12 d. per Mile*; and on Security given by his own Bond to pay the Charges of carrying back the Prisoner, if he should be remanded; and that he will not make any Escape by the Way, make Return of such Writ, and bring or cause to be brought, the Body of the Party so committed or restrained, unto or before the Lord Chancellor, or Lord Keeper, or the

“ Judges or Barons of the Court from which the said Writ shall issue,  
 “ or such other Persons before whom the said Writ is made returnable,  
 “ according to the Command thereof; and shall then likewise certify  
 “ the true Causes of his Detainer or Imprisonment, unless the Commit-  
 “ ment be in a Place beyond Twenty Miles Distance, &c. and if be-  
 “ yond the Distance of Twenty, and not above one Hundred Miles,  
 “ then within the Space of Ten Days; and if beyond the Distance of  
 “ one Hundred Miles, then within the Space of Twenty Days.

And it is further enacted, *Par. 3.* “ That all such Writs shall be  
 “ marked in this Manner, *per Statutum tricesimo primo Caroli secundi Re-*  
 “ *gis*, and shall be signed by the Person that awards the same; and if  
 “ any Person shall be, or stand committed or detained as aforesaid, for  
 “ any Crime, unless for Treason or Felony, plainly expressed in the  
 “ Warrant of Commitment, in the Vacation Time, it shall be lawful for  
 “ such Person so committed or detained, (other than Persons Convict  
 “ or in Execution by legal Process) or any one on his Behalf, to com-  
 “ plain to the Lord Chancellor or Lord Keeper, or any Justice of either  
 “ Bench, or Baron of the Exchequer of the Degree of the Coif; and  
 “ the said Lord Chancellor, &c. Justice or Baron, on View of the  
 “ Copy of the Warrant of the Commitment, or otherwise on Oath  
 “ that it was denied, are authorized and required, on Request in Wri-  
 “ ting, by such Person, or any in his Behalf, attested and subscribed  
 “ by two Witnesses who were present at the Delivery of the same, to  
 “ grant an *Habeas Corpus* under the Seal of the Court, whereof he shall  
 “ be one of the Judges, to be directed to the Officer in whose Custody  
 “ the Party shall be, returnable *immediate* before the said Lord Chan-  
 “ cellor, &c. Justice or Baron, and on Service thereof, as aforesaid, the  
 “ Officer, &c. in whose Custody the Party is, shall within the Times  
 “ respectively before limited, bring him before the said Lord Chancel-  
 “ lor, Justice or Baron before whom the Writ is returnable; and in  
 “ Case of his Absence, before any other of them, with the Return of  
 “ such Writ, and the true Cause of the Commitment and Detainer;  
 “ and thereupon within two Days after the Party shall be brought be-  
 “ fore them, the said Lord Chancellor, Justice or Baron before whom  
 “ the Prisoner shall be brought, as aforesaid, shall discharge the said  
 “ Prisoner from his Imprisonment, taking his Recognizance with one or  
 “ more Sureties, in any Sum according to their Discretions, having re-  
 “ gard to the Quality of the Prisoner and Nature of the Offence, for  
 “ his Appearance in the King’s Bench, the Term following, or in such  
 “ other Court wherein the Offence is properly Cognizable, as the Case  
 “ shall require, and then shall certify the said Writ, with the Return  
 “ thereof, and the Recognizance into such Court, unless it be made ap-  
 “ pear to the said Lord Chancellor, &c. that the Party so committed,  
 “ is detained upon a legal Process, or Order, or Warrant, out of some  
 “ Court that hath Jurisdiction of criminal Matters, or by some War-  
 “ rant signed and sealed with the Hand and Seal of any of the said Ju-  
 “ stices or Barons, or some Justice or Justices of the Peace, for such  
 “ Matters or Offences for which by Law the Prisoner is not bailable.

*But it is provided, Par. 4.* “ That if any Person shall have wilfully  
 “ neglected, by the Space of two whole Terms after his Imprisonment,  
 “ to pray a *Habeas Corpus* for his Enlargement, he shall not have a *Ha-*  
 “ *beas Corpus* to be granted in Vacation Time, in Pursuance of this Act.

*And it is further enacted, Par. 5.* “ That if any Officer, &c. shall  
 “ neglect or refuse to make the Returns aforesaid, or to bring the Body  
 “ of the Prisoner, according to the Command of the Writ, within the  
 “ respective Times aforesaid, or shall not within six Hours after De-  
 “ mand, deliver a true Copy of the Commitment, &c. he shall forfeit  
 “ for the first Offence 100*l.* for the second 200*l.* and be made unca-  
 “ pable to hold his Office.

And it is further enacted, *Par. 6.* That no Person who shall be fet at Large upon any *Habeas Corpus*, shall be again imprifoned for the fame Offence, by any Person whatsoever, other than by the legal Order and Procefs of fuch Court wherein he shall be bound by Recognizance to appear, or other Court having Jurifdiction of the Cause, on Pain of 500*l.*

*And it is further enacted, Par. 7.* “ That if any Person, who shall be committed for Treason or Felony, plainly and fpecially expreffed in the Warrant of Commitment, upon his Prayer or Petition in open Court, the firft Week of the Term, or the firft Day of the Seflions of *Oyer and Terminer*, or General Gaol-Delivery, to be brought to his Trial, shall not be indicted fometime in the next Term, Seflions of *Oyer and Terminer*, or General Gaol-Delivery, after fuch Commencement, the Juftices of the faid Courts shall, upon Motion in open Court, the laft Day of the Term or Seflions, fet at Liberty the Prifoner upon Bail, unlefs it appear upon Oath, that the Witneffes for the King could not be produced the faid Term, &c. and if fuch Prifoner upon his Prayer, &c. shall not be indicted and tried the fecond Term or Seflions, he shall be difcharged from his Imprifonment.

*And it is further enacted, Par. 10.* “ That it shall be lawful for any Prifoner, as aforefaid, to move and obtain his *Habeas Corpus*, as well out of the Chancery or Exchequer, as the King’s Bench or Common Pleas; and if the faid Lord Chancellor or Lord Keeper, or any Judge or Judges, Baron or Barons, for the Time being, of the Degree of the Coif, of any of the Courts aforefaid, in the Vacation Time, upon View of the Copy of a Warrant of Commitment or Detainer, or on Oath made that fuch Copy was denied, shall deny any Writ of *Habeas Corpus* by this Act required to be granted, being moved for as aforefaid, they shall feverally forfeit to the Party grieved the Sum of 500*l.*

*But it is provided, Par. 18.* “ That after the Affifes proclaimed for that County where the Prifoner is detained, no Person shall be removed from the Common Gaol upon any *Habeas Corpus* granted in Purfuance of this Act; but upon fuch *Habeas Corpus*, shall be brought before the Judge of Affife in open Court, who thereupon shall do what to Juftice shall appertain; *but it is provided nevertheless, Par. 19.* that after the Affifes are ended, any Person detained may have his *Habeas Corpus* according to the Direction of this Act.

### (K) In what Form it is to be taken.

2 *Jones* 210.  
1 *Lev.* 106.  
1 *Sid.* 211.  
4 *Inf.* 178.  
and *per* 2  
*Hawk. P. C.*  
115. Ju-  
ftices of  
the Peace may take the Recognifance in fuch Form.

WHERE a Person actually prefent in Court is bailed for a Crime punishable with Lofs of Life or Member, it feems to be in the Difcretion of the Court to take a Recognifance from each of the Bail, either in a certain Sum, or Body for Body, or both Ways; however fuch Recognifance of Body for Body doth not make the Bail liable to the fame Punifhment with the Prifoner, but only to be fined, &c.

2 *Hawk.*  
*P. C.* 115.  
Where the  
Court on

But for a Crime of an inferior Nature, it feems that the Recognifance ought to be only in a certain Sum of Money, and not Body for Body.  
Motion, may difpenfe with the Principals joining in the Recognifance. 1 *Salk.* 3.

(L) What shall forfeit the Recognisance.

**I**F the Recognisance be in the usual Form, *ad standum recto de feloniam prædictam & ad respondendum Domino Regi*, and at the Trial the Party stands mute, though it may be reasonably argued from the Import of these Words, that in Strictness the Recognisance is forfeited, yet the later Opinions hold otherwise; for if a Man's Bail, who are his Gaolers of his own choosing, do as effectually secure his Appearance, and put him as much under the Power of the Court, as if he had been in the Custody of the proper Officer, they seem to have answered the End of the Law, and to have done all that can be reasonably required of them.

If *A.* enters into a Recognisance that *B.* shall appear in the King's Bench such a Term, to answer such an Information, and not to depart till he shall be discharged by the Court, and afterwards a *Nolle prosequi* is entred on that Information, and another exhibited, whereto he refuses to appear, &c. the Recognisance is forfeited.

Bailiff.

**B**A I L F or *Bailiff*, saith my Lord Coke, is an old Saxon Word, which signifies a Keeper or Protector; and though there be several Officers called Bailiffs, whose Offices and Employments seem quite different from each other, yet doth something of Keeping or Protection belong to them all. Hence the Sheriff is considered as Bailiff to the Crown; and his County, of which he hath the Care, and in which he is to execute the King's Writs, is called his Bailiwick; also his Officers, who by his Precept execute Writs, are called Bailiffs; there are likewise Bailiffs of Liberties, who are Officers under Lords who have Franchises exempt from the Jurisdiction of the Sheriff; there are likewise Bailiffs of Lords of Manors, who collect their Rents and levy their Fines and Amercements; also he is called a Bailiff who hath the Administration or Charge of Lands, Goods or Chattels to make the best Benefit for the Owner, against whom an Action of *Account* doth lie for the Profits which he hath raised or made, or might by his Industry and Care reasonably have made, his reasonable Charges and Expences deducted; there are likewise those termed Bailiffs, to whom the King's Castles are committed, as the Bailiff of *Dover-Castle*, &c. The Chief Magistrates in divers antient Corporations are called Bailiffs, as in *Ipswich*, *Tarmouth*, *Colchester*, &c. There are likewise Officers of the Forest which are termed Bailiffs; but as there is but little said of some of these in our Books, and as what relates to others will more properly fall under other Heads, we shall in this Place only consider what we find relating to

- (A) Sheriffs Bailiffs.
- (B) Bailiffs of Liberties or Franchises.
- (C) Bailiffs to Lords of Manors.

(A) Of

## (A) Of Sheriffs Bailiffs.

Co. 54. A Bailiff is to take the same Oath which the Under-Sheriff takes, prescribed by the Statute 27 *Eliz. cap. 12.* But a Special Bailiff, or one employed by the Sheriff for a particular Time only, as to execute one Writ, &c. is not obliged to take the Oath. 1 *Fones* 249. 2 *Lev.* 151. But what he doth is considered as done by the Sheriff himself; and therefore a Rescue from him shall be judged a Rescue from the Sheriff, and his Escape the Escape of the Sheriff, for which the Sheriff shall answer.

Stile 18. If an Under-Sheriff takes Bond from a Bailiff, conditioned to save him harmless in executing all Processes, &c. and on Action brought on this Bond, the Sheriff assigns for Breach that the Bailiff had not executed a certain Warrant sent to him upon a Process directed to him out of the Exchequer, to levy Issues upon certain Lands in *D.* and it is not alledged that *D.* is within his Hundred, this is no Breach of the Condition; for the Bailiff (*a*) cannot execute a Precept out of the Hundred where he is Bailiff.

(a) Unless it be directed to

him particularly, and he made Special Bailiff for that Purpose. 1 *Salk.* 176.

8 *E.* 4. 14. *a.* A sworn Bailiff, commonly known to be an Officer, acting within his own Precinct, need not shew his Writ to the Person he arrests; but 14 *H.* 7. 9. *b.* when he has made his Arrest, he is to inform him of the Substance of 6 *Co.* 54. his Writ, at whose Suit the Action is, and out of what Court the Process Issues; but a Special Bailiff is obliged to shew his Warrant. 9 *Co.* 69. *Stile* 405. *Cro. Jac.* 485, 486.

A Sheriff, who has a Writ directed to him, may authorise others to execute it; but the Person to whom he directs it, must personally execute it; yet it seems that one may (*b*) lawfully assist him. 8 *E.* 4. 14. *a.* *Dalt. cap.* 117.

(b) But an Arrest by a Bailiff's Follower is not good; *Quare* if good by the Follower in the Bailiff's Presence. 6 *Mod.* 211. A Contempt to the Court to hinder a Bailiff from arresting; but no Rescue unless the Arrest be made. 6 *Mod.* 210.

1 *Vent.* 306. A Bailiff caught one by the Hand (whom he had a Warrant to arrest) as he held it out of a Window, and the Court said that it was such 6 *Mod.* 173. a Taking of him that the Bailiff might justify the Breaking open of the In what Cases a Bailiff may House to carry him away. justify breaking open a House. *Vide Cro. Jac.* 280. *Palm.* 53. 6 *Mod.* 105. and *Tit. Sheriff.*

2 *Fones* 197. One who is arrested by a Sheriff's Bailiff, is in the Sheriff's Custody, and if rescued, the Sheriff may alledge that he was rescued out of his 1 *Lev.* 214. Custody. 2 *Lev.* 26. But where

the Sheriff returned *virtute brevis mihi direct' feci warrant' A. and B. ballivis meis qui virtute inde ceperant* the Defendant, & *in Custodia mea habuerunt quousque* such and such *rescufferunt* him *ex Custodia ballivorum meorum*, it was held ill; for when the Bailiffs have arrested the Party, he is in Fact and in Truth in their Custody; but in Law he is in the Custody of the Sheriff, and an Answer either way is good; but to say that it was in the Custody of the Sheriff, and yet rescued out of the Custody of the Bailiffs, is repugnant. 2 *Salk.* 58. *b.*

1 *Salk.* 79. A Bailiff having a Warrant against *A.* went to him in his Yard, and being at some Distance told him he had a Warrant, and said he arrested 6 *Mod.* 173. him, *A.* having a Fork in his Hand, keeps off the Bailiff from touching him, and retreats into his House; and on Motion for an Attachment for

for a Contempt, the Court held that bare Words will not make an Arrest; but if the Bailiff had touched him, that had been an Arrest, and the Retreat a Rescous, and the Bailiff might have pursued and broke open the House, or might have an Attachment or Rescous against him; but as this Case is, the Bailiff has no Remedy but an Action for the Assault; for the holding up of the Fork at him, when he was within reach, is good Evidence of that.

“ By the 29 *Car. 2. cap. 7.* it is enacted, That no Person or Persons upon the Lord’s Day, shall serve or execute, or cause to be served or executed any Writ, Process, Warrant, Order, Judgment or Decree, (except in Cases of Treason, Felony or Breach of the Peace) but that the Service of every such Writ, Process, Warrant, Order, Judgment or Decree, shall be void to all Intents and Purposes whatsoever; and the Person or Persons so serving or executing the same, shall be as liable to the Suit of the Party grieved, and to answer Damages to him for doing thereof, as if he or they had done the same, without any Writ, Process, Warrant, Order, Judgment or Decree at all.

An Arrest on Sunday is void, and the Party may have an Action for false Imprisonment. *1 Salk. 78.* A. was taken on a Sunday, without any War-

rant, and lock’d up all that Day, and then on Monday Morning a Writ was got against him; and on a Motion to discharge him, the Court held that the Party might have an Attachment or an Action of False Imprisonment against those who took him on the Sunday. *6 Mod. 96. vide 1 Mod. 56.* where an Attachment was granted for arresting one on Christmas-Day. *Hetley 19.* But Bail may take their Principal on Sunday, and confine him till Monday, and then surrender him. *6 Mod. 231. vide Stat. 5 Ann.* by which one may be taken on an Escape Warrant on a Sunday; that a Bailiff may arrest in the Night, *vide 9 Co. 65 b. Cro. Jac. 486.* Where he may justify entering the House of a Stranger to make an Arrest, *vide Lutw. 1432.* If a Sheriff makes out a Precept to his Bailiff to arrest one before any Writ directed to him, and the Bailiff arrest the Party accordingly, and afterwards a Writ issues to the Sheriff, the Party arrested may have an Action of False Imprisonment. *1 Sand 298. 2 Keb. 173, 838.*

A Special Verdict found that a *Fieri facias* bore Teste 4. June, but was really sued forth 11 June, and executed 12 June; and that the Party, against whom it went, became a Bankrupt 6 June, and a Commission was taken out 17 June, and *Trover and Conversion* was brought against the Bailiff, who executed the Writ; and the Court held, that though the Property was so bound that the Execution should not have Effect against the Assignment of the Commissioners, yet it was hard to punish the Officer in *Trover*, and make him a Trespassor for doing what he was obliged to do, and from which he could not plead to excuse himself, and therefore gave Judgment for the Defendant.

*1 Sid. 271.*  
*1 Lev. 173.*  
*1 Keb. 930,*  
*932. S. C.*

“ The Statute 23 *H. 6. cap. 10.* enacts, That for an Arrest or Attachment, the Sheriff shall have 20 *d.* and the Bailiff who makes the Arrest 4 *d.* and that the Sheriff or Bailiff who doth contrary, shall pay treble Damages to the Party grieved, and forfeit the Sum of 40 *l.* one Moiety to the King, and the other to the Party that will sue; and that the Justices of Assise in their Sessions, Justices of the one Bench and of the other, and Justices of Peace in their County may determine the said Offences.

*Vide 5 Mod. 225.* An Action brought against a Bailiff on this Statute, for taking 5 *s.* 4 *d.* for an Arrest.

“ By the 1 *H. 5. cap. 4.* it is enacted, That they which be Bailiffs of Sheriffs by one Year, shall be in no such Office for three Years next following, except Bailiffs of Sheriffs which be inheritable in their Sheriffs; and that no Under-Sheriff, Sheriff’s Clerk, Receiver, nor Sheriff’s Bailiff, be Attorney in the King’s Courts, during the Time that he is in Office with any such Sheriff.

Bailiffs being Officers who are to execute the King’s Writs, are most commonly punished in those Courts out of which such Writs issue, by Attachment; but it is impossible to set down all such Misdemeanors and oppressive Practices of which the Court is to determine, for which they shall be punished; however Attachments have been granted against them where they have used needless Force, Violence and Terror in making an Arrest; or where they have broke open Doors where by Law they could

*Finch 237.*  
*5 Mod. 314.*  
*Hob. 62, 263,*  
*264.*  
*11 H. 6. 42. b.*  
*43. a.*  
*Noy 101.*  
*Moor 770.*  
*Pl. 1064.*

2 *Rol. Abr.* not, and there was no plausible Excuse for doing it; where they have  
278. treated the Persons arrested basely and inhumanly, or kept them in Cu-  
*Vide 2 Geo. 2.* stody till they consented to pay Money for their Deliverance; or for ma-  
An excel- king an Arrest without Authority, by Force of a Blank Warrant filled  
lent Statute, up with the Name of a Special Bailiff, by the Party himself, without the  
which pro- Privity or subsequent Agreement of the Sheriff; or if a Bailiff levy a Debt  
vides a Re- by Virtue of an Execution, and keep the Money in his Hands, and im-  
medy against bezil it; but even in these Cases there may be such Circumstances or  
several Abuses com- Matters of Alleviation as will induce the Court to excuse if not wholly  
mitted by Sheriff's and discharge them.  
their Offi- cers, in the Execution of their Offices.

### (B) Of Bailiffs of Liberties or Franchises.

**A** Bailiff of a Liberty is one who hath the same Jurisdiction with the Sheriff's Bailiff, granted to him by the Lord of a Liberty or Franchise. These Liberties and Franchises begun by the Lord's purchasing the Bailiwicks of the Hundreds, sometimes for Years, for Life, or in Fee, at a certain Rate in Fee-farm; and for this the Lords had the Court-Leet, the Assises of Bread and Beer, and the Amends, viz. the Fines for the Breach of any of the Articles examinable in the Leet; and they likewise had the Return of Writs.

These Franchises proving very inconvenient, because the Sheriff could not enter into them to execute the King's Writs, but was to direct them to the Bailiff of the Liberty, who had the Execution of all Writs, the Statute *Westm. 2. cap. 29.* enacts, That if such Bailiffs gave no Answer to the Sheriff, the Court should grant a Special Warrant with a *Non omittas*, which authorises the Sheriff to enter the Franchise; and it being usual to take out the *Capias* and *Non omittas* together, we have but little material in our Books relating to this Matter.

*Dalt. Sher.*  
463.

11 *H. 4.* 6. 94.

*Bro. Offic.* 34.

*Bro. Ret.* 26.

2 *H. 4.* 1.

*Plow.* 216,

243.

33 *Aff.* 19, 41.

*F. N. B.* 95.

*Finch* 54.

11 *H. 4.* 9.

*Bro. Offic.* 35.

*Dalt. Sher.*

464.

*Offic. Brev.*

135.

*Thef. Brev.*

166.

But there are some Cases in which the Sheriff might enter without any Clause of *Non omittas*; as in Case of a *Quo minus*. So where the Sheriff is by *Westm. 1. cap. 17.* to make Deliverance by Replevin; so where he is Judge, as in a Writ of *Redisseisin*; so in *Waste*; so in executing a Warrant for Breach of the Peace.

If the Sheriff executes the Writ of a common Person, without a *Non omittas*, the Execution is good; but the Sheriff is liable to an Action to the Lord for entering into his Bailiwick.

The Bailiff of a Franchise cannot enter into the Guildable; and if he does, it is Erroneous, because he has no Authority out of the Franchise more than the Sheriff has in another County.

If there be two Liberties within a County, viz. *St. Edmond de Bury* and *St. Ethelbed de Ely*, in *Com' Suffolk*, and a *Capias* is directed to the Sheriff to take the Body of *B.* and the Sheriff returns that he has made his Mandate to the Bailiff of *Ethelbed*, who has made no Answer, the Sheriff, on a *Non omittas*, shall enter into the Liberty of *Bury*, though the Bailiff of that Liberty has made no Default.

3 *H. 7.* 12.

5 *H. 7.* 27.

*Bro. Ret.* 89.

*Vide Hawk.*

*P. C.* 142.

If the Bailiff of a Franchise had made an insufficient Return, which the Sheriff returned to the Court, they formerly held the Sheriff was answerable, and not the Bailiff; for an insufficient Return is no Return, and the Bailiff making no Return, the Sheriff ought to have said *nulum dedit mihi respondum*; but this is altered by the 27 *H. 8. cap. 24.* which says that the Amercement for insufficient Returns made by Bailiffs of Franchises, shall be set on the Bailiff's Head, and not on the Sheriff's.

If the Bailiff of a Liberty dies after he has returned *Cepi*, a *Distric- gas* issues against his Successor, because he takes it up under the Return of his Predecessor. *Evo. Ret. Brev. 99. 14 E. 4. 1.*

(C) Of Bailiffs to Lords of Manors.

**B**AILIFF of a Manor may himself, or may command another to take Cattle *Damage-feasant* upon the Land; for he hath the Care of all Things within the Manor. *1 Rol. Abr. 339.*

But if a Distress be taken for *Damage-feasant*, Amends cannot be tendered to the Bailiff; for he cannot deliver a Distress when it is once taken, no more than he can change the Avowry of his Master, or Demand a Rent upon a Condition of Re-entry. *5 Co. 76. Pilkington and Hastings. But for this vide 1 Brownl. 173.*

*Hob. 154. 1 Rol. Abr. 316. Dyer 222. Moor 141. Pl. 282. Cro. Eliz. 22, 813.*

A Bailiff of a Manor, though he has no Interest in the Land, has an Authority to receive Rents, take Fealty, pay Quit-Rents, repair Houses and Fences, and in other Things act for his Master's Benefit; but he cannot do any Thing to his Prejudice, nor can he Tile a House that was before thatched, nor impale a Place before mounded with a Hedge. *Vide Cro. Jac. 178. Owen 28. Hob. 154.*

A Bailiff may be Steward of the same Manor; for those are Offices which are compatible. *Cro. Jac. 178.*

A Bailiff hath no Permanent Estate, but is removable at the Lord's Pleasure. *Cro. Jac. 178.*

A Bailiff of a Manor may lease the Piscary for Years, but he cannot by any Usage, make a Lease of his Master's Land. *1 Rol. Abr. 339.*

where he may make a Lease at Will, though not a Lease for Years. *Lit. Rep. 71. for this vide 1 Rol. Rep. 258. Cro. Jac. 377. 2 Leon. 46. Diversity 1 Rol.*

If a Man takes Cattle without any Command for Services due to the Lord, if the Lord after agree to the Taking, he shall be adjudged his Bailiff, altho' he was not his Bailiff in any Place before. *1 Rol. Abr. 685. But for this vide Godb.*

*110. Kelw. 174. Fitz. Bailiff. 7. Bro. Distress 83. Comp. Incumb. 481.*

A Bailiff may give Licence to another to go over the Land; for this is a Trespass to the Possession only, and the Bailiff hath the Disposal of the Profits of the Possession. *1 Rol. Abr. 339. But Quare if there must not be a*

Consideration given for such Licence, and *vide 1 Rol. Rep. 258. Cro. Jac. 337.*

In Debt for Rent, upon a Lease for Years, the Defendant pleaded that the Plaintiff made *J. S.* Bailiff of his Manor, of which the Lands in Lease were Part, and gave him Power to receive the Rents of the Lessees, &c. and also Power to make Leases for Years; and that an Agreement between the said Bailiff and Defendant was made, that he should pay 100*l.* and also surrender his Lease to the Use of the Lord, and then should be discharged of the Rent, which he hath done; and whether this Agreement would bind the Lord was doubted, and a peremptory Day given to the Defendant to maintain his Plea, after which the Reporter *Nil plus inde audivit.* *Palm. 402.*

*A.* leases to *B.* for Ninety-nine Years, if *B. C.* or *D.* shall so long live, reserving a Heriot of 5*l.* upon the Death of every of them, *A.* dies, and the Bailiff of *A.* makes Conuzance as Bailiff generally for a Heriot, *Lit. Rep. 32, 70, 71. Hel. 12, 16, 17. S. C. ill reported.*

Heriot, but does not shew that *A.* had made his Election; and whether this was not good and incident to the Place of Bailiff, or at least whether this should not be intended for the Benefit and Advantage of the Master till the contrary was shewn, *dubitatur*, and after the Parties agreed.

3 *Mod.* 138.

*Cro. Eliz.* 698,

748.

*Moor* 574.

1 *Salk.* 107, 108. *Skin.* 587. 2 *Keb.* 745.

No Bailiff can distrain for a Fine or Amercement, without a Special Warrant for so doing, which must be set forth by him in an Avowry or Justification of such a Distress.

## Bailment

- (A) Of simple Bailment, by which the Bailee has only the bare Possession.
- (B) Of Pledging of Goods as a Security for Money.
- (C) Of Bailment, which vests a Special Property, and therein of Lending on Special Contracts.
- (D) Where the Thing bailed is violated or destroyed, to whom is the Loss, and to whom is the Remedy.

### (A) Of simple Bailment, by which the Bailee has only the naked Possession.

*Holt's* Argument in *Cogg's* and *Barnard's* Case at the End of this Title; but

it was formerly held, that where Goods were bailed Generally, that if those Goods, with others of the Bailee's were stoln, though without his Default, that the Bailee should be responsible for them, there being a Warranty in Law annexed to all such Bailments. 4 *Co.* 83. *Southcotes's* Case. But for this vide *Co. Lit.* 89. *a.* *Cro. Eliz.* 815. *Kelw.* 77. *Sav.* 74. 1 *Sid.* 36. 1 *Roll. Abr.* 5. *Pl.* 2. *Bro. Tit. Bailment* 7. *Tit. Detinue* 35.

*Co. Lit.*

89. *a.*

4 *Co.* 83. *b.*

*Doct. & Stud.*

129.

So *a fortiori*, if a Man delivers Goods to another to keep as a Man would keep his own; and this is called a Special Bailment, in which the Bailee doth undertake for no more than for his Diligence in the keeping of them, and has no Manner of Use of the Thing to him committed, but the naked Possession only.

*Co. Lit.* 89.

*a. b.*

4 *Co.* 83.

If *A.* leave a Chest lock'd with *B.* to be kept, and take away the Key, without acquainting *B.* with the Particulars, the Goods in the Chest are in the Possession of *A.* for since *A.* keeps the Key, the Goods are

are lock'd out of the Possession of *B.* and *B.* being unacquainted with the Particulars, cannot be supposed to have them under his Custody ; so that neither the Possession nor Use of the Goods are in *B.* for though the Possession of the Box is in *B.* yet is he shut out from the Possession of the Goods in the Box ; for that cannot be said to be in his Possession, that he cannot take hold of and remove, or order, during the Continuance of such Possession.

The naked Possession of Chattels Personal cannot be aliened, for such Alienation if admitted, would destroy the Right of the Proprietary ; and if allowed to be translated or handed about from one to another, by Concealment or Imbezilment, might be lost and destroyed, and would not be returned as they ought, to the right Owners. *Bro. Attach. ment on Assise 20.*

If the Goods of *A.* are bailed by *B.* to *C.* *C.* must deliver them to *B.* for *C.* cannot pretend to remove or alter that Possession committed to him, in order to restore it to the right Owner ; for the Right of Restitution must be demanded of him that did the Injury, of which *C.* has no Pretence to judge ; and therefore it would be down right Treachery in him to deliver it to any other than him from whom he had it. *1 Rol. Abr. 607.*

But if *A.* bail Goods to *B.* to which *C.* has a Right, and *B.* dies, his Executors are chargeable only to *C.* that has Right, for the Executors came to the Possession by the Law, and therefore must deliver it to those Persons in whom the Law has established the Property ; and the taking up of an Executorship is an Engagement to answer all Debts of the Deceased, and all Undertakings that create a Debt, so far as there are Assets, but doth not imbarck him in the Personal Trusts of the Deceased, no more than he is obliged to answer for his several Injuries, which no Man can tell how they might have been discharged or answer'd by the Testator. *1 Rol. Abr. 607. Vide Tit Trover and Conversion.*

## (B) Of Pledging of Goods as a Security for Money.

**P**LEDGING is where Goods and Chattels are delivered in Security for Money lent, and by such Pledging the Pawn-Broker hath more than the naked Possession in the Nature of a Bailment ; for he hath the Property and Interest in the Thing itself ; and by the better Opinions, shall have a reasonable Use of it, so that it be without Damage to the Thing thus pledged. *Doct. & Stud. 130. 1 Rol. Abr. 338, 673. Owen 124. 2 Salk. 522.*

If a Man pledge Goods to *B.* and they are (*a*) stolen, *B.* shall not answer for them, because he hath a Property in them ; and his Custody is but a Consequent of that Property ; and therefore he doth undertake to keep them as his own ; for a Man that undertakes to secure what is another's, is bound to keep them at all Adventures, since the right Owner might possibly defend them with his Life ; but where a Man is only obliged to keep them as his own, no unavoidable Accident is to be imputed to him. *Co. Lit. 89. a. 2 Inst. 108. 4 Co. 83. Palm. 551. Owen 123. Yelv. 178. Cro. Jac. 244. 1 Bullf. 29, 30. 1 Rol. Rep. Co. Lit. 89. b.*

181. (*a*) The Law is the same in Case of Fire, and all other inevitable Accidents. *Co. Lit. 89. b.*

But if a Man pledge Goods, and tender the Money to the Pawn-Broker, and he refuses, this determines the qualified Property ; and therefore if after such Tender the Goods are stolen, &c. the Bailor shall have Satisfaction made him in an Action of *Trover* ; for a Tender and Refusal must in those Cases amount to a Payment ; because other- *Cro. Jac. 243. Yelv. 179. 1 Bullf. 29. Bro. Bailment 7. 1 Rol. Rep. 129. Co. Lit. 89.*

wife no Man could again come to his own, since Pawns are over the Value lent.

*Cro. Jac.* 243. And though the Borrower tender the Money and recover the Goods  
*Yelv.* 179. in an Action of *Trover*, yet the Pawn-Broker may have an Action of  
*1 Bulst.* 29. *Debt* for his Money; because though the Security ceases, yet the Duty  
31. remains, inasmuch as the Money lent is not paid back to the Party from  
If *A.* pawns Goods to whence it came.  
*B.* for 25*l.*  
and *B.* deliver them over to *C.* and makes *D.* his Executor, and dies, *A.* shall tender the 25*l.* to  
the Executor, and not to *C.* for *C.* is no more than a Bailee, and hath only the Custody of them, but  
the Property of them is in *D.* as Representative of *B.* and therefore to him must the Tender be  
made; otherwise it is in the Case of a Mortgage, where the Tender may often be to the Assignee,  
because the Property of the Land is in him. *Cro. Jac.* 244. *Yelv.* 178, 179.

*Yelv.* 179. So if a Man lend perishable Goods as a Pledge, and they decay, yet  
*Co. Lit.* 209. the Person to whom they are pledged, may have an Action of *Debt* for  
his Money, because the Duty continues.

*Bro. Attach.* These Goods thus taken to Pledge, cannot be forfeited by the Pawn-  
*in Assise* 20. Broker for his Offence, nor can they be taken in Execution, nor attached  
for his Debt; for the absolute Property is in another; and therefore  
they are not alienable, nor by consequence forfeitable; because they cannot  
be forfeited without Loss and Danger to the absolute Owner; and  
all qualified Possessors do take the Property under the Restriction to preserve  
the Property of the right Owner.

*2 H.* 7. 1. If a Man pledge Goods, and after is Attainted of Felony, the King  
*1 Bulst.* 29. shall not have the Goods without paying the Sum for which they were  
pledged; for the Alteration of the general Property doth not alter the  
special Property in the Pawn-Broker.

*1 Bulst.* 29. If a Man pledge Goods, and then is outlawed, he cannot redeem  
them, because then the absolute Property of them is in the King; but if  
the Outlawry be reversed, then the outlawed Person is re-instated in his  
Property as if there had been no Outlawry, and therefore may redeem  
them.

*Co. Lit.* 205. If the Money be not paid at the Day, the Property is absolute at  
*Shep.* 106. Law, but still the right Owner has his Redemption in Equity, as in Case  
of a Mortgage.

*2 Vern.* 177, One pawned Jewels to *A.* who signed a Writing that they were to be  
698, 691. redeemed in Twelve Months, otherwise for the 110*l.* lent they were to be  
*Abv. Ca. in* as bought and sold, *A.* within a short Time after delivers over the Jew-  
*Equ.* 324. els, together with some Plate of his own to *B.* as a Pledge for 200*l.*  
*Demaindray* afterwards *A.* borrowed 38*l.* and 50*l.* of *B.* on Promissory Notes, to  
and *Met-* be repaid on Demand, *B.* by his Answer in Chancery, insisted it was  
*calf.* agreed that the Pledge should be a Security as well for the Money on the  
Notes, as for the Money first lent, but could make no Proof of any  
such Promise or Agreement; and though a Redemption was decreed,  
yet it was on Payment of all that was due to *B.* as well upon the Notes  
as on the Pawns; but the Goods of *A.* which were pawned, were to be  
first applied as far as the Value of them would extend.

*5 H.* 7. f. 1. In the old Books they took the Nature of a Pledge to be, that it  
ought to be delivered at the same Time that the Money was lent; and if  
the Goods were not delivered at the same Time, in Security of the  
Money, they did not plead it as a Pledge, but in the Nature of a Li-  
cence, to excuse the Trespas.

*2 Leon.* 30. But by later Authorities it appears that the Pawn-Broker hath a spe-  
*Felo.* 164. cial Property, though it be not delivered at the Time of the Money  
lent.

*2 Leon.* 30, As if *A.* be indebted to *B.* and delivers Goods to *C.* in Satisfaction  
31. for the Debt of *B.* the Property is thereby altered, and the Right to  
*Yelv.* 164. the Goods is vested in *B.* so it is where the Goods are delivered to *C.*  
in

in Security of the Money of *B.* there *B.* hath a special Property in them ; and in these Cases *A.* cannot countermand such Delivery to *C.* or take the Goods back again, because the Property of these very Goods is vested in *B.* for here there is a Consideration to alter the Property, and that is the Debt due to *B.* so that it is not a bare naked Donation which the Party may possibly revoke before the Possession be vested in *B.* himself, for *ex nudo pacto non oritur actio* ; for there is no Consideration to found an Action on a naked Donation ; but here there is a Consideration to alter the Property ; so that upon the immediate Delivery of the Goods, the Property is vested in *B.*

Before these Resolutions that the Property was altered by the Delivery of the Goods by *A.* to the Use of *B.* the only Remedy for such Goods, when countermanded was in Equity, upon the Consideration ; for it was ever thought altogether inequitable that such Delivery of the Goods upon a valuable Consideration, should be countermanded at Pleasure. Dyer 49.

There is great Difference between a Pawn and a Mortgage of Lands ; for if Goods be pawned without Mention of Time for Redemption, they may be redeemed after the Death of the Pawn-Broker ; but if Lands are mortgaged without any Mention of the Time for Redemption, they cannot be redeemed after the Death of the Feoffee in Mortgage ; for when the Feoffment is made to the Mortgagee and his Heirs, the Limitation is absolute, and the Condition only goes in Derogation of that absolute Feoffment ; so that as far as the Condition doth not extend, the absolute Words in the Feoffment must take Place ; and from hence it is that a Condition must be taken strictly, and can never be extended ; because since the Condition goes in Defeasance of the Estate absolutely limited, it absolutely must come in to shut out all extended Construction ; and therefore in this Case, where the Feoffment is made on Condition that the Feoffor pay so much Money to the Feoffee, the Money must be paid to the Feoffee, during his Life ; for the Money is not limited to be paid to his Heirs ; and therefore there the Words of the absolute Feoffment take Place ; but where Goods are pawned, the Pawn-Broker hath but a qualified Property, the absolute Ownership is in the Person that deposits them ; and this Property cannot be extended beyond the Intent for which it was created ; and that is only for securing the Money lent ; for should the Property be thus extended, it would be to the Injury of him that has the absolute Ownership. Now the Intent of the Parties in not limiting a Time of Redemption, was plainly in Ease of the Pledger ; and therefore the Time of Redemption must be during his Life ; and he cannot be confined to the Life of the Pawn-Broker, for that might fall more to the Disadvantage of the Person pledging than if a Time had been limited ; and there are no absolute Words to induce such a rigorous Construction, contrary to the Design of the Parties ; but if the Pledger doth nor redeem during his own Life, his Executors cannot redeem, for then the Words and Intent both agree to make an absolute Property to the Pawn-Broker. 2 Co. 79.  
1 Bullf. 29.  
Vide Head of  
Mortgages.

But if Time be set for the Redemption of a Pledge, and before the Time the Pledger dies, his Executors may redeem it, and it shall be Assets in their Hands ; for when there is a Time limited, there by the express Words the Party hath till the Time appointed ; and the Time appointed is definite, and not during the Life of the Pledger ; and therefore if he dies his Executors shall redeem ; and therefore the Death of either Party cannot prejudice. 1 Bullf. 29,  
30.

Some have held that upon a valuable Consideration a Pledge is assignable over, and that on such Assignment the Tender of the Money from the Pledger must be to the Assignee, because the Pawn-Broker hath a Special Property, and what he hath he may transfer over. 1 Bullf. 31.  
Owen 124.  
But if a  
Thing is not  
in my Pos-

session, I cannot grant it as a Pawn, though I have a Right to it ; for a naked Right is not transferrable over. 2 Rol. Rep. 439.

If

2 Salk. 522. If a Pawn-Broker refuses, upon Tender of the Money, to re-deliver  
 Per Holt, Ch. the Goods pledged, he may be indicted; for being secretly pawned, it  
 Just. and may be impossible to prove a Delivery in *Trover* for Want of Witnessees.  
 Eyre Just. A Pawn-Broker was indicted for refusing to deliver a Silk Petticoat  
 Carth. 277. which the Wife of J. S. had given him in Pawn for the Re-payment of  
 King ver. 2 s. 6 d. after a Tender of the Money, and it being moved to quash  
 Galkwich; the Indictment, the Court (*absente Holt*) refused, because of the great  
 but the Re- Abuse by Pawn-Brokers.  
 porter adds a *Quere*, and  
 says that if the Defendant had demurred to this Indictment, it could not have been maintained by  
 Law, being only a Breach of Contract, which is Actionable but not Indictable. *Vide* 2 Hawk. P. C.  
 210.

### (C) Of Bailment Which vests a Special Property, and therein of Lending on Special Contracts.

Cro. Car. 271. IF *A.* puts his Beasts into *B.*'s Pasture, on Agreement to pay *B.* 6 d.  
 2 Rol. Abr. 92. *per* Week for the Pasturage, *B.* cannot retain the Beasts of *A.* until  
 he hath paid him the Money, unless this were at first provided by their  
 8 Co. 147, Agreement; but the only Remedy that *B.* has is upon the Contract.  
 39 H. 6. 18. But if a Horse be committed to an Hostler, he shall detain him till  
 5 H. 7. 15. he is paid for his Meat.  
 2 Rol. Abr. 85

22 E. 4. 49. So if Cloth be committed to a Taylor to make up into a Garment,  
 Cro. Car. 271. he shall detain the Cloth until he is satisfied for his Labour.  
 8 Co. 147.

For in Behalf of Trade and Commerce, the Law doth annex the Condition that the Bailee shall retain in certain Cases; for Men that get their Livelihood by Commerce, and by Entertainment of others, cannot annex such disobliging Conditions that they shall retain the Bailors Property in Case of Non-payment, or make such disadvantageous and impudent Suppositions that they shall not be paid; and therefore the Law annexes such a Condition, without any express Agreement of the Parties. Besides, Goods that are put into the Places of publick Entertainment and Trade, are for the Sake of publick Commerce, taken into Custody of Law as well as of the Party; and therefore cannot be there distrained. Now Goods, that are in the Custody of the Law, cannot come out thence till the Purposes are satisfied for which they were there placed; and the Purpose for which these Chattels are first committed to such publick Places is, that they might be there conserved, and the Party to whom they were committed paid for his Trouble and Charge about them. Now since the Act of Law doth no Man any Injury, it cannot free any Thing from such publick Custody till the Party is satisfied to whom they were thus committed. *Vide* Tit. *Innkeepers*.

Palmer 225, A Taylor hath Cloth delivered to him to make up into a Garment,  
 224. which he doth accordingly, he shall have an Action for his Work, without delivering the Garment; and if the Taylor refuse to deliver the Garment upon Request, it ought to be shewn on the other Side in Excuse of the Action; for the Taylor's Action is founded upon the Promise, and if he hath done the Work, and is ready to deliver the Garment, he hath performed all that the Law requires on his Part, and on that Consideration is intitled to the Benefit of the Defendant's Promise.

Doff. & Stud. 129. If a Man lends another his Sheep, Oxen or his Cart, the Borrower hath a qualified Property in them, according to the Purposes for which they were borrowed; and by Force of this Loan they may be used reasonably for these Purposes and for the Time agreed on; and if they Perish in such Occupation, it is at the Peril of the Lender; but if they Perish in any other Manner, the Borrower must answer for them.

Yelv. 172. If *A.* borrows a Horse to ride to *Dover*, and he ride out of his Way, and the Owner of the Horse meet him, he cannot take the Horse from him; for *A.* has a Special Property in the Horse till the Journey is determined; and being in lawful Possession of the Horse, the Owner cannot

not violently seize and take it away, for the Continuance of all Property is to be taken from the Form of the original Bargain, which in this Case was limited till the appointed Journey was finished.

But if *A.* borrows a Horse to go to *Dover*, and goes to other Places, the Owner may have an Action on the Case against him, for exceeding the Purposes of the Loan; for so far it is a secret and falacious Abuse of his Property; but no general Action of Trespafs, because it is not an open and violent Invasion of it. 1 *Resl. Rep.*  
128.

If a Man lend another his Sheep to Stock his Land, the Borrower hath the bare Use of them; but if he kill them, the Owner shall have a general Action of Trespafs, or an Action of Trover at his Election; for though the Use is in the Borrower, yet the Property is in the Lender, and the Killing of the Sheep is an open Violation of another's Property, which is complained of in the general Action of Trespafs. Co. Lit. 57  
5 Co. 15.  
1 *Lev.* 87, 88.  
Cro. El. 2782.  
15 *Ed.* 4. 84.  
*Mo.* 248.  
Goldb. 66, 67.  
*Owen* 52. *Dyer* 121. pl. 17.

If I sell you a Horse for 20 s. I shall retain him unless the Money be actually, or conditioned to be paid at a future Day, for unless there be *quid pro quo* the Property is not altered. 5 *E.* 4. 2. 6.

As to the borrowing of Things perishable, as Corn, Wine, Money or the like, a Man must from the Nature of the Thing have an absolute Property in them; otherwise it could not supply the Uses for which it was lent, and therefore he is obliged to return something of the same Sort, the same in Quantity and Quality with what is borrowed. Dr. and Stud.  
129.

**(D) When the Thing bailed is violated or destroyed, to Whom is the Loss, and to Whom is the Remedy.**

IT is held by some, that if *A.* commits Goods to *B.* to be kept, or which is all one, to be safely kept, and they are stolen, that *B.* must answer the Value of them to *A.* others have made a Distinction, that if *B.* had undertaken for a Price to keep them, that then he should have been bound to answer for them if they had been stolen; because there is a Consideration to found the Promise; but where no Reward is agreed on, there they say there can be no Consideration on which the Promise is built, and therefore a naked Promise which affords no Action; but the Reasons urged against this are, That where another loses by Undertaking, I am equally bound to make good the Value of my Promise, as if I myself was to receive Gain by the Bargain; for since another Man's Property, and possibly the whole Fruits of a long and painful Industry is lost and wasted by my Undertaking to secure it, certainly, I from whom the Damage arose ought to make him Satisfaction; for every Man is presumed to Guard his own, and not easily to part with that which cannot be acquired without great Difficulty; and therefore it must be presumed that he would have safely kept it, and not have committed it to me, unless I had undertaken to secure it; and if I fail in that Undertaking, I am bound to a Restitution; for I am equally obliged to a Restitution where another Man suffers an Injury by my Means, as where I myself commit an Injury; and had the Law any other Course in these Cases it were a perfect Inlet into all Collusion; for Agreements and Contrivances might arise between the Men of Violence and such treacherous Undertakers, as are not easy to be discovered. 4 *Co.* 83.  
*Southcote's*  
Case.  
Dr. and Stud.  
129.  
*Post*, *Coggs*  
and *Barnard.*

8 Co. 84. If a Carrier, Ferryman, or Hostler be robbed, he shall answer the  
 Co. Lit. 89. Value of the Goods, for the Carrier hath his Hire, which implies an Un-  
 1 Sid. 36. dertaking for the safe Custody and Delivery of them; for no Man would  
 Palm. 523. give another Money for securing his own, if the Party that received it  
 1 Rol. Abr. were not to undertake on his Part to secure it.  
 124.

2 Rol. Abr. 367. 1 Rol. Rep. 79. Hob. 17, 18. Cro. Jac. 162, 330. 1 Mod. 85. 2 Sand. 380. 1 Bulst. 280.

1 Rol. Abr. 606. If *A.* delivers Goods to *B.* to be delivered over to *C.* *C.* hath the Pro-  
 perty, and *C.* hath the Action against *B.* for *B.* undertakes for the safe  
 Delivery to *C.* and hath no Property or Interest but in order to that  
 Purpose.

1 Bulst. 68. But if the Bailment were not on valuable Consideration the Delivery  
 compared is countermandable; and in that Case, if *A.* the Bailor bring Trover, he  
 with 2 Leon. reduces the Property again in himself, for the Action amounts to a Coun-  
 30. Yelv. 164. termand of the Gift; but if the Delivery was on a valuable Consideration,  
 then *A.* cannot have Trover, because the Property is altered, and in  
 Trover the Property must be proved in the Plaintiff.

13 Co. 69. If a Man delivers Goods to another, the Bailee shall have a general  
 14 H. 4. 28. Action of Trespass against a Stranger, because he is answerable over to  
 25 H. 7. 14. the Bailor; for a Man ought not to be charged with an Injury to ano-  
 other, without being able to retire to the Original Cause of that Injury,  
 and in Amends there to do himself Right.

F. N. B. 157. If I deliver Goods to *B.* and *C.* that hath Right demands them of  
 1 Rol. Abr. him, if *B.* either before or pending the Action deliver over the Goods to  
 607. me, this is a good Bar to the Action of *C.* brought against *B.* for since  
*B.* hath undertaken to deliver the Goods back to me, he shall not be  
 chargeable for the honest Performance of that Undertaking; for *B.* that  
 is trusted with my Possession, shall not remove nor alter my Possession, and  
 therefore shall not be put to answer for that to which the Law obliges  
 him.

1 Rol. Abr. 607. But if I find Goods and convert them, and another recover them from  
 me, yet a Stranger that has Right shall have his Action against me, and  
 therefore two Persons claiming in Trover shall interplead with each other;  
 for I have by my finding the Property in me till another shews a better  
 Right; now this Property continues till the real Owner appears; and if I  
 by weak Defences do not support that Property, that shall be no Injury  
 to the Right of another; for the original Injury begins from me, by un-  
 dertaking to intermeddle with what is another's, and which I were sure  
 was none of my own.

1 Rol. Abr. 607. If a Bailee deliver the Goods to another, there he shall have an Action  
 of Detinue against him, because he hath his Possession, and undertakes  
 for the Custody; and the Original Bailor may have his Action against  
 either of them, because in him is the Property which both are bound to  
 answer to him.

5 Co. 14. If a Man lend or hire another his Horse, and for want of safe keep-  
 Cro. Eliz. 777, ing he die, the Owner hath an Action on the Case for to repair the Da-  
 784. mage sustained by the Negligence; so if a Man lend another Sheep to  
 Owen 52. Tath his Land, and by the Negligence of the Borrower they are drown-  
 Dyer 121. ed, an Action on the Case lies; so if a Man lend another a Horse, and  
 Godb. 72. he put him into a Stable that is ruinous, and the Stable tumbles in upon  
 Dr. and Stud. the Horse and kills him, an Action on the Case lies; but if the Stable  
 128. b. The Reason of had been strong and substantial, and had fallen by violent Tempest, then  
 these several

Cases is this, That when any Man borrows or hires any Thing, and only uses it according to the  
 Purposes of the Loan, that Contract bears him out from all Accidents that are consequent upon such  
 Use; for there is no Reason why the Borrower should not have the Use of it according as the  
 Owner had licensed and impowered him; and if any unavoidable Accident happen upon such a Li-  
 cence, the Lender must impute it to the Folly of his own Permission; but if it happened through  
 the Negligence of the Borrower, then it is fit he also should answer for that whereby he becomes  
 injurious to the Lender.

is the Borrower excused; so if a Man lend another a Horse, and he dies of divers Diseases, the Borrower is excused.

If *A.* take a Gelding to Pasture, and the Gelding be stolen, no Action lies against *A.* unless he had made a Special *Assumpsit* to deliver him, for the Undertaking of *A.* is to feed the Gelding in the Fields and in the open Air, and not to keep him safely as the Hostler is obliged to do in his Stable; and the Law will not stretch Mens Promises beyond their first Undertaking. *Moor* 543.

If a Man find Goods and abuse them, or if he find Sheep and kill them, this is a Conversion; but if a Man find Butter, and by his negligent keeping it putrefies; or if a Man finds Garments, and by negligent keeping they are Moth-eaten, no Action lies; so it is if a Man finds Goods and loses them again, and the Reason of the Difference is this, for where a Man delivers Goods to another, the Bailee by Acceptance of the Goods undertakes for the safe Custody of them; and it is to be presumed that the Owner would not have parted with them but under the Confidence of that Security; but where a Man only finds the Goods of another, the Owner did not part with them under the Caution of any Trust or Engagement; nor did the Finder receive them into his Possession under any Obligation; and therefore the Law only prohibits a Man in this Case from making an unjust Profit of what is another's, but the Finder is not obliged to preserve those Goods safer than the Owner himself did; for there is no Reason for the Law to lay such a Duty on the Finder in Behalf of the careless Owner; for it seems too rigorous to extend the Charity of the Finder beyond the Diligence of the Proprietor; it is therefore a good Mean to punish an injurious Act, *viz.* The Conversion of the Goods to his own Use, but not to punish a Negligence in him that is much greater in the Ownership. *1 Leon.* 123,  
*223.*  
*Owen* 141.  
*2 Bullst.* 21.

A Carrier is bound to the safe Delivery of a Box, though he doth not know what is in the Box, unless he refuses to carry it without he be instructed in the Particulars, for the Party is not obliged to tell him. *Allen* 93.  
*Vide* Head of  
*Carriers.*

I shall, as applicable to this Doctrine, insert the following noted Case, with the Argument at large of the Lord Chief Justice *Holt*.

In an *Assumpsit*, the Case was this; The Defendant did undertake to remove a Quantity of Brandy from *Brook's Market* to *Water-Lane*, and by reason of his Neglect one of the Casks broke; and Not guilty, a Verdict was for the Plaintiff; and in Arrest of Judgment two Exceptions were taken. *Term. Trin.*  
*Anno* 2 *Ann.*  
*Regina* in *B.*  
*R.* 1703.  
*Coggs* v. *Barnard,*  
*Holt,*  
*Chief Just.*  
*Powel,* *Powis,*  
*Gould Just.*

1st. Because in the Declaration he was not alledged to be a common Porter.

2dly, Because it was not averred that he had a Reward.

But the whole Court resolved, That in this Case the Plaintiff ought to have his Judgment.

*Holt*, Chief Justice, his Argument was to this Purpose.

There be six several Sorts of Bailments, which lay a Care and Obligation upon the Party to whom the Goods are bailed.

1. The first is a bare and naked Bailment to another, to keep for the Use of the Bailor, which is called *Depositum*.

2. A Delivery of Goods to another which are in themselves useful to keep, and these are to be restored again in Specie, which is called *Accommodatum*.

3. A Delivery of Goods for Hire, which is called *Locatio* or *Conductio*.

4. A Delivery by way of Pledge, which is called *Vadium*.

5. A Delivery of Goods to be carried for a Reward.

6. Such a Delivery as here in the Case at Bar, where Goods are delivered to do some Act about them, as the Carrying, and without a Reward, which is called *Mandatum*, by *Bracton*, *Lib.* 3. 100. in *English*, an acting by Commission.

And

And though I do not think all these immediately necessary to the Case in Question, yet the Explanation of them will make the Cause clearer.

1. Then as to the First, if a Person out of Kindness keeps the Goods of another, he shall not be answerable if they be stolen, without there be a particular Default in him: And 2dly, Such a Bailee is not chargeable for a common Neglect, for it must be a gross Neglect for which he shall be liable. I must confess I have a great Authority to encounter, which is *Southcott's Case*, 4 *Rep.* 83. *b.* Howsoever, my Lord *Coke* in his Report goes farther than the Case it self, for he there makes a Difference between keeping generally, and safe keeping; which in the Case it self is not mentioned, but in his Note at the End of it; and I cannot think it to be Justice to charge the Bailee if the Goods be lost without any Default of his; for why should he answer for the Wrongs of other People against whom he undertook not.

There never was before *Southcott's Case*, any solemn Determination of this Matter; the first Case of it was in 29 *Aff.* pl. 28. 8 *Ed.* 2. *Fitz. Detinue* 59. both quoted in *Southcott's Case*; but I cannot agree to the Reasons of those Cases; for the Neglect of the Party may be as great where Goods are locked up in a Chest, as where not, and by that reason ought to be chargeable as much in the one Case as in the other; and the 4 *Ed.* 4. is only a Debate of two Council at the Bar, for ——— was not then Ch. Just. and what he said was only for his Client, and not of Authority; and 3 *H.* 7. is only a sudden Opinion; now *Southcott's Case* came long after, *viz.* 43 *Eliz.* and there two Judges in the Absence of the other two gave that Opinion, which Cause was improved by my Lord *Cook*; but it has been the constant Practice for as long as I knew the Court, that in all the Trials at the *Guildhall*, where upon the Evidence no Default appeared in the Bailee, to direct for the Defendant; nor did ever any one venture, upon the Authority of *Southcott's Case*, to find the Matter Specially; I take it that this Bailee is so far from being charged, that though the Goods be lost by a common Neglect he shall not be answerable; as if he negligently keep his own Goods, and that his own and his Friend's Goods are both lost; now the Loss of his own is not an Argument of his Sincerity, and therefore he shall not be chargeable; this is in *Bracton* 99. and though this is an antient Author, yet it is agreeable to Reason, and is not in this Point only the Law of *England*, but of Foreign Countries, as may be seen in *Justinian's Inst.* where I believe *Bracton* got his Notion; now if there be an apparent gross Neglect, it is looked upon to be a Fraud; but otherwise, if it be not a gross Neglect; and I know no Reason why the Bailees upon taking Goods, if it were in Writing, shall not be charged against the Wrong of a third Person, as in *Hob.* 34. 2 *Cro.* 425. and 3 *Cro.* 514. and yet without Writing, as in *Southcott's Case*, to be charged; and the *Doctor and Student* 128, 212. says, it is for the Advantage of the Bailee, and that an Action does not lie unless they be lost through negligent keeping; so that I do not find sufficient Reason nor Authority to support the Opinion of *Southcott's Case*.

2. A Lending *gratis* to use for his Advantage, there the Borrower is strictly bound to keep it, for if he be guilty of the least Neglect he shall be answerable; as if I lend a Horse to go to the *North* of *England*, and he goes to the *West*, and the Horse is stole, he shall in that Case be chargeable; for if he had gone as I directed, the Horse, perhaps, would not have been stolen; this Sort of Bailment is mentioned in *Bracton* 99. but in this Case, if this Horse had been in the Stable of the Bailee, and stolen thence without his Default, as perhaps the Thieves might first have bound the Bailee, and then have taken the Horse, he shall not be answerable; but if he left the Stable Doors open he shall for that Neglect be answerable; *Bracton* says, he ought to take the utmost Care, but in no Place says he shall be charged where no Default was in him.

3. As to the third Bailment, where Goods are hired out for a Reward; *Bracton* 62. says, the Hirer is to take all imaginable Care, and to restore it at the Time, and he is bound to such a Care as a diligent Master of a Family useth to his Family, which Care, if he so useth, he shall not be bound; now the most diligent Man is liable to be robbed, and therefore I collect, that if he be so careful, as according to *Bracton's* Definition, and be robbed, he shall not be liable.

4. If Goods be pawned, the Pawnee has a Special Property, which is in Nature of a Security to compel the Pawner to pay; and if the Goods be the worse for using, the Pawnee must not use them; as Cloaths, &c. but if they be not the worse for using, he may use them at his Peril; as Jewels pawned to a Lady, and she keeps them in a Box, and they are stolen, she shall not be charged; but if she goes abroad with them to a Play, and there they are stolen, she shall be answerable. 2dly, If the Pawnbroker be at Charge in keeping of them, as if it were a Horse, and he gives it Meat, he may use it for his reasonable Charge he has been at, *Bracton* 99. If a Creditor takes a Pawn, he is bound to restore it upon Payment; but if he, notwithstanding all his Diligence lose it, he shall howsoever recover his Debt, 29 *Aff. pl.* 28. for the Law does not lay upon him an Obligation to keep against all Accidents; but if the Money be tendred, and he after detains, and then it is lost, he shall then be liable, for he is then a Wrong-doer, and his Keeping it after is the Occasion of its being stolen, and he is then answerable at all Events.

5. Goods to be carried for a Reward. 1. If you deliver them to a publick or common Carrier, and they are stolen, he must be liable, for the Law charges him at all Events; but yet the Act of God, or the Enemies of the Queen, may excuse, and this is a political Institution by the Laws of *England*, that People may be safe in their Dealing; for otherwise Carriers, that are frequently trusted with Things of greatest Value, would be often tempted to confederate with Thieves. 2dly, But he who has a particular private Employment, though he has a Reward, yet he is not bound against all Events, as a Factor or a Bailiff, if they do to the best of their Power; and that is *Southcott's* Case, and he is bound no otherwise than as his Master himself should do; for it were unjust to charge him with what he cannot prevent.

6. To this Point, Here is a Man not intrusted to keep, but to carry, and not to have any Thing for his Pains, and he through his own Negligence miscarries, though he be to have nothing, yet it appears there was a Neglect, and for that Reason he is chargeable; but if the Goods had been misused by a third Person in the Way as he carried them, and without any Neglect of his, I hold that he would not then be liable, because he had nothing for a Reward; in *Bracton lib. 3. 100.* this is called *Mandatum*, and ariseth upon the *Emendato*, in *English*, Acting by Commission; and if he thro' his Negligence suffers the Goods to be damaged, he is liable. *Vivian's* Comment upon *Just. Inst.* 684. *Mandatum* is there defined to be a Contract whereby any Thing is committed *gratis* to be done for another; and with this agrees *Bracton*; and though this Word be not used in any other Book of the Law, and this be an old Authority, yet in this Point he is supported by Reason; and upon the whole, I am of Opinion that the Defendant in this Case is liable, for it is a Deceit to the Plaintiff his being negligent; for it is upon the Confidence of his Carefulness that the Plaintiff intrusted him; and in *Godb. 64.* and *2 H. 7.* For the negligent keeping of Sheep, &c. an Action lay, for there is a Consideration, *viz.* the Trusting, though no Money be paid; and here he becomes chargeable by the Mischief he has done. *29 H. 6. 49.* *33 H. 6. 34.* *11 H. 4. 33.* By these Cases, though a Man promises to build an House for another, he shall not be bound, being *nudum Pactum*; yet I doubt not but if he had once gone about the Building it, and he do it so ill that it falls, an Action would lie; and in *Telv. 4.* the Plaintiff decla-

red, that in Consideration that he delivered to the Defendant twenty Quarters of Corn, the Defendant assumed upon Request to deliver the Corn again to the Plaintiff; and it was there held that the Action lay; but this Judgment was after reversed in the *Exchequer-Chamber*; and contrary to it is a Case in *Yelv.* 128. but in the same Book 50. is the Case *fol.* 4. of *Biggs* and *Riches*, confirmed and allowed good Law; and there *Gaudy* and the Court held it a bad Reversal, and contrary to that Reversal solemnly adjudged in 2 *Cro.* 667. Now if a Trust be once undertaken, that is a sufficient Consideration; the Cases in the *Register* 110. are full in Point, for there the very Precedent is *quod* (the Defendant) *tam negligenter, &c. carriavit quod Papa illa confracta fuit*, without any Mention of a Reward, or that he was a common Carrier; though in latter Days for the greater Caution they insert these Words, *pro quadam mercede*, so that he that is intrusted by Commission, if he enters upon the Employment, and after any Loss accrues to the Owner through his Neglect, he is liable though he receive no Reward; but if any Loss accrues to the Owner not through any Neglect of his, though he receive a Reward as a Factor, &c. yet shall not he be liable: So that upon this whole Matter, I am of Opinion Judgment ought to be given for the Plaintiff.

## Bankrupt.

*Digest. Lib.*  
27. *Tit.* 10.  
For the Definition and  
Derivation  
of the Word,  
*vide* 4 *Inst.*  
277.

**T**HE granting Commissions of Bankruptcy seems to be derived from the Civil Law, which constituted a Guardian to a Prodigal in the same Manner as to a Madman; and such Guardian the Pretor appointed on the Petition or Application of Relations, as well as Creditors: But the Feudal Law, though it admitted of Commissions of Lunacy *ex necessitate*, would allow of none for Prodigality, not being reckoned injurious, because such Prodigal could not alien his Lands without the Leave of his Lord; also the Condition of a Freeman was not to be altered without the Crime of Felony. But as Trade and Commerce increased, it was found necessary, for the Support of Credit, to introduce such a Law amongst us, and therefore our Acts of Parliament have confined it to Traders and Creditors only.

We shall consider the Laws of Bankruptcy as moulded by several Statutes and Acts of Parliament, under the following Heads:

- (A) What kind of Trade, Occupation or Profession a Man must be of, or of what Nation, before he can be adjudged a Bankrupt, and what Acts must he do, permit or suffer, which will make him one.
- (B) Of the Commission of Bankruptcy, and herein of the Creditors who may obtain it, and what they are to do previous thereto.

- (C) Of the Commissioners, their Duty, and herein of the Power they may exercise over the Bankrupt or others in discovering of the Bankrupt's Estate.
- (D) Of the Assignees; and herein of the Manner and Time of chusing them.
- (E) Of the Creditors, who are such, and therein of proving their Debts, and Time of coming in.
- (F) Of the Bankrupt's Estate and Effects, to which the Commissioners or Assignees are intitled, when it shall be said to be vested in them, and therein of fraudulent Dispositions by the Bankrupt, and of the Actions they may bring for the Recovery thereof.
- (G) Of setting off, submitting to Arbitration, and compounding Debts due to the Bankrupt.
- (H) Of the Distribution to be made of the Bankrupt's Estate.
- (I) How the Bankrupt is to demean himself, and herein of the Crime in not appearing, not discovering his Estate, and the Privilege he is to enjoy during his Attendance.
- (K) Overplus of the Bankrupt's Estate, and the Allowances to be made him; and herein of his Discharge and Certificate.

(A) What kind of Trade, Occupation or Profession a Man must be of, or of What Nation, before he can be adjudged a Bankrupt, and What Acts must he do, permit or suffer, which will make him one.

BY the 13 *Eliz. cap. 10.* " Any Person being a Subject or Denizen, " using or exercising the Trade of Merchandize by way of Bargain- " ing, Exchange, Rechange, Bartry, Chevifance, or otherwise in Gross " or by Retail, or seeking his or her Trade of Living by buying and " selling, that departs the Realm, or begins to keep House, or other- " ways to absent himself, or take Sanctuary, or suffers himself willingly " to be arrested for any Debt not due, or suffers himself to be outlawed " to defraud any of his Creditors, being Subjects born, shall be deemed " a Bankrupt.

The 1 *Ja. 1. cap. 15. Sect. 1.* is the same with the foregoing Statute, <sup>(a)</sup> In Trover the following Addition only, *viz.* " Or fraudulently procures his Goods and Conver- " to be attached or sequestred, or makes any (a) fraudulent Grant of sion a Spe- " his Land, &c. to the Intent that his Creditors, being Subjects born, was found, " may be defrauded, or being arrested for Debt, shall lie in Prison for that a Mer- " fix chant had

made a fraud-  
ulent Deed to the Defendant of the Goods contained in the Declaration, and that afterwards he went to the *Exchange* and appeared publicly in Trade, and then absconded; and afterwards a Commission being taken out, these Goods were assigned by the Commissioners: the executing of the Deed

does not " six Months or more, on that or any other Arrest, shall be adjudged a make him a " Bankrupt.

Bankrupt, because the Jury find that he was afterwards abroad, and that then he absconded, and that the Commissioners pitched upon that Act of Bankruptcy to declare him a Bankrupt; and though they have found it a fraudulent Deed, yet they did not find it *in fraudem Creditorum*, and it might be only a fraudulent Deed in respect of some subsequent valuable Sale; and therefore no Title was found for the Plaintiff. *Hutton* 42, 43. *Cartwright* and *Underbill*.

21 *Ja. 1. cap. 19. Sect. 2.* sets forth, " That every Person that uses  
" the Trade of Merchandize, or that uses the Trade of a Scrivener, re-  
" ceiving other Mens Money into his Trust and Custody, who by him-  
" self or others shall procure any Protection, except such as shall be law-  
" fully protected by Privilege of \* Parliament, or by Petition, Bill, &c.  
" shall endeavour to compel their Creditors to take less than their due  
" Debts, or gain longer Time than was given upon the original Contract;  
" [or (a) being indebted in 100 l. or more, shall not pay or compound for the  
" same within six Months after the same becomes due, and the Debtor be ar-  
" rested for the same, or within six Months after an Original sued out, and  
" Notice thereof given or left in Writing at his House, or last Place of Abode,  
" or being arrested for Debt shall lie in Prison for two Months or more, upon  
" that or other Arrest or Detention for Debt, or being arrested for 100 l. or  
" more just Debts, escapes out of Prison, or is delivered by putting in com-  
" mon or hired Bail, shall be adjudged a Bankrupt; and in Case of Arrest,  
" lying in Prison, or getting forth by common or hired Bail from the Time of  
" the Arrest].  
" By the 14 *Car. 2. c. 24.* it is provided, " That whereas divers Noblemen  
" and Gentlemen, and Persons of Quality, no ways bred up to Trade,  
" do often put in great Stocks of Money into the *East-India* and *Guinea*  
" *Company*, no Persons Adventurers for putting in Money or Merchan-  
" dize into the said Companies, or for adventuring or managing the  
" Fishing, called the Royal Fishing Trade, shall be (b) reputed or taken  
" to be a Merchant or Trader within any Statutes for Bankrupts; pro-  
" vided, that Persons Trading in any other Way or Manner, shall be  
" liable to a Commission as fully, and not otherways, as if that Act had  
" not been made.

(a) Note, The Statute 10 *Ann.* reciting these very Words of this Act, repeals the same and all other Acts, as far as they relate to these Descriptions of a Bankrupt.  
(b) But if a Trader put in Money in- to the *East-India* Com- pany and ab- seond, he is a Trader within this Act, because such Goods being bought and sold were within the original Statutes touching Bankrupts; for they make no Distinction between the Manner of Trade, whether in Com- panies or out of them; and though this Statute hath excepted the Nobility and Gentry for the In- ceuragement of these Companies, yet Traders are left as they were before. 2 *Keb.* 487. *Hugh. Abr.* Tit. *Bankrupt.* Sir *John Williston.* *Vide Goodwin of Bankrupts* 20. Where it is said to have been adjudg- ed, that such Trading did bring a Man within the Statutes before this Act.

By the 5 *Geo. 2.* it is provided, " That whereas Persons dealing as  
" Bankers, Brokers and Factors, are frequently intrusted with great  
" Sums of Money, and with Goods and Effects of very great Value be-  
" longing to other Persons, that such Bankers, Brokers and Factors,  
" shall be and are hereby declared to be subject and liable to that and all  
" other the Statutes made concerning Bankrupts.

5 *Ann.* and 5 *Geo. 1.* have the same Clause, but being Temporary Acts are expi- red, before which it was held, that a Drover might be a Bankrupt. 1 *Jones* 304.

Note; It is provided in the latter End of the Statute of 21 *Ja. 1. c. 19.*  
" That that Act, and all other Acts heretofore made against Bankrupts,  
" shall extend to Strangers born, as well Aliens as Denizens, as effectual-  
" ly

“ ly as to Natural-born Subjects, both to make them subject to the Laws  
 “ as Bankrupts, as also to make them capable of the Benefit, or Contri-  
 “ bution as Creditors, by these Laws.

Upon these Statutes which describe a Bankrupt there have been several Resolutions, especially in the Common Law Courts, the Judges being the proper Expositors of all Acts of Parliament ; and therefore the usual Method when Bankruptcy is denied is, for my Lord Chancellor to order it to be tried in a Common Law Court, on an Issue *Bankrupt* or not.

For tho' the Commissioners declare him a Bankrupt he may traverse it.

*Palm.* 325. 8 Co. 121. n. 4 *Inst.* 277.

A Shoemaker is within 13 *Eliz. cap.* 7. for he lives by his Credit, in buying Leather and selling it again in Shoes, and not on his manual Labour only, as Labourers and Husbandmen do; for the Thing bought and sold under different Forms is the Leather, and though the Shoemaker's Labour is employed in the Alteration of the Form, yet Men do not contract for the Labour but for the Thing it self.

*Cro. Eliz.* 268.  
*Cro. Ja.* 584.  
*Cro. Car.* 31.  
 3 *Mod.* 350.

A Weaver and Dyer are within the Statute, for they get their Living by buying and selling, and therefore may have an Action for calling them Bankrupt.

*Cro. Jac.* 584.

If one covenants with the King to Victual the Fleet at a certain Rate, and thereupon buys up a great Quantity of Provision, &c. though with the Surplus he Victuals Merchants, yet being originally designed for the Use of the Navy, it will not make him a Trader within the Act, and it is one Act or Contract only, and not a continued Trading.

1 *Vent.* 270.  
 2 *Show.* 270.  
*Sir Thomas Littleton's Case*, adjudged.

An Inn-keeper, as such, can be no Bankrupt, for though he buys Provision to be spent in his House, yet he does not properly sell them, but utter them at such Rates which he thinks reasonable, and the Attendance of his Servants, Furniture of his House, &c. are to be considered; and the Statutes only mention Merchants that use to buy and sell in Gross or by Retail, and such as get their Living by buying and selling; so that their principal Subsistence is by buying and selling; now the Contracts with Inn-keepers are not for any Commodities in Specie, but they are Contracts for House-Room, Trouble, Attendance, Lodging and Necessaries, and therefore cannot come within the Design of such Words, since there is no Trade carried on by Buying and Bartring Commodities; and though in this Case a Jury should find that the Inn-keeper got his Living by buying and selling, it would not bring him within the Statute for the Reasons aforesaid.

3 *Keb.* 451.  
 S. C.

And in these Books it is said, that there is no material Difference between an Inn-keeper and a Master of a Boarding School, who buys and dresses Provisions for young Scholars.

*Cro. Car.* 549.

1 *Jones* 437.  
*Crisp and Prat, Murch*  
 35. S. C.

3 *Lev.* 309.  
 S. P. adjudged between *Newton and Trigo.*

3 *Mod.* 327.

1 *Show.* 268.

1 *Salk.* 109,

110.

*Skin.* 291.

*Comb.* 181.

A Carpenter that sells wrought Timber seems to be within the Statute, for he sells the Materials though altered by his Workmanship, so that he gets his Living by buying in and selling out the Timber; but otherwise it seems it is of a meer working Carpenter.

3 *Mod.* 155.

The Buying Part of a Ship makes no Trading, because it is no Buying and Selling within the Statute; but the buying Part in the Ship, and the Party's employing it in carrying and re-carrying Goods for himself, is an Evidence of Trade, because the Exportation and Importation of Goods is the Business of a Merchant; but if a Man buys a Part of a Ship which he lets to Freight, this is no Evidence of Trade, for there is no Exportation or Importation; but if a Man repairs a Ship, which is usual on the Credit of the Bottom, and afterwards takes a Share in it for his Debt, and employs the Ship in Exportation, it has been held by some, that since in this he is compulsory, having no other Way to obtain his Debt, that it shall not be taken as an Evidence of Trading, because this is only accidental, and not the Way the Party hath put himself in to get his Livelihood.

1 *Sid.* 411.

1 *Vent.* 29.

2 *Show.* 268.

2 *Keb.* 487.

*March 35.* A Man buying and selling brings not the Man within the Statutes, for  
*Cro. Jac. 549.* they intend such as gain the greatest Part of their Living thereby; and  
*1 Danv. Abr. 687.* therefore where a Farmer bought and sold Cattle, it was adjudged that he was not a Bankrupt, for a Farmer is not within the Statutes, because he only sells the Profits originally raised from the Ground, and if he buys in Commodities, and sells them again, this is only accidental.

If a Man contracts a Debt while he is a Trader, and after leaves off, and lives upon his Estate in the Country, and afterwards absconds for this Debt, he is a Bankrupt, because he lived by his Trade when the Debt was contracted; but if a Merchant leaves off his Trade, and after contracts Debts, and then sells off the Surplusage of his Goods, but hath neither Factor, Correspondent nor Packer, he is (a) no Bankrupt.

*Palm. 325.* For in *1 Vent. 166.* where the same Case comes on again, the Court holds that he is a Bankrupt; otherwise the Mischief would be great; for Men cannot take Notice when another withdraws his Trade, or when he commands his Factors beyond Sea to deal no farther for him; but they seeing great Quantities of Goods and Merchandize in his Hands, are apt to trust him; so that it is fit they should be relieved by the Statutes.  
*1 Vent. 5.*  
*3 Lev. 17.*  
*1 Sid. 411.*  
*Sir Robert Cotton's Case.*  
*3 Keb. 451.*

If a Trader gives over his Trade, and then contracts Debts, and then goes into Trade again upon a new Stock, it seems upon the Petition of such intermediate Creditors he cannot be made a Bankrupt, because such Creditors did not trust him upon the Credit of his Trade.  
*1 Sid. 411.*  
*2 Show. 268.*  
*1 Vent. 5.*  
*Comb. 463.*

But if such a Person leaves Goods in the Hands of another to be disposed of, and is to be Partner with him in Loss and Gain, he may be a Bankrupt, for he still carries on his Trade by Proxy. *Palm. 325.* But the having of a Joint Stock does not make a Bankrupt without some Proof of a Disposal thereof; for otherwise there is no Commerce driven. *3 Keb. 487.*

If a Trader become Security for another, he is a Bankrupt within the Statute, because he is trusted upon the Reputation of his Stock and Dealings, as well where he is Security, as where he contracts for his own Debts.

A Man buys in *England* only, and sells in *Ireland*, he may be a Bankrupt, for many Merchants buy beyond Sea, and sell in *England* only, and others buy here, and sell beyond Sea; for it is Trading that makes a Man capable of being a Bankrupt.  
*Raym. 375.*  
*Dowesworth*  
*and Anderson,*  
*2 Jones 141.*  
*S. C.*

*2 Vern. 162.* S. C. cited.

A Gentleman of the *Temple* went from thence to *Lisbon*, where he turned Factor and Traded to *England*, and broke; it was insisted upon that the Statutes of Bankruptcy did not extend to Persons out of the Realm, the Subject of them being Cases of Arrests, Outlawries, and departing the Realm; and that the *21 Ja. 1.* which extends to Aliens, is to be understood of Aliens here; but the Court held him a Bankrupt by reason of his Trading hither and back again, which gained him a Credit here.  
*1 Salk. 110.*  
*Bird and*  
*Sedgwick, on*  
*a Trial at*  
*Bar.*

If a Man keeps his House for a long Time, this does not immediately make him a Bankrupt; but if he conceals himself within his House but for a Day or Hour to delay or defraud his Creditors, he is a Bankrupt.  
*Palm. 325.*

If there be a Process out against a Merchant, who thereupon keeps House to save himself from an Arrest, and after goes out to Market and other Places, but hearing of a new Process keeps House again, and after goes at large; *per Cur'*, He is no Bankrupt, because the keeping in House is an Act of Bankruptcy, for which a Commission might have been taken out at that Time, yet by his going abroad it is afterwards purged; for though the Statute makes the Keeping of House an Act of Bankruptcy, yet it must be understood of a Keeping in order to conceal himself.  
*Cro. Eliz. 13.*  
*Godb. 25.*  
*1 Lev. 13.*  
*2 Sid. 177.*

If *A.* commits a plain Act of Bankruptcy, as Keeping House, &c. tho' he after goes abroad, and is a great Dealer, yet that will not purge the first Act of Bankruptcy, but he will still remain a Bankrupt; but if the Act was not plain, but doubtful, then going Abroad and Dealing, &c. will be an Evidence to explain the Intent of the first Act; for if it was not done to defraud Creditors and keep out of the Way, it will not be an Act of Bankruptcy within the Statute: Also if after a plain Act of Bankruptcy he pays off or compounds with all his Creditors, he is become a new Man.

*1 Salk. 110. Hopkins and Ellis, ruled by Holt, Ch. Just. on an Issue directed out of Chancery.*

If a Man permit himself to be outlawed, to the Intent or Purpose to defraud his Creditors of a just Debt, it is one of the Causes of Bankruptcy; so that on a Special Verdict, if a Jury find that he was outlawed, and do not find that it was *in fraudem Creditorum*, that is not a sufficient Finding to make him a Bankrupt; because the Intent of the Statute was, that it must be such an Outlawry as the Debtor permits by keeping out of the Way to defraud his Creditors.

*1 Keb. 11. Bradford's Case.*

**(B) Of the Commission of Bankruptcy, and herein of the Creditors Who may obtain it, and What they are to do previous thereto.**

**T**HE Commission of Bankruptcy, which arms the Commissioners with all the Power which they are to exercise over the Bankrupt and his Estate, is to be granted by my Lord Chancellor, Lord Keeper, or Commissioners of the Great Seal, on the Application of Creditors (*a*) only; and this is a Matter not Discretionary, but to be granted (*b*) *de Jure*.

*(a) For if twenty swear that such a*

one is a Bankrupt, yet a Commission cannot be awarded without a Petition from the Debtor for that Purpose. *2 Chan. Ca. 190.* (*b*) As if the Words of the Act had been, shall or ought to grant. *1 Vern. 152. 2 Chan. Ca. 191.*

By the *34 H. 8. cap. 4.* "The Lord Chancellor, Treasurer, &c. were to take Order with the Bankrupt's Lands and Goods for Payment of his Debts.

And by the *13 Eliz. cap. 7.* "The Lord Chancellor or Keeper, upon Complaint in Writing, shall have Power, by Commission under the Great Seal, to appoint honest and discreet Persons, who, or the most of them, may take such Order with the Body, &c.

*Where such Commission may be superadded, vide 1 Vern. 208, 209.*

By the *5 Geo. 2.* it is enacted, "That no Commission of Bankruptcy shall abate by the Death of the King, and that if it shall be necessary to renew any such Commission by reason of the Death of the Commissioners named in such Commission, so that a sufficient Number of Commissioners shall not be living who can act therein, or for any other Cause; in every such Case such Commission shall be renewed, and but half of the (*c*) Fees usually paid upon granting or obtaining of Commissions of Bankruptcy, shall be paid for any such renewed Commission.

*Vide 2 Chan. Ca. 193. By the 21 Fa. 1. c. 15. the Commissioners may proceed after the Death of the Bank-*

*rupt. (c) By this Statute a Master in Chancery is to settle the Fees of the Clerk to the Commission.*

The *5 Geo. 2.* for preventing the taking out Commissions of Bankrupts maliciously, enacts, "That no Commission of Bankrupt shall be awarded against any Person whatsoever, upon the Petition of one or more Creditors, unless the single Debt of the Creditor, or of two or more Persons, being Partners, Petitioning for the same, do amount to the

" SUM

“ Sum of one hundred Pounds or upwards, or unless the Debt of two  
 “ Creditors so petitioning, as aforesaid, shall amount to 150*l.* or up-  
 “ wards, or unless the Debt of three or more Creditors so petitioning,  
 “ as aforesaid, shall amount to 200*l.* or upwards, and the Creditor or  
 “ Creditors petitioning for such Commission, shall before the same shall  
 “ be granted, make an Affidavit, or (being one of the People called  
 “ Quakers) make a solemn Affirmation in Writing, before one of the  
 “ Masters of the High Court of Chancery (which Oath or Affirmation  
 “ they are hereby impowered to administer, and which shall be filed  
 “ with the proper Officer) of the Truth and Reality of such his, her  
 “ and their respective Debt and Debts; likewise give Bond to the Lord  
 “ Chancellor, Lord Keeper or Commissioners of the Great Seal, for the  
 “ Time being, in the Penalty of 200*l.* to be conditioned for proving  
 “ his, her or their Debts, as well by the Commissioners named in such  
 “ Commission, as upon a Trial at Law, in Case the Due issuing forth  
 “ of the same shall be contested and tried; and also for proving the Par-  
 “ ty a Bankrupt at the Time of Taking out such Commission, and fur-  
 “ ther to proceed on such Commission, as by the Act is directed; and  
 “ if such Debt or Debts shall not be really due or owing; or if after  
 “ such Commission taken out, it cannot be proved that the Party was a  
 “ Bankrupt at the Time of the Issuing the said Commission; but on the  
 “ contrary it shall appear that such Commission was taken out fraudu-  
 “ lently or maliciously; that then the Lord Chancellor, Lord Keeper  
 “ or Commissioners of the Great Seal, for the Time being, shall and  
 “ may, upon Petition of the Party or Parties grieved, examine into the  
 “ same, and order Satisfaction to be made to him, her or them, for the  
 “ Damages by him, her or them sustained; and for the better Reco-  
 “ very thereof, may, in Case there be Occasion, assign such Bond or  
 “ Bonds to the Party or Parties so petitioning, who may sue for the  
 “ same in his, her and their Name and Names.

*By the said 5 Geo. 2. it is enacted,* “ That Persons who have Bills,  
 “ Bonds, Promissory Notes, or other Personal Security for their Mo-  
 “ ney, payable at a future Day, who by the 6 Geo. 1. are enabled to  
 “ come in as Creditors, and allow'd to discount such Debts, allowing  
 “ 5 per Cent, &c. may (though disabled by the Statute) Petition for or  
 “ join with others in petitioning for any Commission of Bankruptcy.

*And by the said Statute 5 Geo. 2. for preventing Fraud in Creditors, in  
 extorting their whole Debts from the Bankrupt, or that one Creditor should  
 be preferred before another, it is enacted,* “ That if any Bankrupt or Bank-  
 “ rupts, shall after Issuing of any Commission against him, her or them,  
 “ pay to the Person or Persons who sued out the same, or otherwise  
 “ give or deliver to such Person or Persons, Goods or any other Satis-  
 “ faction or Security for his, her or their Debt, whereby such Person  
 “ or Persons suing out such Commission, shall privately have and receive  
 “ more in the Pound, in Respect of his, her or their Debt than the  
 “ other Creditors, such Payment of Money, Delivery of Goods, or gi-  
 “ ving greater or other Security or Satisfaction, shall be deem'd and ta-  
 “ ken to be such an Act of Bankruptcy, whereby on good Proof thereof,  
 “ such Commission shall and may be superseded; and it shall be lawful  
 “ for the Lord Chancellor, Lord Keeper, or Commissioners for the Cu-  
 “ stody of the Great Seal, to award to any Creditor or Creditors pe-  
 “ titioning another Commission; and such Person or Persons so taking  
 “ or receiving such Goods or other Satisfaction, as aforesaid, shall for-  
 “ feit and lose, as well his, her or their whole Debt, as the whole he,  
 “ she or they shall have taken or received, and shall pay back and de-  
 “ liver up the same, or the full Value thereof, to such Person or Per-  
 “ sons as the said Commissioners, acting under such new Commission,  
 “ shall appoint in Trust for and to be divided amongst the other of the  
 “ Bankrupts Creditors, in Proportion to their respective Debts.

*Also by the said 5 Geo. 2. it is enacted,* “ That the Creditor or Creditors, who shall petition for and obtain any Commission of Bankrupt, shall be, and is, and are hereby oblig’d, at his, her or their own Costs and Expences, to sue forth and prosecute the same, until an Assignee or Assignees shall be chosen of such Bankrupt’s Estate and Effects, and the Commissioners to be named in any such Commission, shall at the same Meeting which shall be appointed for the Choice of the Assignees, ascertain such Costs, and by Writing under their Hands, shall direct and order the Assignee or Assignees of such Bankrupt’s Estate, who is and are hereby required to pay and reimburse such petitioning Creditor or Creditors, such his, her or their Costs and Charges, as aforesaid, out of the first Monies or Effects of the Bankrupt, that shall be got in and received under the said Commission; and every Creditor of the said Bankrupt shall be at Liberty to prove his, her or their Debt or Debts under the said Commission, without paying any Contribution or Sum of Money whatsoever, for or on Account of such Debt or Debts.

**(C) Of the Commissioners, their Duty; and herein of the Power they may exercise over the Bankrupt and others, in discovering his Estate.**

“ **T**HE Commissioners, by the 5 Geo. 2. before they proceed in the Execution of any Commission of Bankruptcy to them directed, shall each of them take the following Oath. *I A. B. do swear that I will faithfully, impartially and honestly, according to the best of my Skill and Knowledge, execute the several Powers and Trusts reposed in me as a Commissioner in a Commission of Bankrupt against —, and that without Fear, favour or Affection, Prejudice or Malice.* Which Oath any two or more of the said Commissioners are empowered and required to administer to each in the same Commission named and authorized, of which they are to enter a Memorial signed by them respectively, among their other Proceedings.

Their Commission and Power is by Force of the several Acts of Parliament, which ought to be pursued, or else they are subject to the Action of the Party grieved; for he

h. n. no other Remedy. 4 Inst. 277. But if in their Proceedings they commit some Mistake, which appears to be only an Error of their Judgment, they shall not be liable to an Action. Comb. 391.

By the 13 Eliz. cap. 7. “ The Commissioners may call before them, by such Process, Ways or Means as they think proper, any Person suspected to have any of the Bankrupt’s Estate, &c. in his Custody, or to be indebted to him, and upon Oath or (a) otherwise examine such Persons of the Certainty thereof; and by the said Statute, if such Person refuse to swear, or being sworn, (b) discloses not the whole Truth, he shall forfeit double the Value of the Goods, to be levied by the same Statute. He that fraudulently Demands or Detrains any of the Bankrupt’s Goods, &c. shall forfeit double the Value.

(a) Though such Persons have been examined by the Commissioners, yet a Bill for the Discovery of the same Matters may be filed against them in

Chancery. 2 Chan. Ca. 73. (b) Must disclose and answer directly to the Question put to him. 1 Vent. 324.

By the 1 Jac. 1. cap. 15. “ They may examine the Bankrupt upon Interrogatories touching his Lands, &c. and by the said Statute, if he refuses, &c. they may commit him, &c.

And by the 1 Jac. 1. cap. 15. " If any Person after Warning, refuses or comes not before the Commissioners to be examined, &c. having no Excuse, to be allowed by the Commissioners at their Meeting, or having Warning of any other Meeting of the Commissioners, appears not before them, having no lawful Impediment to be allow'd, as aforesaid, they may direct their Warrant, &c. to apprehend and bring him before them, &c. or if being before them, he refuses to be sworn or to answer Interrogatories, he shall be (c) committed to such Prison as the Commissioners think fit, until he shall submit and be examined, &c.

(a) A. was summoned before Commissioners of

Bankrupts, and the Questions demanded of him were, first, to give an Account of all Matters which he knew concerning the Bankrupt's Estate; secondly, when and in what Manner did he aid and abet the Bankrupt in carrying away his Effects, or in imbeziling or concealing the same, to which he refused to answer; because the first was too general, and the second tended to accuse himself, and bring him within the 13 Eliz. cap. 7. which gave a Penalty of double the Value of the Goods, against him who conceals them; for which Refusal the Commissioners committed him; and their Warrant of Commitment concluded that he should be committed until he conform to the Authority of the Commissioners. On a Habeas Corpus brought by A. in B. R. the Court inclined that a Witness was not to pay universal Obedience to all Questions asked him by the Commissioners; nor was he to answer to any Thing which tended to accuse himself; but for the Conclusion of the Warrant of Commitment, they held clearly that he should be discharged; for the Act directs that he shall remain without Bail until he submit to the Commissioners to be examined, which being a particular Authority, and in Restraint of Liberty, ought to be construed strictly, and the very Words of the Statute pursued. 5 Mod. 390. Brays's Case. Comb. 308, 309. S. C. 1 Salk. 390, 391. S. C.

By the 21 Jac. 1. cap. 19. " The Wife of a Bankrupt shall be examined; and for not coming or refusing to be sworn, &c. shall incur the same Penalty as other Witnesses.

Vide 2 Show. 247. that it is only the Bankrupt's own House they can break open. Quare.

By the 1 Jac. 1. cap. 19. " The Commissioners, in Case of Resistance, may break, or by Warrant under their Hands and Seals, authorize others to break open any Doors, &c. where the Bankrupt or his Goods, &c. are, or are reputed to be.

By the 5 Geo. 2. it is enacted, " That the Commissioners, or the major Part of them, may examine as well by Word of Mouth, as on Interrogatories in Writing, all and every Person or Persons against whom any Commission of Bankrupts is or shall be awarded, touching all Matters relating to the Trade, Dealings, Estate and Effects of all and every such Bankrupt and Bankrupts; and also to examine, in the Manner aforesaid, all and every other Person duly summoned before, or present at any Meeting of the said Commissioners, or the major Part of them, touching all Matters relating to the Person, Trade, Dealings, Estate and Effects of all and every such Bankrupt and Bankrupts; and any Act or Acts of Bankruptcy committed by him, her or them; and also to take down or reduce into Writing the Answers of verbal Examinations of every such Bankrupt or other Person had or taken before them, as aforesaid; which Examination so taken down or reduced into Writing, the Party examin'd shall, and is hereby required to sign and subscribe; and in Case any such Bankrupt or Bankrupts, or other Person or Persons shall refuse to answer, or shall not fully answer to the Satisfaction of the Commissioners, or the major Part of them, all lawful Questions put to him, her or them by the said Commissioners, or the major Part of them, as well by Word of Mouth as by Interrogatories in Writing, or shall refuse to sign and subscribe his, her or their Examination so taken down or reduced into Writing, as aforesaid (not having a reasonable Objection either to the Wording thereof, or otherwise to be allowed by the said Commissioners) it shall and may be lawful to and for the said Commissioners, or the major Part of them, by Warrant under their Hands and Seals, to commit him, her or them to such Prison as the said Commissioners, or the major Part of them, shall think fit, there to remain without Bail or Mainprize, until such Time as such Person or Persons shall submit " him

“ him, her or themselves to the said Commissioners, and full answer  
 “ make to the Satisfaction of the said Commissioners, to all such Que-  
 “ stions as shall be put to him, her or them, as aforesaid, and sign and  
 “ subscribe such Examination as aforesaid, according to the true Intent  
 “ and Meaning of this Act.

“ *Provided always,* That in Case any Person or Persons shall be com-  
 “ mitted by the said Commissioners, for refusing to answer, or not ful-  
 “ ly answering any Question or Questions put to him, her or them by  
 “ the said Commissioners, by Word of Mouth or on Interrogatories, that  
 “ the said Commissioners shall in their Warrant of Commitment speci-  
 “ fy such Question or Questions.

“ *Provided also,* That in Case any Person or Persons committed by  
 “ the Commissioners Warrant, by Virtue of this or any other Acts now  
 “ in Force concerning Bankrupts, shall bring any *Habeas Corpus* in or-  
 “ der to be discharged from any such Commitment, and on the Re-  
 “ turn of any such *Habeas Corpus* there shall appear any such Insuffi-  
 “ ciency: whatsoever in the Form of the Warrant, whereby such Person  
 “ was committed, by Reason whereof the Party might be discharged of  
 “ such Commitment, that then it shall and may be lawful for the Court,  
 “ or Judge, before whom such Party shall be brought by *Habeas Corpus*,  
 “ as aforesaid, and such Court or Judge shall, and is hereby required  
 “ by Rule, Order or Warrant, to commit such Person or Persons to  
 “ the same Prison, there to remain as aforesaid, unless it shall be  
 “ made appear to such Court or Judge, by the Party committed, that  
 “ he, she or they have fully answered all lawful Questions put to him,  
 “ her or them by the said Commissioners; or in Case such Person was  
 “ committed for not signing his, her or their Examination, unless it shall  
 “ appear to such Court or Judge, that the Party so committed had a  
 “ good and sufficient Reason for refusing to sign the same; and in Case  
 “ any Gaoler or Keeper of any Prison, to whom any such Bankrupt  
 “ or Bankrupts, Person or Persons shall be committed, as aforesaid,  
 “ shall wilfully suffer such Bankrupt or Bankrupts, Person or Persons to  
 “ escape from such Prison, or to go without the Walls or Doors of the  
 “ said Prison, until he, she or they shall be duly discharged, as aforesaid,  
 “ such Gaoler or Keeper shall for such his Offence, being duly  
 “ convicted by Indictment or Information, forfeit 500*l.* for the Use of  
 “ the Creditors of such Bankrupt or Bankrupts.

By the said  
 Statute, a  
 Gaoler, re-  
 fusing to  
 shew or  
 produce such  
 Prisoner to  
 a Creditor,  
 forfeits 100*l.*

By the said 5 Geo 2 it is enacted, “ That all and every Person and  
 “ Persons, who shall at any Time after the Time allowed to such Bank-  
 “ rupt to surrender and conform himself as the Act directs, voluntarily  
 “ come and make Discovery of any Part of such Bankrupt’s Estate,  
 “ not before come to the Knowledge of the Assignees, either to the said  
 “ Assignees or to the Commissioners, or the major Part of them, shall  
 “ be allowed 5 *per Cent.* and such further and other Reward as the As-  
 “ signees, and the major Part of the Creditors shall think fit to be paid  
 “ out of the neat Proceed of such Bankrupt’s Estate; and the Assignee  
 “ or Assignees shall be allowed the same in their Accounts.

Also by the said 5 Geo. 2. “ For the better Discovery of the Estate of a  
 “ Bankrupt, it is enacted, That all and every Person or Persons who shall  
 “ have accepted of any Trust or Trusts, and shall wilfully protect or  
 “ conceal any Estate Real or Personal, of any Person or Persons becoming  
 “ Bankrupt, from his, her or their Creditors, and shall not within For-  
 “ ty-two Days next after such Commission shall issue forth, and Notice  
 “ thereof be given in the *London Gazette*, discover and disclose such  
 “ Trust and Estate, in writing, to one or more of the Commissioners or  
 “ Assignees of such Bankrupt or Bankrupts Estate; and likewise submit  
 “ him or herself to be examined by the Commissioners, in and by the  
 “ Commission authorized, or the major Part of them, if thereunto re-  
 “ quired, and truly discover the same, shall forfeit the Sum of 100*l.*  
 “ and

“ and double the Value of the Estate, either Real or Personal, so concealed, to and for the Use and Benefit of the said Creditors, to be recovered by Action of Debt, in any of his Majesty's Courts of Record at *Westminster*, in the Name of the Assignee or Assignees of the said Commissioners, in which Case full Costs shall be allowed to either Party.

(D) Of the Assignees; and herein of the Manner and Time of Chusing them.

By 5 Geo. 2. No Creditor, nor any on his Behalf, to have a Vote in the Choice of an Assignee, unless his Debt amounts to 10*l*.

By the 5 Geo. 2. it is enacted, “ That where any Commission of Bankrupt shall issue out, the Commissioners therein named, or the major Part of them thereby authorized, shall forthwith, after they have declared the Person or Persons, against whom such Commission shall issue, a Bankrupt or Bankrupts, cause Notice thereof to be given in the *London Gazette*, and shall appoint a Time and Place for the Creditors to meet, which Meeting for the City of *London*, and all Places within the Bills of Mortality, shall be at the *Guildhall* of the said City, in order to chuse an Assignee or Assignees of the said Bankrupt's Estate and Effects, at which Meeting the Commissioners shall admit the Proof of any Creditor's Debt that shall live remote from the Place of such Meeting of the Commissioners, by Affidavit, or (being of the People called Quakers) by solemn Affirmation; and also permit any Person duly authorized by Letter of Attorney from such Creditor's Oath or Affirmation being made of the due Execution thereof, either by an Affidavit sworn, or Affirmation made, before a Master in Chancery, Ordinary or Extraordinary, or before the Commissioners *viva voce*, (which Oath or Affirmation they are hereby respectively authorized to administer) and in Case of Creditors residing in foreign Parts, such Affidavits or solemn Affirmations to be made before a Magistrate where the Party shall be residing, and shall, together with such Creditor's Letter of Attorney, be attested by a Notary Publick, to vote in the Choice of an Assignee or Assignees of such Bankrupt's Estate and Effects, in the Place and Stead of such Creditor; and the Commissioners, or the major Part of them authorized, shall assign over such Bankrupt's Estate and Effects unto such Person or Persons as the major Part in Value of such Creditors, according to the several Debts then proved, shall choose as aforesaid; and the Assignee or Assignees so chosen, shall be obliged to keep one or more distinct Book or Books of Account, wherein he or they shall duly enter all Sum and Sums of Money, or other Effects which he or they shall have got in or received out of the said Bankrupt's Estate; to which Book or Books of Account every Creditor who shall have proved his or her Debt, shall at all seasonable Times have free Resort, and inspect the same as often as he or she shall think fit.

“ *Provided* that no Creditor, or any other Person for and on the Behalf of any Creditor, shall be permitted to vote in such Choice of an Assignee or Assignees, whose Debt, or the Debt of the Person or Persons so authorizing him to vote, shall not amount to the Sum of 10*l*. or upwards.

By the said 5 Geo. 2. it is further enacted, “ That it shall and may be lawful for the Commissioners or the major Part of them, as often as they shall see Cause, for the better preserving and securing the Bankrupt's Estate, immediately to appoint one or more Assignee or

“ Assignees of the Estate and Effects, or any Part thereof, which  
 “ Assignee or Assignees, or any of them, shall or may be removed or  
 “ displaced at the Meeting of the Creditors, so to be appointed as  
 “ aforesaid, for Choice of Assignees, if they or the major Part in Va-  
 “ lue of them (whose Debts respectively amount to 10*l.* or upwards  
 “ then present, and of such Persons duly authorised shall think fit; and  
 “ such Assignee or Assignees as shall be so removed and displaced, shall  
 “ deliver up and assign all the Estate and Effects of such Bankrupt  
 “ which shall have come to his or their Hands or Possession, or which  
 “ shall have been assigned by the said Commissioners, as aforesaid, unto  
 “ such other Assignee or Assignees who shall be so chosen by the Credi-  
 “ tors, as aforesaid; and all the Estate and Effects of the Bankrupt  
 “ which shall be delivered up or assigned, shall be to all Intents and  
 “ Purposes as effectually and legally vested in such new Assignee or As-  
 “ signees, as if the first Assignment had been made to him or them by  
 “ the said Commissioners; and if such first Assignee or Assignees shall  
 “ refuse or neglect, by the Space of Ten Days next after Notice given  
 “ of the said Choice of such new Assignee or Assignees, and of his and  
 “ their Consent to accept of such Assignment, signified to the first As-  
 “ signee or Assignees, by Writing under his or their Hand or Hands, to  
 “ make such Assignment and Delivery, as aforesaid, every such first  
 “ Assignee or Assignees, shall respectively forfeit the Sum of 200*l.* to  
 “ be divided and distributed amongst the Creditors, towards Satisfaction  
 “ of their Debts, in such Manner as the Estate of the Bankrupt is or  
 “ ought to be divided and distributed, and to be recovered by Action  
 “ of Debt, Bill, Plaint or Information, in any of his Majesty’s Courts of  
 “ Record at *Westminster*, by such Person or Persons, as such the major  
 “ Part of the Commissioners authorised, as aforesaid, shall appoint to  
 “ sue for the same, with full Costs of Suit, wherein no Privilege, Pro-  
 “ tection or Wager in Law, or more than one Imparllance shall be al-  
 “ lowed.

“ And whereas it may be found necessary, that as well Assignments  
 “ of Bankrupts Estates already made by Commissioners, as Assignments  
 “ hereafter to be made pursuant to the Choice of Creditors, should be  
 “ vacated, and a new Assignment or Assignments be made of the Debts  
 “ and Effects received and not disposed of by the then Assignees to  
 “ other Persons to be chosen by the Creditors, as aforesaid, it is en-  
 “ acted, that it shall and may be lawful to and for the Lord Chancellor,  
 “ Lord Keeper, or Commissioners of the Great Seal, upon Petition of  
 “ any Creditors, to make such Order therein as he or they shall think  
 “ just and reasonable; and in Case a new Assignment shall be ordered  
 “ to be made, as aforesaid, that then such Debts, Effects and Estate  
 “ of such Bankrupt shall be thereby effectually and legally vested in such  
 “ new Assignee or Assignees; and it shall and may be lawful for him  
 “ and them to sue for the same, in his or their Name or Names, and  
 “ to discharge any Action or Suit, or to give any Acquittance for such  
 “ Debts, as effectually to all Intents and Purposes, as the Assignee or  
 “ Assignees in the former Assignment might have done in Case no new  
 “ Assignment had been made; and that the said Commissioners shall  
 “ cause publick Notice to be given in the two *London Gazettes* that  
 “ shall immediately follow the Removal of such Assignee or Assignees,  
 “ and the Appointment of such other Assignee or Assignees, as afore-  
 “ said, that such Assignee or Assignees is or are removed, and such other  
 “ Assignee or Assignees appointed in his or their Stead; and that such  
 “ Persons as are indebted to the said Bankrupt’s Estate, do not pay such  
 “ Debt or Debts to such Assignee or Assignees, as shall be removed as  
 “ aforesaid.

## (E) Of the Creditors, Who are such, and therein of proving their Debts.

**B**Y the 1 Jac. 1. cap. 15. "The Commissioners may examine upon Oath, or by other ways, any Person for the Discovery of the Truth of Debts owing to such Creditors as seek Relief, and Creditors by Judgment, Statute, Recognizance, Specialty or other Security, or having no Security, and having made Attachments in *London*, or other Place by Custom, of the Goods of the Bankrupt, whereof there is no Execution or Extent served upon any Lands, &c. before he became a Bankrupt, shall be relieved for no more than a (a) ratable Part of their just Debts, without respect to any Penalty in any Judgment, Statute, &c.

(a) Creditors upon what Security so ever they be, come in all equal, unless such as have obtained actual Execution before the Bankruptcy, or had taken Pledges for their just Debts; and the Reason is, because from the Act of Bankruptcy all the Bankrupt's Estate is vested in the Commissioners, who are established as Courts of Justice touching the Bankrupt's Estate, and before whom the Creditors must authenticate their Debts, in order to receive their Dividends; and therefore they must equally admit all Persons to make Proof of their Debts; but such as have Pawns or Mortgages have a Property in the Thing so pledged, precedent to the Translation of the Property to the Commissioners; in which Case they have only an Equity of Redemption, and are in no better Condition than the Bankrupt himself; that the Bankrupt before the Assignment of the Commissioners, has such a Property as will maintain an Action for the Recovery of the Goods. *Vide* 1 Salk. 108.

1 Vern. 267. *Chapman and Tanner.* If *A.* sells Lands to *B.* who afterwards becomes a Bankrupt, and Part of the Purchase Money is not paid, *A.* shall not be obliged to come in as a Creditor under the Statute of Bankruptcy, but the Land shall stand charged with the Money unpaid, though there be no Agreement for that Purpose.

2 Vern. 203. *Wiseman and Vandeput,* a Bill was brought against a Man who had bought Goods of a Person really a Bankrupt; who in his Answer sets forth, That he bought them for a full and valuable Consideration, not knowing that he was a Bankrupt; but did not set forth the Consideration, nor the Time, and refused to do it; the Court ordered that he should set out what the Consideration was, otherwise he would make himself the Judge, but they would not compel him to shew the Time when he bought the Goods, for fear it should over-reach and be within the Time after an Act of Bankruptcy committed: And *North* seemed to hold, That upon a Contract where there is *quid pro quo*, an Act of Bankruptcy shall not over-reach. *Skin.* 149. If one lends Money to a Bankrupt after a Commission sued out against him, but before actual Notice of it, he cannot come in under the Statute as a Creditor. 2 Vern. 94.

By the 7 Geo. 1. it is enacted, "That every Person who hath or shall give Credit on Securities, to any Person or Persons who shall become Bankrupts, upon a good and valuable Consideration *bona fide*, for any Sum or Sums of Money, or other Matter or Thing whatsoever, which is or shall not be due or payable, at or before the Time of such Persons becoming Bankrupt, shall be (b) admitted to prove his, her, and their several and respective Bills, Bonds, Notes, or other Securities, Promises or Agreements for the same, in like Manner as if they were made payable presently, and not at a future Day, and shall be intitled payable at a future Day on Contingency, can before the Contingency has happened come in under the Statute. Q. & vide 2 Vern. 662. *Abr. Eq.* 54, 55.

(b) But whether Creditors who have Debts due to them

“ unto, and shall have and receive a proportionable Part, Share, and  
 “ Dividend of such Bankrupt's Estate, in Proportion to the other Cre-  
 “ ditors of such Bankrupt, deducting only thereout a Rebate of Interest,  
 “ and Discounting such Securities payable at future Times, after the Rate  
 “ of 5 l. per Cent. per Annum, for what he shall so receive, to be com-  
 “ puted from the actual Payment thereof, to the Time such Debt, Duty,  
 “ or Sum of Money should or would have become due and payable in  
 “ and by such Securities.

By the 1 Jac. cap. 15. “ Any (a) Creditor within four Months after (a) Extends  
 “ the Commission sued forth, and until Distribution made, may partake to Sureties  
 “ and join with those who sued out the Commission; the Creditors so of the Bank-  
 “ coming in to (b) contribute to the Charges of the Commission, and rupt that  
 “ if they come not within (c) four Months, then the Commissioners to have Coun-  
 “ Distribute. ter-Bonds to  
 save them  
 harmless.

*Cro. Jac.* 127. *Noy* 142. For the Cases and Resolutions on this Statute, *vide Hist.* 37. 1 *Chan. Ca.* 307.  
*Hob.* 287. 2 *Chan. Ca.* 143, 190. (b) But by the 5 *Geo.* 2. the Creditor or Creditors who sued out  
 the Commission shall be reimbursed their Expence out of the first Monies or Effects that shall be got  
 in and received under the Commission; and every Creditor shall be at Liberty to prove his Debt  
 without paying any Contribution. (c) *Vide* of the Distribution to be made of the Bankrupt's Estate,  
 Letter (H).

By the 5 *Geo.* 2. it is enacted, “ That if any Person shall before the  
 “ acting Commissioners in any Commission of Bankrupt, or by Affidavit  
 “ or Affirmation exhibited to them, swear or depose, or being of the  
 “ People called Quakers, affirm that any Sum of Money is due to him  
 “ or her from any Bankrupt or Bankrupts, which Sum of Money is not  
 “ really due or owing, or shall swear or affirm that more is due than is  
 “ really due or owing, knowing the same to be not due or owing,  
 “ and that such Oath or Affirmation is false and untrue; and being  
 “ thereof convicted by Indictment or Information, such Person shall  
 “ suffer the Pains and Penalties inflicted by the several Statutes now in  
 “ Force against wilful Perjury, and shall moreover be liable to pay  
 “ double the Sum so sworn or affirmed to be due or owing, as aforesaid;  
 “ to be recovered and levied as other Penalties and Forfeitures are upon  
 “ Penal Statutes after Conviction, to be levied and recovered; and such  
 “ double Sum shall be equally divided among all the Creditors seeking  
 “ Relief under the said Commission.

(F) Of the Bankrupt's Estate and Effects, to  
 Which the Commissioners or Assignees are  
 intitled, When it shall be said to be vested in  
 them; and therein of fraudulent Disposi-  
 tions by the Bankrupt, and the Actions they  
 may bring for the Recovery thereof.

BY the 13 *Eliz.* cap. 7. “ The Commissioners, or the major Part of  
 “ them, by Virtue of the Act and their Commission, may at their  
 “ Discretion order the Body of the Bankrupt, and his Lands and Tene-  
 “ ments, as well (d) Copy as Freehold, which he had before he became (d) For this  
 “ a Bankrupt, or hath Purchased for Money or other Recompence *vide Cro. Car.*  
 “ jointly with his Wife or Children, to the only Use of such Offender, 569.  
 “ or for such Use, Title, &c. as he may lawfully depart with, or with 1 *Jones* 451,  
 “ other Person, to any secret Use of such Offender, and his Money, 439.  
 “ Goods, 3 *Lev.* 327.

(a) But may  
 sell Lands  
 without Deed  
 inrolled.  
 2 Co. 26.  
 The Inrol-  
 ment ope-  
 rates not by  
 Relation, so

as to pass an Estate *ab initio*. 1 Vent. 360, 361. 1 Jones 196. Carth. 178, 179.

“ Goods, Chattels, &c. and Debts wherever found, and cause the same  
 “ to be searched, viewed, rented and apprized, and by Deed indented  
 “ inrolled in one of his Majesty’s Courts of Record, sell the (a) Lands,  
 “ Tenements and Hereditaments, and all Deeds touching the same, and  
 “ all Fees, Annuities, Offices, Goods and Chattels, or otherways order  
 “ the same for the Satisfaction of the Creditors: And by the same Sta-  
 “ tute, *Par.* 8. Lands, &c. Purchased, Descending, Reverting, or any  
 “ Way coming to him after he is declared a Bankrupt, shall be sold.

“ *Provided* the Act shall not extend to Lands, Tenements or Heredita-  
 “ ments, Free or Copy *bona fide* conveyed by the Bankrupt before he  
 “ became so, and not to the Use of himself or his Heirs, or such who  
 “ were privy or consenting to his fraudulent Purpose.  
 By the 1 *Fac.* 1. *cap.* 15. “ If any Person, who shall be Bankrupt, shall

“ convey or cause to be conveyed, any Lands or Goods to his Children,  
 “ or others, or transfer his Debts into other Mens Names, except upon  
 “ Marriage of a Child (both Parties being of the Age of Consent) or  
 “ some valuable Consideration, the Commissioners may sell them.  
 And by the same Statute *Par.* 13. “ They may grant and assign, or  
 “ otherways order and dispose the Debts due to the Bankrupt, by which  
 “ Assignment or Disposal, the Property, Right and Interest of the  
 “ Debt shall be so vested in the Assignees, as if to them originally made  
 “ or due; and it shall not be recovered or released by, or attached for  
 “ the Debt of the Bankrupt, but the Assignees shall have like Remedy  
 “ for it in their own Name, as the Bankrupt had; Provided that no  
 “ Debtor be prejudiced by Payment of his Debt to the Bankrupt before  
 “ he became so.

By the 21 *Fac.* 1. *cap.* 19, “ If the Lands, &c. after the Bankruptcy  
 “ are extended by the King’s Accountant, the Commissioners, upon  
 “ Oath, may examine, Whether upon a Contract, &c. originally made  
 “ between the Accountant and Bankrupt, and if not, they may order  
 “ and dispose of the Lands.

And by the same Act *Par.* 11. “ Whereas Bankrupts, commonly be-  
 “ fore they became so, convey their Goods upon good Consideration,  
 “ and yet continue the Possession of them, and are reputed the Owners  
 “ thereof, it is enacted, That if at the Time of the Bankruptcy they  
 “ have in their Possession, Order or Disposition, as Owners, the Goods  
 “ of others, with their Consent, the Commissioners may sell them, &c.

And by the same Act *Par.* 12. “ They may sell any Lands whereof  
 “ the Bankrupt is seised in Tail, in Possession, Reversion or Remainder,  
 “ whereof there is no Reversion or Remainder in the King, of the Gift  
 “ or Provision of the King, which shall bind the Issue in Tail, and all  
 “ others whom the Bankrupt by common Recovery might cut off.

The Com-  
 missioners  
 may sell an  
 Equity of  
 Redemption.  
 1 Chan. Ca. 71.  
 2 Vern. 97.

And by the same Act *Par.* 13. “ If the Bankrupt hath granted any  
 “ Land, &c. upon Condition to be void upon Payment of Money, or  
 “ other Performance, the Commissioners before the Time of Perform-  
 “ mance, under their Hands and Seals, may appoint one to tender the  
 “ Money, or make other Performance, and may after sell the Lands, &c.

In the Construction of these Statutes the following Opinions have been  
 holden.

1 Chan. Ca. 71.  
 2 Vern. 97.  
 S. C. cited.

If a Lessor covenants with his Lessee to renew his Lease, and the Les-  
 see becomes a Bankrupt, the Commissioners cannot assign this Cove-  
 nant.

An Action for Words is not assignable, but when by the Judgment the Damages and Costs are reduced to a certain Sum, that may be assigned. *1 Fines 215. Cro. Car. 166.* If the Judgment is executed and the Money in the Sheriff's Hands, *Q.* If the Commissioners may not Assign before the Return of the Writ. *2 Keb. 372.* For being *in Custodia Legis*, adjudged that it could not be assigned. *Cro. Car. 166.*

If a Man commits an Act of Bankruptcy, and after continues in Possession of his Lands four Years, and then sells, and after commits another Act of Bankruptcy, and two Years after a Commission is taken out, &c. this Sale shall stand, for the Act of Bankruptcy by which the Sale is to be avoided, must be done within five Years before the Commission sued out. *3 Lec. 13, 14. 1 Keb. 11, 12, 722. 2 Sid. 69, 114, 175. Vide 1 Saik. 109.*

If *A.* having committed an Act of Bankruptcy, keeps on his Trade, and four Years after binds his Son Apprentice with a Goldsmith, and pays with him 120*l.* being the usual Sum in such Cases; and two Years after a Commission is taken out against *A.* this Money is not assignable by the Commissioners, being paid so long before the Commission, and without any Fraud. *3 Lec. 59. Skin. 22.*

If a Man purchases a Copyhold to himself and Wife for Life, Remainder to his Son and his Heirs, and two Years after he becomes a Trader, and four Years after a Debtor and Bankrupt, there being no Fraud in this Case, nor any Intent to deceive Creditors, the Interest of the Wife and Heirs of the Bankrupt, cannot be defeated by this Act of Bankruptcy. *Cro. Car. 550. Crisp and Part. 1 Jones 438, 439. March 37.* If the Father conveys to his Children

to secure them Money given by their Grandfather, if it can be proved the Father had Effects of the Grandfather's in his Hands at the Time of the Execution of the Deed, it shall not be avoided. *1 Mod. 76.* But if there be no Consideration, a Settlement on his Wife and Children shall be construed a Settlement on himself; and such an Interest vests in the Assignees. *Style 289.* An Obligation taken in the Name of another to the Use of a Bankrupt, is such an Interest in the Bankrupt, that the Commissioners may assign it, and after such Assignment the Oblige cannot release it. *Palm. 505.*

If *A.* devises 800*l.* to be invested in Land for the Benefit of the Wife of *J. S.* for her Life, and afterwards for her Children, and the Interest of the Money in the mean Time to go to such Persons as ought to receive the Profits; and *J. S.* becomes a Bankrupt, the Interest of this 800*l.* shall not be liable to the Bankruptcy, this not being any Trust created by the Bankrupt, but a Maintenance intended the Wife, and given to her by her Relation. *2 Vern. 96. Vandemaker and Defbrough. If a Father agrees to pay his Son 15*l.* during his Life, and the*

Son becomes a Bankrupt, Equity will not enforce this Agreement in Favour of the Creditors under the Commission of Bankruptcy. *2 Vern. 194.* But if a Father devises a Legacy of 600*l.* payable to his Son at twenty one, and the Son obtains a Decree for it, and 657*l.* is reported due for Principal and Interest, the Commissioners may assign this Legacy and Benefit of the Decree. *2 Vern. 432.*

A Man devises his Lands which were in Mortgage to be sold, and the Surplus of the Money to be paid his Daughter, the Daughter married a Man who soon after became a Bankrupt, and the Commissioners assigned this Interest of the Wife's; the Husband died, and the Assignees brought their Bill against the Wife and Trustees, to have the Land sold and the Surplus of the Money paid them; but the Court would not assist in stripping the Wife (who was wholly unprovided for) of this Interest, but dismissed the Bill. *Abv. Eq. 54.*

*A.* puts out 1000*l.* at Interest to the East-India Company, and takes Bond for it in the Name of *J. S.* his Wife's Relation; *A.* becomes a Bankrupt, *J. S.* is summoned before the Commissioners, but before Examination he tells the East-India Company, that the Money was not his, but that they should pay it to the Person that brought the Bond; *A.*'s Wife brings the Bond, and has the Money paid her; Equity will not relieve against it. *Preced. Chanc. 18.*

*Ca. in Eq. Abr. 54. Jacobson and Peer Will ams.* A Legacy of 1000 *l.* was given to one after the Death of her Mother, when she should attain the Age of twenty-one Years, and the Defendant was appointed Trustee for the Raising and Payment thereof out of certain Lands; the Legatee was drawn into an improvident Match with one who soon after became a Bankrupt, and the Commissioners assigned all his Effects, and gave him a Certificate of his Conformity; and the Assignees brought a Bill against the Trustee for this 1000 *l.* who insisted that the Assignees could be in no better Condition than the Husband, and that if he were Plaintiff, he could not prevail without making a suitable Provision on his Wife, and that this Legacy being liable to a double Contingency, *viz.* the Death of the Mother, and the Legatee's arriving at the Age of twenty-one Years, at the Time of the Bankruptcy was not such an Interest as could be assigned; and the Court held, that though both Contingencies have since happened, yet those being since the Assignment of the Bankrupt's Estate, and since a Certificate of his having conformed himself in every Thing to the Acts, he was now discharged as a Bankrupt; and this Portion could not pass without a new Assignment, which the Commissioners could not make, their Commission being determined; and so dismissed the Bill.

The Assignees have an Interest in the Bankrupt's Estate from the very Act of Bankruptcy, so as to avoid all mesne Acts done by the Bankrupt during that Time, and the issuing out the Commission; so that the Privy of Contract between the Bankrupt and his Creditors, being from that Time transferred to the Assignees, they have the same Right as an Administrator, who has a Property from the Death of the Intestate, and may declare generally *ut de bonis suis Propriis*.

But it has been held, that before an actual Assignment the Bankrupt has such a Property for which he may maintain an Action. 1 *Salk.* 108. If upon a *Capias ad Satisfaciendum* the Money is levied, and after the Plaintiff becomes a Bankrupt, and the Money is assigned before the Return of the Writ, this Assignment is void, for being in the Hands of the Sheriff it is *quasi in Custodia Legis*, and not the Bankrupt's Money before it is paid him. *Cro. Car.* 166. If the Comisor after the *Extent* and before the *Liberate*, becomes a Bankrupt, and the Goods are after delivered upon the *Liberate*, and a Commission is after taken out, &c. they cannot be sold; for by the *Extent* they were *in Custodia Legis*; and it was not in the Power of the Comisor by any subsequent Act to destroy the Effect of the *Extent*. *Cro. Car.* 148. 1 *Jones* 202, 203. If between the Act of Bankruptcy and before Assignment the Goods of the Bankrupt are seized, and in the Officers Hands for the Debt of the King, it seems that these Goods cannot be assigned; for the King's Title and that of a Subject's commencing at the same Time, the King shall be preferred; also the King cannot come in as a Creditor under the Statutes. 1 *Salk.* 108, 109.

If a *Fieri Facias* is taken out, and indorsed according to the Statute, and delivered to the Sheriff, and after, the same Day, the Defendant becomes a Bankrupt, and the Sheriff levies 400 *l.* of the Goods of the Defendant, and pays it to the Plaintiff; yet the Commissioners may assign these Goods notwithstanding, &c. for by the Delivery of the Writ to the Sheriff, the Goods are bound in no other Manner than before the Statute they were bound from the *Teste* of the Writ; and by the Delivery of the Writ the Execution is not served or executed.

1 *Lev.* 67, 191, 192. For this *vide* 1 *Keb.* 930, 932. 1 *Sid.* 271. *Cro. Eliz.* 174. 1 *Lev.* 95, 173. 8 *Co.* 143. 13 *Co.* 21. 1 *Vent.* 193. 1 *Mod.* 93. 3 *Keb.* 1. 14, 68.

Though the Bankrupt's Estate is transferred to the Assignees, yet must they pursue the same Remedies for the Recovery of it as the Bankrupt himself; therefore if a Debt upon a simple Contract due to the Bankrupt is assigned, an Action of Debt will not lie against the Executor of the Debtor, but the Assignee must bring his Action on the Case. *Cro. Car.* 187. 1 *Jones* 223. Where Wager of Law is assigned, an Action of Debt will not lie against the Bankrupt, it lies against the Assignee. *Cro. Jac.* 105.

*Allen* 28, 29. *Style* 62. *S. C.* *Raym.* *S. C.* cited. The Plaintiff declares upon an *Assumpsit* for 43 *l.* 1 *s.* and sets forth an Assignment of the Debts of the Bankrupt, *mentionat' in quadam Schedula continen' Prædict' summam* 43 *l.* 1 *s.* and the Jury find he was indebted only in 41 *l.* 1 *s.* which he promised, &c. and that the Commissioners assigned

assigned *Debita Præd' in quadam Scheda continen' Præd' summan* 43 l. 1 s. and if this is the same Promise, concludes for the Plaintiff; and because the Issue and Verdict were concluded to the Promise, and the Assignment not in Question, and the Statute giving the like Remedy to the Assignee as the Bankrupt had, it was adjudged for the Plaintiff.

If there be a joint Bond to *A* and *B*. and *A*. becomes a Bankrupt, &c. 1 Lev. 17. Raym. 6, 7. 1 Keb. 167. the Assignee cannot bring an Action alone; but if assigned to *B*. he alone may bring an Action, being intitled to one Moiety in his own Right, and to the other for the Benefit of Creditors, by Virtue of the Assignment.

In *Assumpsit* the Plaintiff declared as Assignee under a Commission of Bankruptcy awarded against *J. S.* who became a Bankrupt, &c. and that the Defendant was indebted to the said *J. S.* &c. and on Demurrer to the Declaration it was objected, that it was uncertain, it not being shewn how *J. S.* became a Bankrupt, *viz.* either by keeping close within his House, by suffering himself to be arrested, &c. and that in pleading Simony, the particular Act must be set forth; but it was held well enough in this Case, for the Statutes mention the Word *Bankrupt*, but in the Statute against Simony no Mention is made of the Word; besides, in this Case the Plaintiff is a Stranger to the Bankrupt, and it cannot be presumed that it lies in his Knowledge in what Manner he became a Bankrupt. Carth. 29. Pepys and Low, Comb. 108. S. C. That the Assignee must lay the Promise to be made to the Bankrupt, vide 6 Mod. 131.

By the 5 *Geo. 2.* it is enacted, “ That no Suit in Equity shall be commenced by any Assignee or Assignees, without the Consent of the major Part in Value of the Creditors of such Bankrupt, who shall be present at a Meeting of the Creditors, pursuant to Notice to be given in the *London Gazette* for that Purpose.

### (G) Of setting off, submitting to Arbitration, and compounding Debts due to the Bankrupt.

BY the 5 *Geo. 2.* it is enacted, “ That where it shall appear to the Commissioners, or the major Part of them, that there hath been mutual Credit given by the Bankrupt, and any other Person, or mutual Debts between the Bankrupt and any other Person, the said Commissioners, or the major Part of them, or the Assignees of such Bankrupt's Estate, shall state the Account between them, and one Debt may be set against another; and what shall appear to be due on either Side on the Ballance of such Account, and on setting such Debts against another, and no more, shall be claimed or paid on either Side respectively. For this, before the Statutes 5 Ann. and 5 Geo. which have the same Clause, vide 2 Bulst. 26. 1 Mod. 215. Vide C. 1. Abr. 8, 9.

By the said Statute, “ Whereas Assignees are and may sometimes be prevented from making such speedy Dividends of the Estate and Effects of Bankrupts, as by this Act is intended, by reason of Debts due, or pretended and claimed to be due from such Bankrupts, upon long and intricate Accounts or Demands, which are disputed or not admitted by the Commissioners and Creditors to be just and fair Debts, and such Claimants are thereby obliged to ascertain such their Demands by Actions or Suits in Law or Equity; which are oftentimes many Years depending, and many other Differences and Difficulties do arise under Commissions of Bankrupts, which might be determined by Arbitration, if Assignees had Power to submit the same: Be it therefore enacted, That it shall and may be lawful to and for the Assignee or Assignees

“ assignees of any Bankrupt’s Estate and Effects, by and with the Consent  
 “ of the major Part in Value of the Bankrupt’s Creditors, who shall have  
 “ duly proved their Debts under such Commission, and who shall be pre-  
 “ sent at any Meeting of the said Creditors, pursuant to Notice for that  
 “ Purpose to be given in the *London Gazette*, to submit any Difference  
 “ or Dispute between such Assignee or Assignees, and any Person or  
 “ Persons whatsoever, for or on Account, or by Reason or Means of  
 “ any Matter, Cause or Thing whatsoever relating to such Bankrupt or  
 “ Bankrupts, his, her or their Estate or Effects, to the final End and  
 “ Determination of Arbitrators, to be chosen by the said Assignee or  
 “ Assignees, and the major Part in Value of such Creditors, and the  
 “ Party or Parties with whom they shall have such Difference, and to  
 “ perform the Award of such Arbitrators, or otherwise to compound  
 “ and agree the Matters in Difference and Dispute between them, in  
 “ such Manner as the said Assignee or Assignees, with such Consent as  
 “ aforesaid, shall think fit and can agree; and the same shall be binding  
 “ to all the Creditors of the said Bankrupt or Bankrupts, and the As-  
 “ signees are hereby indemnified for what they shall fairly do according  
 “ to the Direction aforesaid.

And by the said Statute it is further enacted, “ That any Assignee or  
 “ Assignees made or chosen as aforesaid, shall be, and is and are hereby  
 “ empowered, by and with the Consent of the major Part of the Bank-  
 “ rupt’s Creditors in Value, who shall be present at a Meeting to be had  
 “ for that Purpose, of which publick Notice shall be given in the *London*  
 “ *Gazette*, to make Composition with any Person or Persons, Debtors  
 “ or Accountants to such Bankrupts, where the same shall appear neces-  
 “ sary and reasonable, and to take such reasonable Part, as can upon  
 “ Composition be gotten in full Discharge of such Debts and Accounts.

## (H) Of the Distribution to be made of the Bankrupt’s Estate.

**B**Y the 13 *Eliz. cap. 7.* “ The Commissioners are to sell or otherwise  
 “ order the Bankrupt’s Lands, &c. for the Satisfaction and Pay-  
 “ ment of the Creditors, to every Creditor a Portion Rate-like, accord-  
 “ ing to the Quantity of his Debt.

If the Com-  
 missioners  
 make a frau-  
 dulent Di-  
 stribution, it  
 may be set aside in Chancery. 2 *Vern.* 158, 162. For the Cases which have been on this Statute, *vide*  
 2 *Co.* 26. 8 *Co.* 98. b. 1 *Jones* 203. 2 *Sid.* 177. *Godb.* 195. How Distribution is to be under a joint  
 Commission taken out against Partners, *vide* 1 *Chan. Ca.* 139. 2 *Vern.* 293, 706.

By the 5 *Geo. 2.* it is enacted, “ That before the Creditors shall pro-  
 “ ceed to the Choice of an Assignee or Assignees of any Bankrupt’s  
 “ Estate, the major Part in Value of the said Bankrupt’s Creditors then  
 “ present, shall, if they think fit, direct in what Manner, how, and  
 “ with whom, and where the Monies arising by, and to be received  
 “ from Time to Time out of the Bankrupt’s Estate, shall be paid in and  
 “ remain until the same shall be divided amongst all the Creditors, as by  
 “ this Act is directed; to which Rule and Direction every such Assignee  
 “ and Assignees afterwards to be chosen, shall conform as often as 100 *l.*  
 “ shall be got in and received from such Bankrupt’s Estate; and shall be  
 “ and are hereby indemnified for what they shall do in Pursuance of such  
 “ Direction of the said Creditors.

And by the said Statute it is further enacted, “ That every Person or Persons chosen, or who shall be chosen Assignee or Assignees of the Estate and Effects of such Bankrupt, shall at some Time after the Expiration of four Months, and within twelve Months from the Time of issuing of such Commission, cause at least twenty-one Days publick Notice to be given in the *London Gazette*, of the Time and Place the Commissioners and Assignees intend to meet, to make a Dividend or Distribution of such Bankrupt’s Estate and Effects, at which Time, the Creditors who have not before proved their Debts, shall then be at Liberty to prove the same; which Meeting for the City of *London*, and all Places within the Bills of Mortality, shall be at the *Guild-Hall* of the said City, and upon every such Meeting the Assignee or Assignees shall produce to the said Commissioners and Creditors then present, fair and just Accounts of all his and their Receipts and Payments touching the said Bankrupt’s Estate and Effects, and of what shall remain out-standing, and the Particulars thereof; and shall, if the Creditors then present, or the major Part of them, require the same, be examined upon Oath, or being of the People called *Quakers*, upon solemn Affirmation before the said Commissioners, or the major Part of them, touching the Truth of such Accounts; and in such Accounts the said Assignee or Assignees shall be allowed, and retain all such Sum and Sums of Money as they shall have paid and expended in suing out and prosecuting of such Commission, and all other just Allowances on Account of, and by Reason or Means of their being Assignee or Assignees; and the said Commissioners or the major Part of them, shall order such Part of the neat Produce of the said Bankrupt’s Estate, as by such Accounts or otherwise shall appear to be in the Hands of the said Assignees, as they or the major Part of them shall think fit, to be forthwith divided amongst such of the Bankrupt’s Creditors who have duly proved their Debts under such Commission, in Proportion to their several and respective Debts; and the Commissioners, or the major Part of them, shall make such their Order for a Dividend, in Writing under their Hands, and shall order one Part of such Order to be filed amongst the Proceedings under the said Commission, and shall deliver unto each of the Assignee or Assignees under such Commission, a Duplicate of such their Order, likewise under the Hands of the said Commissioners; which Order of Distribution shall contain an Account of the Time and Place of making such Order, and the Sum Total or *Quantum* of all the Debts proved under the said Commission, and the Sum Total of the Money remaining in the Hands of the Assignee, to be divided, and how much in particular in the Pound, is then ordered to be paid to every Creditor under the said Commission; and the said Assignee or Assignees in Pursuance of such Order, and without any Deed or Deeds of Distribution to be made for that Purpose, shall forthwith make such Dividend and Distribution accordingly, and shall take Receipts in a Book to be kept for that Purpose, from each Creditor, for the Part or Share of such Dividend or Distribution which he or they shall make and pay to each Creditor respectively; and such Order and Receipt shall be a full and effectual Discharge to such Assignee, for so much as he shall fairly pay pursuant to such Order.

And by the said Statute it is further enacted, “ That within eighteen Months next after the Issuing of any Commission, the Assignee or Assignees shall make a second Dividend of the Bankrupt’s Estate and Effects, in Case the same was not wholly divided upon the first Dividend, and shall cause a Notice to be inserted in the *London Gazette*, of the Time and Place the Commissioners intend to meet to make a second Dividend and Distribution of such Bankrupt’s Estate or Effects; and for the Creditors who shall not before have proved their Debts, to come and prove the same; and at such Meeting every such Assignee

“ or Assignees, shall produce, upon Oath or Affirmation, &c. his, her  
 “ or their Account or Accounts of the Bankrupt’s Estate and Effects,  
 “ and what upon the Ballance thereof shall appear to be in his, her or  
 “ their Hands; and shall by the like Order of the Commissioners, or  
 “ the major Part of them, be forthwith divided among such of the  
 “ Bankrupt’s Creditors who shall have made due Proof of their Debts,  
 “ in Proportion to their several and respective Debts, which second Di-  
 “ vidend shall be final, unless any Suit at Law or in Equity shall be  
 “ depending, or any Part of the Estate standing out that cannot have  
 “ been disposed of, or that the major Part of the Creditors shall not  
 “ have agreed to be sold and disposed of in Manner aforesaid, or unless  
 “ some other future Estate or Effects of the said Bankrupt shall after-  
 “ wards come to or vest in the Assignee or Assignees, in which Case the  
 “ Assignee or Assignees shall, as soon as may be, convert such future or  
 “ other Estate and Effects into Money, in Manner aforesaid; and shall  
 “ within two Months next after the same shall be converted into Money,  
 “ by the like Order of the Commissioners, or the major Part of them,  
 “ divide the same amongst such Bankrupt’s Creditors who shall have  
 “ made due Proof of their Debts under such Commission.

(1) **How the Bankrupt is to demean himself;  
 and herein of the Crime in not appearing  
 nor discovering his Estate, and the Privilege  
 he is to enjoy during his Attendance.**

“ **B***T the 5 Geo. 2. it is enacted,* That if any Person or Persons, who  
 “ since the Fourteenth Day of *May, 1729.* hath or have become  
 “ Bankrupt, or who shall at any Time hereafter, during the Continu-  
 “ ance of this Act, become Bankrupt, within the Intent and Meaning  
 “ of the several Statutes made, and now in Force concerning Bankrupts,  
 “ or any of them, and against whom a Commission of Bankrupt, under  
 “ the Great Seal of *Great Britain,* hath since the said Fourteenth Day  
 “ of *May, 1729.* been awarded and issued out, whereupon the Person  
 “ or Persons against whom such Commission hath issued, or shall issue,  
 “ hath or have been, or shall be declared Bankrupt or Bankrupts, shall  
 “ not within Forty-two Days after Notice thereof in Writing, to be  
 “ left at the usual Place of Abode of such Person or Persons, or Per-  
 “ sonal Notice in Case such Person or Persons be then in Prison, and  
 “ Notice given in the *London Gazette,* that such Commission or Com-  
 “ missions is, are or have been issued, and of the Time and Place of  
 “ a Meeting of the Commissioners therein named, or the major Part of  
 “ them, surrender him, her or themselves to the said Commissioners  
 “ named in the said Commission, or the major Part of them, and sign  
 “ or subscribe such Surrender, and submit to be examined from Time  
 “ to Time upon Oath, or (being of the People called Quakers) upon  
 “ the solemn Affirmation by Law appointed for such People, by and  
 “ before such Commissioners, or the major Part of them by such Com-  
 “ mission authorised, and in all Things conform to the several Statutes  
 “ already made, and now in Force concerning Bankrupts; and also upon  
 “ such his, her or their Examination, fully and truly disclose and dis-  
 “ cover all his, her or their Effects and Estate Real and Personal; and  
 “ how and in what Manner, to whom and upon what Consideration,  
 “ and at what Time or Times he, she or they have or hath disposed of,  
 “ assigned

“ assigned or transferred any of his, her or their Goods, Wares, Mer-  
 “ chandises, Monies or other Estate and Effects (and all Books, Papers  
 “ and Writings relating thereto) of which he, she or they was or were  
 “ possessed, or in or to which he, she or they was or were any ways in-  
 “ terested or intitled, or which any Person or Persons had or hath, or  
 “ have had in Trust for him, her or them, or for his, her or their Use,  
 “ at any Time before or after the Issuing of the said Commission, or  
 “ whereby such Person or Persons, or his or their Family or Families  
 “ hath or have, or may have or expect any Profit, Possibility of Pro-  
 “ fit, Benefit or Advantage whatsoever, except only such Part of his,  
 “ her or their Estate and Effects as shall have been really and *bonâ fide*  
 “ before sold or disposed of in the Way of his, her or their Trade and  
 “ Dealings, and accept such Sums of Money as shall have been laid  
 “ out in the ordinary Expence of his, her or their Family or Families ;  
 “ and also upon such Examination deliver up unto the said Commissions  
 “ by the said Commission authorised, or the major Part of them, all  
 “ such Part of his, her or their the said Bankrupt’s Goods, Wares, Mer-  
 “ chandises, Money, Estate and Effects ; and all Books, Papers and  
 “ Writings relating thereunto, as at the Time of such Examination,  
 “ shall be in his, her or their Possession, Custody or Power, (his, her  
 “ or their necessary wearing Apparel of the Wife and Children of such  
 “ Bankrupt only excepted) then he, she or they the said Bankrupt or  
 “ Bankrupts, in Case of any Default and wilful Omission in not sur-  
 “ rendering and submitting to be examined, as aforesaid ; or in Case he,  
 “ she or they shall remove, conceal or imbezel any Part of his, her or  
 “ their Estate Real or Personal, to the Value of Twenty Pounds ; or  
 “ any Books of Account, Papers or Writings relating thereto, with an  
 “ Intent to defraud his, her or their Creditors, (and being thereof law-  
 “ fully convicted by Indictment or Information) shall be deemed and  
 “ adjudged to be Guilty of Felony, and shall suffer as Felons, without  
 “ Benefit of Clergy, or the Benefit of any Statute made in Relation to  
 “ Felons ; and in such Cases such Felon’s Goods and Estate shall go and  
 “ be divided among the Creditors seeking Relief under such Commission,  
 “ any Law, Usage, &c.

“ *Provided* that the said Commissioners authorised shall appoint with-  
 “ in the said Forty-two Days, (so appointed, as aforesaid) for the  
 “ Bankrupt to surrender and conform, not less than three several Meet-  
 “ ings, for the Purposes aforesaid, the last of which shall be on the  
 “ Forty-second Day hereby limited for such Bankrupt’s Appearance.

“ *Provided also*, That it shall and may be lawful to and for the Lord  
 “ Chancellor or Lord Keeper, or Commissioners for the Custody of the  
 “ Great Seal, to enlarge the Time for such Person or Persons surren-  
 “ dring him, her or themselves, and disclosing and discovering his, her  
 “ or their Estate and Effects, as aforesaid, as the said Lord Chancellor,  
 “ &c. shall think fit, not exceeding Fifty Days, to be computed from  
 “ the End of the said Forty-two Days, so as such Order for enlarging  
 “ the Time be made by the said Lord Chancellor, &c. Six Days at  
 “ least before the Time on which such Person or Persons was or were so  
 “ to surrender him, her or themselves, and make such Discovery, as  
 “ aforesaid.

“ *It is also enacted by the said Statute*, “ That every such Bankrupt  
 “ or Bankrupts, as aforesaid, after any Assignee or Assignees of his, her  
 “ or their Estate and Effects, shall be chosen and appointed, as by this  
 “ Act directed, shall be and is, and are hereby required forthwith to  
 “ deliver up upon Oath, before one of the Masters of the High Court  
 “ of Chancery, or before any Justice of the Peace within his respective  
 “ Jurisdiction, all his, her or their Books of Accounts, Papers and Wri-  
 “ tings not seized by the Messenger of the said Commission, or not  
 “ before delivered up to the Commissioners, or the major Part of them,  
 “ and

“ and then in his, her or their Custody or Power, and discover such  
 “ as are in the Custody or Power of any other Person or Persons that  
 “ any Ways relate to or concern his, her or their Estate or Effects ;  
 “ and all and every such Bankrupt or Bankrupts, not in Prison or Cu-  
 “ stody, shall at all Times after such Surrender, as aforesaid, be at Li-  
 “ berty, and is and are hereby required to attend such Assignee or Af-  
 “ signees, upon every reasonable Notice in Writing for that Purpose  
 “ given by such Assignee or Assignees, unto such Bankrupt or Bankrupts,  
 “ or left for him, her or them, at his, her or their House or Place of  
 “ Abode, in order to assist, and shall assist such Assignee or Assignees in  
 “ making out the Accounts of the said Bankrupt’s Estate and Effects.

“ It is further enacted, That all and every Bankrupt or Bankrupts  
 “ having surrendered, as aforesaid, shall at all seasonable Times before  
 “ the Expiration of the said Forty-two Days, or such further Time as  
 “ shall be allow’d to such Bankrupts to finish his, her or their Examination,  
 “ be at Liberty to inspect his, her or their Books, Papers and Writings  
 “ in the Presence of such Assignee or Assignees, or some Person to be  
 “ appointed by such Assignee or Assignees for that Purpose, and to take  
 “ and bring with him her or them, for his, her or their Assistance, such  
 “ Persons as he, she or they shall think fit, not exceeding two Persons at  
 “ any one Time, and to make out such Extracts and Copies from thence,  
 “ as he, she or they shall think fit, the better to enable him, her and  
 “ them to make a full and true Discovery and Disclosure of his, her or  
 “ their Estate and Effects; and in order thereto the said Bankrupt or  
 “ Bankrupts shall be free from all Arrests, Restraint or Imprisonment  
 “ of any of his, her or their Creditors in coming to Surrender, and  
 “ from the actual Surrender of such Bankrupt to the said Commissioners,  
 “ for and during the said Forty-two Days, or such further Time as  
 “ shall be allowed to such Bankrupt or Bankrupts, for finishing his, her  
 “ or their Examinations, as aforesaid, provided such Bankrupt was not  
 “ in Custody at the Time of such Surrender and Submission to be exa-  
 “ mined ; and in Case such Bankrupt shall be arrested for Debt, or on  
 “ any Escape Warrant, coming to surrender him or herself to the said  
 “ Commissioners, or after his or her Surrender shall be so arrested within  
 “ the Time before mentioned, that then on producing such Summons or  
 “ Notice, under the Hands of the said Commissioners, Assignee or Af-  
 “ signees, to the Officer who shall arrest him, her or them, and making  
 “ it appear to such Officer that such Notice or Summons is signed by the  
 “ said Commissioners, or the major Part of them, or such Assignee or  
 “ Assignees, and giving such Officer a Copy thereof, shall be immedi-  
 “ ately discharged ; and in Case any Officer shall detain such Bankrupt or  
 “ Bankrupts (after he, she or they shall have shewn such Notice or Sum-  
 “ mons to him, and made it appear that it was signed, as aforesaid) in  
 “ his Custody, such Officer shall forfeit and pay to such Bankrupt, for  
 “ his own Use, the Sum of 5*l.* for every Day such Officer shall detain  
 “ such Bankrupt, to be recovered by Action of Debt, in any of his  
 “ Majesty’s Courts of Record at *Westminster*, in the Name or Names of  
 “ such Bankrupt or Bankrupts, with full Costs of Suit.

“ *Provided* that in Case any Bankrupt be in Prison or in Custody at  
 “ the Time of Issuing of the said Commission, as aforesaid, and is wil-  
 “ ling to surrender and submit to be examined, according to the Direc-  
 “ tions of this Act, and can be brought before the said Commissioners  
 “ and Creditors for that Purpose, the Expence thereof shall be paid  
 “ out of the said Bankrupt’s Estate and Effects ; but in Case such Bank-  
 “ rupt is in Execution, or cannot be brought before the Commission-  
 “ ers, that then the acting Commissioners shall from Time to Time at-  
 “ tend the said Bankrupt in Prison or Custody, and take his or her  
 “ Discovery, as in other Cases ; and the Assignees of the said Estate  
 “ shall have Power, and are hereby required to appoint one or more

“ Persons to attend such Bankrupt, being in Prison or in Custody, as  
 “ aforesaid, from Time to Time, and to produce to him or her, his or her  
 “ Books, Papers and Writings, in order to prepare his or her last Discovery  
 “ and Examination, according to the Directions before mentioned, a  
 “ Copy whereof the Assignees of the said Estate shall apply for, and  
 “ the said Bankrupt shall deliver to them or their Order, ten Days at  
 “ least before such Examination.

“ Also by the said Statute it is enacted, That after such Bankrupt or  
 “ Bankrupts shall have obtained his, her or their Certificate, and the  
 “ same shall be duly confirmed, every such Bankrupt or Bankrupts,  
 “ shall and is, and are hereby obliged to give his, her or their Atten-  
 “ dance upon every reasonable Notice in Writing, to be given to him,  
 “ her or them, or to be left at his, her or their usual Place of Abode,  
 “ by the Assignee or Assignees, or their Order, thereby requiring him,  
 “ her or them to attend the Assignee or Assignees of such Bankrupt’s  
 “ Estate, in order to make up, adjust or settle any Account or Accounts  
 “ between such Bankrupt or Bankrupts, and any Debtor to or Creditor  
 “ of such Bankrupt’s Estate, or to attend any Court or Courts of  
 “ Record, in order to be examined touching the same, or for such other  
 “ Business which such Assignee or Assignees shall judge necessary for get-  
 “ ting in the said Bankrupt’s Estate and Effects, for the Benefit of his,  
 “ her or their Creditors, for which said Attendance the Bankrupt shall  
 “ be allowed and paid the Sum of *2s. 6d. per diem*, by such Assignee  
 “ or Assignees out of the Bankrupt’s Estate; and in Case such Bank-  
 “ rupt or Bankrupts shall neglect or refuse to attend, or on such At-  
 “ tendance shall refuse to assist in such Discovery, without good and  
 “ sufficient Cause to be shewn to the Commissioners, or the major Part  
 “ of them, for such his, her or their Neglect or Refusal, to be by them  
 “ allowed as sufficient, such Assignee or Assignees making due Proof  
 “ thereof upon Oath before the said Commissioners authorized as afore-  
 “ said, or the major Part of them, the said Commissioners, or the major  
 “ Part of them are hereby impowered and required to issue a Warrant  
 “ or Warrants directed to such Person or Persons as they shall think pro-  
 “ per for apprehending such Bankrupt or Bankrupts, and him, her or  
 “ them to commit to the County Gaol, there to remain in close Custody,  
 “ without Bail or Mainprise, until he, she or they shall duly  
 “ conform to the Satisfaction of the said Commissioners authorized as  
 “ aforesaid; and be by the said Commissioners, or the Special Order of  
 “ the Lord Chancellor, or otherwise by due Course of Law discharged;  
 “ and such Gaoler or Keeper of such Prison, to which such Bankrupt  
 “ or Bankrupts shall be committed, is hereby required to keep such Per-  
 “ son in close Custody, within the Walls of the said Prison, until he,  
 “ she or they be duly discharged, &c.

(K) Of the Overplus of the Bankrupt’s Estate, and the Allowances to be made him; and herein of his Discharge and Certificate.

BY 13 Eliz. cap. “ Upon Request by the Bankrupt, the Commis-  
 “ sioners shall declare how they have bestowed his Lands, &c. and  
 “ pay the Overplus to the Bankrupt, &c. 17. c. 15.  
 A Clause to  
 the same Ef-  
 fect.  
 By the 5 Geo. 2. it is enacted, “ That all and every Person and Per-  
 “ sons become or to become Bankrupts, who shall by the Time limited  
 “ in this Act, surrender him, her or themselves to the acting Commis-  
 “ sioners

“ fioners named and authorised in or by any Commission of Bankrupt  
 “ awarded or to be awarded against him, her or them, and in all Things  
 “ conform, as in and by this Act is directed, shall be allowed the Sum  
 “ *5l. per Cent.* out of the neat Produce of all the Estate that shall be  
 “ recovered in and received, which shall be paid unto him, her or them,  
 “ by the Assignee or Assignees of the said Commissioners, in Case the  
 “ neat Produce of the said Estate, after such Allowance made, shall be  
 “ sufficient to pay the Creditors of the said Bankrupt, who have proved  
 “ their Debts under the said Commission, the Sum of *10s.* in the Pound,  
 “ and so as the said *5l. per Cent.* shall not amount in the whole to above  
 “ the Sum of *200l.* and in Case the neat Produce of the said Estate  
 “ shall over and above the Allowance hereafter mentioned, be sufficient  
 “ to pay the said Creditors the Sum of *12s. 6d.* in the Pound, for  
 “ their respective Debts, that then all and every Person or Persons, so  
 “ conforming, shall be allowed the Sum of *7l. 10s. per Cent.* out of  
 “ such neat Produce, to be paid by the Assignee or Assignees, so as such  
 “ *7l. 10s. per Cent.* shall not amount in the whole to above the Sum  
 “ *250l.* And in Case the neat Produce of the Estate shall, over and  
 “ above the Allowance hereafter made, be sufficient to pay the said Cre-  
 “ ditors the Sum of *15s.* in the Pound, for their respective Debts,  
 “ that then all and every such Person and Persons so conforming, shall  
 “ be allowed the Sum of *10l. per Cent.* out of such neat Produce, to  
 “ be paid by the Assignee or Assignees, so as such *10l. per Cent.* shall  
 “ not amount in the whole to above the Sum of *300l.* and every such  
 “ Bankrupt shall be discharged from such Debts, by him, her or them,  
 “ due or owing at the Time that he, she or they did become Bankrupt;  
 “ and in Case any such Bankrupt shall afterwards be arrested, prosecu-  
 “ ted or impleaded for any Debt due before such Time as he, she or  
 “ they became Bankrupt, such Bankrupt shall be discharged upon Com-  
 “ mon Bail, and shall and may plead in general, that the Cause of such  
 “ Action or Suit did accrue before such Time as he, she or they became  
 “ Bankrupts, and may give this Act and the Special Matter in Evidence,  
 “ and the Certificate of such Bankrupts conforming, and the Allowance  
 “ thereof, according to the Directions of this Act, shall be, and shall  
 “ be allowed to be sufficient Evidence of the Trading, Bankruptcy, Com-  
 “ mission and other Proceedings, precedent to the obtaining such Cer-  
 “ tificate, and a Verdict shall thereupon pass for the Defendant, unless  
 “ the Plaintiff in such Action can prove the said Certificate was obtained  
 “ unfairly and by Fraud, or unless the Plaintiff in such Action can make  
 “ appear any Concealment by such Bankrupt, to the Value of *10l.* and  
 “ if a Verdict pass for the Defendant, or the Plaintiff shall become Non-  
 “ suited, or Judgment be given against the Plaintiff, the Defendant shall  
 “ recover his full Costs.

“ *Provided* that if the neat Proceed of such Bankrupt's Estate, so to  
 “ be discovered, recovered and received, together with what shall be  
 “ otherwise recovered and received, shall not amount to so much as will  
 “ pay all and every the Creditors of such Bankrupt who shall have  
 “ proved their Debts under the said Commission, the Sum of *10s.* in the  
 “ Pound for their respective Debts, after all Charges first had and deducted,  
 “ that then and in such Case, such Bankrupt shall not be allowed the  
 “ Sum of *5 per Cent.* out of such Estate as shall be so recovered in, but  
 “ shall be allowed and paid by the Assignees so much Money as the said  
 “ Assignees and Commissioners authorised shall think fit to allow to such  
 “ Bankrupt, not exceeding *3l. per Cent.*

“ *Provided* that from and after the 24th Day of *June, 1732.* in Case  
 “ any Commission of Bankruptcy shall issue against any Person or Per-  
 “ sons, who after the said 24th Day of *June, 1732.* shall have been dis-  
 “ charged by Virtue of this Act, or shall have compounded with his,  
 “ her or their Creditors, or delivered to them his, her or their Estate

“ or Effects, and been released by them, or been discharged by any Act  
 “ for the Relief of Insolvent Debtors, after the Time aforesaid, that  
 “ then and in either of these Cases, the Body and Bodies only of such  
 “ Person and Persons conforming as aforesaid, shall be free from Arrest  
 “ and Imprisonment by Virtue of this Act, but the future Estate and  
 “ Effects of every such Person and Persons, shall remain liable to his,  
 “ her, or their Creditors, as before the making of this Act (the Tools  
 “ of Trade, the necessary Household Goods and Furniture, and neces-  
 “ sary wearing Apparel of such Bankrupt and his Wife and Children,  
 “ only excepted) unless the Estate of such Person or Persons against  
 “ whom such Commission shall be awarded, shall produce clear, after all  
 “ Charges, sufficient to pay to every Creditor under the said Commis-  
 “ sion, 15 s. in the Pound for their respective Debts.

“ *Provided*, That no Discovery upon Oath or solemn Affirmation, to  
 “ be made by any Bankrupt or Bankrupts, of his, her, or their Estate  
 “ and Effects, pursuant to this Act, shall intitle such Bankrupt or Bank-  
 “ rupts to the Benefits allowed by this Act, unless the Commissioners  
 “ authorized by such Commission, or the major Part of them, shall in  
 “ Writing under their Hands and Seals, certify to the Lord Chancellor,  
 “ that such Bankrupt or Bankrupts hath or have made a full Discovery  
 “ of his, her, or their Estate and Effects, and in all Things conformed  
 “ himself, herself, or themselves, according to the Directions of this  
 “ Act, and that there doth not appear to them any Reason to doubt of  
 “ the Truth of such Discovery, or that the same is not a full Discovery  
 “ of all such Bankrupt's Estate and Effects; and unless four Parts in  
 “ five in Number and Value of the Creditors of such Bankrupt or  
 “ Bankrupts who shall be Creditors for no less than 20 l. respectively,  
 “ and who shall have duly proved their Debts under such Commission,  
 “ or some other Person by them respectively duly authorized thereunto,  
 “ shall sign such Certificate, and testify their Consent to such Allowance  
 “ and Certificate, and to the said Bankrupt's Discharge, in Pursuance  
 “ of this Act, to be also certified by such Commissioners; but the said  
 “ Commissioners shall not certify the same till they shall have Proof by  
 “ Affidavit or Affirmation in Writing of such Creditors, or of the Per-  
 “ son by them respectively authorized for that Purpose, signing the said  
 “ Certificate; and of the Power and Authority by which any Person  
 “ shall be authorized by any Creditor to sign such Certificate for any  
 “ Creditor; which Affidavit or Affirmation, together with such Warrant  
 “ or Authority to sign, shall be laid before the Lord Chancellor, in or-  
 “ der for the Allowing and Confirming the same; and unless such Bank-  
 “ rupt make Oath that such Certificate and Consent of the Creditors  
 “ thereunto, were fairly obtained, and without Fraud; and unless such  
 “ Certificate shall after such Oath or Affirmation of the Bankrupt be  
 “ allowed and confirmed by the Lord Chancellor, Lord Keeper, or Com-  
 “ missioners for the Custody of the Great Seal of *Great Britain*, for the  
 “ Time being, or by such two of the Justices of the Courts of King's  
 “ Bench, Common Pleas, or Barons of the Court of Exchequer at  
 “ *Westminster*; to whom the Consideration of such Certificate shall be  
 “ referred by the Lord Chancellor; and any of the Creditors of such  
 “ Bankrupt are to be allowed to be heard, if they shall think fit, before  
 “ the respective Persons aforesaid, against the making such Certificate,  
 “ and against the Confirmation thereof; nor shall any Commissioner sign  
 “ such Certificate till after four Parts in five in Number and Value of  
 “ the said Creditors shall have signed the same.

By the said Statute it is enacted, “ That every Bond, Bill, Note,  
 “ Contract, Agreement or other Security whatsoever, to be made and  
 “ given by any Bankrupt, or by any other Person, unto, or to the Use  
 “ of, or in Trust for any Creditor or Creditors, or for the Security of  
 “ the Payment of any Debt or Sum of Money due from such Bankrupt  
 “ at

“ at the Time of his becoming Bankrupt, or any Part thereof, between  
 “ the Time of his becoming Bankrupt and such Bankrupt’s Discharge,  
 “ as a Consideration, or to the Intent to persuade him, her, or them, to  
 “ consent to, or sign any such Allowance or Certificate, shall be wholly  
 “ void and of no Effect, and the Monies thereby secured or agreed to be  
 “ paid, shall not be recovered or recoverable; and the Party sued on  
 “ such Bond, Bill, Note, Contract or Agreement, shall and may plead  
 “ the general Issue, and give this Act and the Special Matter in Evi-  
 “ dence.

“ *Provided*, That nothing in this Act shall be construed to extend, or  
 “ give or grant any Privilege, Benefit or Advantage to any Bankrupt  
 “ whatsoever, against whom a Commission of Bankrupt under the Great  
 “ Seal, since the 14th Day of *May* 1729. hath issued, or hereafter shall  
 “ issue, who hath or shall, for, or upon Marriage of any of his or her  
 “ Children, have given, advanced or paid, above the Value of 100*l.*  
 “ unless he or she shall prove, or by his or her Books fairly kept, or  
 “ otherwise upon his or her Oath, or being of the People called *Quakers*,  
 “ upon solemn Affirmation, before the major Part of the Commissioners  
 “ in such Commission named and authorized, that he or she had at the  
 “ Time thereof, over and above the Value so given, advanced or paid,  
 “ remaining in Goods, Wares, Debts, ready Money, or other Estate  
 “ Real or Personal, sufficient to pay and satisfy unto each and every  
 “ Person to whom he or she was any ways indebted, their full and in-  
 “ tire Debts; or who hath or shall have lost in any one Day, the Sum  
 “ or Value of 5*l.* or in the Whole, the Sum or Value of 100*l.* within  
 “ the Space of twelve Months next preceding his, her, or their becoming  
 “ Bankrupt, in playing at, or with Cards, Dice, Tables, Tennis, Bowls,  
 “ Billiards, Shovelboard, or in or by Cock-fighting, Horse-Races, Dog-  
 “ matches or Foot-races, or other Pastimes, Game or Games whatso-  
 “ ever, or in or by bearing a Share or Part in the Stakes, Wagers or  
 “ Adventures, or in or by Betting on the Sides or Hands of such as do  
 “ or shall play, act, ride or run as aforesaid; or that within one Year  
 “ before he or she became Bankrupt, shall have lost the Sum of 100*l.*  
 “ by one or more Contracts for the Purchase, Sale, Refusal or De-  
 “ livery of any Stock of any Company or Corporation whatsoever, or  
 “ any Parts or Shares of any Government or Publick Funds or Secur-  
 “ ities, where every such Contract was not to be performed within one  
 “ Week from the Time of the making such Contract, or where the Stock  
 “ or other Thing so bought or sold was not actually transferred or de-  
 “ livered in Pursuance of such Contract.

It is further enacted, “ That if any Bankrupt, who shall have obtain-  
 “ ed his or her Certificate from the acting Commissioners, and such  
 “ Certificate shall have been allowed and confirmed as by this Act is di-  
 “ rected, shall be taken in Execution, or detained in Prison, on Account  
 “ of any Debts due or owing before he or she became Bankrupt, by  
 “ reason that Judgment was obtained before such Certificate was allow-  
 “ ed and confirmed, it shall and may be lawful for any one or more of  
 “ the Judges of the Court wherein Judgment has been so obtained a-  
 “ gainst such Bankrupt, on such Bankrupt’s producing his or her Cer-  
 “ tificate allowed and confirmed, to order any Sheriff or Sheriffs, Bailiff  
 “ or Officer, Gaoler or Keeper of any Prison, who hath or shall have  
 “ any such Bankrupt in his Custody, by Virtue of any such Execution,  
 “ to Discharge such Bankrupt out of Custody on such Execution, with-  
 “ out Payment of any Fee or Reward; and such Sheriff or Sheriffs,  
 “ Bailiff or Officer, Gaoler or Keeper, is and are hereby required to  
 “ Discharge such Bankrupt out of Custody accordingly, and is and are  
 “ hereby indemnified from any Action for an Escape for his or their so  
 “ doing.

## Bargain and Sale.

**B**argain and Sale is a Contract in Consideration of Money, passing an Estate in Lands by Deed indented and inrolled: This Manner of conveying Lands is created and established by the 27 H. 8. cap. 10. which executes all Uses raised; and as this has introduced a more secret Way of Conveyancing than was known to the Policy of the Common Law, therefore the Inrollment of the Deed of Bargain and Sale was made necessary by the 16th Chapter of the Statute; but the Learning of this Head depending on Statutes, it is first proper to recite that.

*Co. Lit. 275.  
2 Inst. 672.  
Kew. 85.  
1 Co. 87.*

By the 27 H. 8. cap. 10. "Where any Person or Persons stands or is seised, of or in any Honours, &c. Lands, Tenements, Rents, Services, &c. to the Use, Confidence or Trust of any other Person or Persons, or Body Politick, by reason of any Bargain, Sale, Feoffment, &c. such Person or Persons, &c. that have any such Use, shall be deemed and adjudged in lawful Seisin, Estate and Possession thereof, to all Intents and Purposes, of, or in such like Estates as they have in the Use, &c. and the Estate, Right and Possession of him and them so seised to any Use, &c. shall be deemed and adjudged in him or them which have the Use, &c. after such Quality, Manner, &c. as they had before in or to the Use, &c.

By the 27 H. 8. cap. 16. "No Manors, Lands, Tenements or other Hereditaments shall pass from one to another, whereby any Estate of Inheritance of Freehold shall be made or take Effect, or any Use thereof to be made, by reason only of any Bargain and Sale, except by Writing indented, sealed and inrolled in one of the Courts at *Westminster*, or else within the County or Counties where the Lands, &c. so bargained and sold lie, before the *Custos Rotulorum*, and two Justices of Peace, and the Clerk of the Peace of, &c. or two of them, whereof the Clerk of the Peace to be one; the same Inrollment to be made within six Months after the Date of the same Writing indented.

"Provided this Act extends not to any Lands, &c. lying within any City, Borough, &c. wherein the Mayors, &c. or other Officers have used to inroll any Evidences, Deeds or other Writings within their Precinct or Limits.

By the 5 Eliz. cap. 26. Bargains and Sales of Lands, &c. in the County of *Lancaster*, being within six Months inrolled in the Chancery at *Lancaster*, or before the Judges of Assise there, of Lands, &c. in *Cheshire*, in the Exchequer at *Chester*, or before the Judges of Assise there, of Lands, &c. in the Bishoprick of *Durham*, in the Chancery at *Durham*, or before the Justices of Assise there, shall be as effectual as if inrolled in any Courts at *Westminster*. Provided this Act extends not to any Lands lying within any City, &c. wherein the Mayors, &c.

We shall now consider,

- (A) Who may Bargain and Sell, and to whom.  
(B) What may be bargained and sold.

(C) In what Manner a Bargain and Sale may be made, and therein of the Words to be made use of.

(D) Of the Consideration.

(E) Of the Inrolment: And herein,

1. The Relation between the Inrolment and the Deed.
2. What Estates are to be inrolled, and herein of the Exception as to Lands in Cities, Boroughs, &c.
3. The Time of Inrolment.

(F) The Manner of pleading Bargains and Sales.

### (A) Who may Bargain and Sell, and to Whom.

*Bro. Feoffment*  
*to Uses 33.*  
*Hard. 468.*  
*Popb. 72.*

THE King, and all other Persons that cannot be seised to a Use, cannot bargain and sell, for at Common Law, when a Man had sold his Land for Money without giving Livery, the Use only passed in Equity, and this is now executed and becomes a Bargain and Sale by the Statute; but antecedent to any such Execution there must be a Use well raised, which cannot be without a Person capable of being seised to a Use, which the King is not, there being no Means to compel him to perform the Use or Trust; for the Chancery has only a delegated Power from the King over the Consciences of his Subjects; and the King, who is the universal Judge of Property, ought to be perfectly indifferent, and not to take upon him the particular Defence of any Man's Estate as a Trustee.

*10 Co. 96, 98.*  
*1 Sand. 260,*  
*261.*  
*1 Co. 14, 15.*  
*Co. Lit. 151. b.*

If Tenant in Tail bargains and sells his Land in Fee, this passes an Estate determinable upon the Life of Tenant in Tail; for at common Law the Use could not be granted of any greater Estate than the Party had in him; now Tenant in Tail had an Inheritance in him, but he could dispose of it only during his own Life; and therefore when he sells the Use in Fee, *Cestui que Use* has a kind of Inheritance yet determining within the Compass of a Life; and the Statute executes it in the same Manner as he has the Use, and consequently he will have some Properties of a Tenant in Fee, and some of a Tenant for Life only; but if Tenant for Life bargains and sells in Fee, this passes only an Estate for (a) Life, for he could not pass the Use of an Estate for Life to the Bargainee, and the Statute executes the Possession as the Party has the Use.

(a) And creates no Forfeiture.

*1 Sand. 260.*

*2 Inst. 674. Mo. 42. 1 Co. 98. 10 Co. 96.*

*Mo. 41.*

If a Husband seised of Lands in Right of his Wife, or Tenant in Tail bargains and sells the Trees growing on the Lands, and dies before Severance, the Bargainee cannot afterwards cut them down and take them away.

If a Son and Heir bargains and sells the Inheritance of his Father, this is void, because he hath no Right to transfer; the same Law of a Release. *Kelw. 84. Co. Lit. 265.*

(a) Release. But if the Son makes a Feoffment of the Inheritance of his Father, this passes an Estate during the Son's Life, for it is a *Disseisin* to the Father; and the Son, after the Father's Death cannot avoid it; for no Man can allege an Injury in any voluntary Act of his own. *Co. Lit. 265. a. (a)* But if the Son releases with Warranty, he and his Heirs are for ever hereafter barred by the Rebutter. *Co. Lit. 265. a.*

If there be two Jointenants, and one of them makes a Bargain and Sale of his own Estate in Fee, and then the other dies, the other Moiety shall survive to the Bargainor; for since the Freehold is in the Bargainor the Inheritance continues; but if such Jointenant had bargained and sold *totum Statum suum* in Fee, though he died before Inrolment; yet if the Deed were afterwards inrolled, the Moiety would not survive, but would pass to the Bargainee. *Cro. Jac. 53. Co. Lit. 186. 1 Bulst. 3.*

If an Infant bargains and sells his Land by Deed indented and inrolled, yet he may plead Non-age; for notwithstanding the Statute the Bargainee claims by the Deed as at common Law, which was, and therefore is still defeasible by Non-age. *2 Inst. 6-3.*

If a Wife joins with her Husband in a Bargain and Sale by Deed indented and inrolled, of her Lands, yet it shall not bind her, for the Wife cannot be examined by any Court without Writ, and there is no Writ allowed in this Case, which is for the better Security of Wives, who are by our Law intirely subjected to the Will of the Husband. *2 Inst. 673.*

A Man may bargain and sell to a Corporation, for they may take a Use, though the Money be given by the Governors in their Natural Capacity. *10 Co. 24, 34. 2 Rol. Abr. 788.*

A Man may bargain and sell to his Son, but then the Consideration of Money ought to be expressed, and it ought to have all the other Circumstances of a Bargain and Sale; but this shall operate as a Covenant to stand seised, if there be none but the Consideration of Natural Love and Affection expressed. *7 Co. 40. 2 Co. 24. Cro. Eliz. 394. 1 Vent. 137. 1 Lev. 96.*

## (B) What may be bargained and sold.

ANY Freehold or Inheritance in Possession, Reversion or Remainder, upon an Estate for Years, or Life, or in Tail, may be bargained and sold, but the Deed shall be inrolled. *2 Co. 54. Dyer 309. 2 Inst. 671.*

But a Man seised of a Freehold may bargain and sell it for Years, and this shall be executed by the Statute of Uses, but it need not be inrolled by the Statute of Inrolments. *8 Co. 93. 2 Rol. Abr. 204.*

A Man possessed of a Term cannot bargain and sell it so as to be executed by the Statute. *2 Inst. 671. 2 Co. 35, 36. Poph. 76.*

A Rent in *Esse* may be bargained and sold, because this is a Freehold within the Statute; and before the Statute a Rent newly created might be bargained and sold, because when Money, as an Equivalent, was given, and Ceremonies or Words of Law were wanting, the Chancery supplied them; but it seems, that since the Statute, a Rent newly created cannot be bargained and sold, because there ought to be a Freehold in some other Person, to be executed *in Cestui que use*, but here can be no Seisin of this Rent in the Bargainor, because no Man can be seised of a Rent in his own Land, and consequently there can be no Estate to be executed in the Bargainee. *Kelw. 85. 1 Co. 126. 1 And. 327. 1 Jones 179.*

*Cro. Jac.* 189. *Beaudly v. Brook.* If *A.* by Indenture inrolled bargains and sells Lands to *B.* and his Heirs, with a Way over other of the Lands of *A.* this is void as to the Way; for nothing but an Use passes by the Deed, and there can be no Use of a Thing not in *Effc.*, as a Way, Common, &c. before they are created.

### (C) In what Manner a Bargain and Sale may be made, and therein of the Words to be made use of.

*2 Inst.* 675. *Dyer* 229. *Popb.* 48. *Dalt.* 63. **A**T Common Law Lands might be bargained and sold by Words only, for it was the Consideration that in Equity raised the Use, but since the Statute of 27 *H.* 8. Lands cannot pass without Indenture. And therefore Lands in Cities and Boroughs might, since this Act, till the 29 *Car.* 2. have been bargained and sold by Word only. *2 Inst.* 676. *Yelv.* 124.

*2 Inst.* 672. *Cro. Jac.* 210. *Mo.* 34. *Cro. Eliz.* 166. 'Tis not necessary to use the Words Bargain and Sale, but any Words equivalent are sufficient, and whatever Words upon valuable Consideration would have raised an Use of any Lands, &c. at Common Law, the same amount to a Bargain and Sale within this Act; as if a Man by Deed, &c. for a valuable Consideration covenants to stand seised to the Use of another, &c.

*2 Inst.* 373. Though the Deed may be either in Parchment or Paper, yet the Inrolment must be in Parchment only, for that is implied when an Inrolment is to be in any of the Courts of Record at *Westminster*; and in the Clause of Inrolment by the Clerk of the Peace, it is particularly provided, that he shall sufficiently inroll and ingross it in Parchment.

*2 Co.* 35. *Hayward's Case.* A Man demises, bargains and sells a Manor, Part in Demesne and Part in Tenants Hands for seventeen Years, the Party may chuse either to take it by way of Lease at Common Law, and then the Tenants must attorn; or by way of Bargain and Sale without Attornment; and this agrees with the Policy of the Common Law, to take every Man's Grant, so as to pass an Interest as shall be most advantagious for the Grantee; and since, in this Case, the Words allow a double Way of taking it, the Grantee shall be Judge which is most beneficial.

### (D) Of the Consideration.

*1 Co.* 176. *Mo.* 578. **I**F a Man bargains and sells Lands for divers good Causes and Considerations, it is void, unless Money be averred; for Selling *ex vi termini* supposes a Transferring a Right of something for Money, the common Medium of Commerce; but if there be no such Consideration it may be an Exchange, a Covenant to stand seised, Grant, &c. but it can be no Sale within the Statute.

*Mo.* 378. If there be a Consideration of Money expressed in the Deed, no Averment nor Evidence can be admitted against it, for the Affirmative is proved by the Deed; and it is impossible to prove the Negative.

If the Deed says for a competent Sum of Money, it is sufficient, without averring the Sum, for it is a Sale if there be any Money. *Moor* 378.

A Man in Consideration of 70 l. bargains and sells to his Daughter and *J. S.* in Tail, who intermarry, it may be averred *tam in Consideratione Maritagii quam in Confid' del 70 l.* for a Man may aver any Consideration consistent with that in the Deed. *1 Co.* 176. *2 Co.* 76. a.

If a Man in Consideration that *J. S.* was bound in a Recognizance, and other Bonds for him, and for divers other good Causes and Considerations, bargains and sells his Lands to him and his Heirs, it is not good. *Cro. Eliz.* 394.

If a Man in Consideration of so much Money to be paid at a Day to come, bargains and sells, the Use passes presently, and after the Day the Party has an Action for the Money, for it is a Sale by the Money paid presently or hereafter. *Dyer* 337. a.

## (E) Of the Inrolment: And herein,

### 1. The Relation between the Inrolment and the Deed.

AT Common Law the Use passed from the Delivery or Date of the Deed, and by the Statute 27 H. 8. cap. 10. the Possession passed as the Party had the Use at the Time of the Delivery of the Deed; but it was thought proper to add some further Circumstances, which is done by cap. 16. and therefore, if these Circumstances are observed, it hath the same Effect it had before at Common Law, to wit, to raise the Uses from the Delivery; for the Words of the Statute are only to add some Things, and not to abolish or set aside the Force it had formerly. *Dyer* 218. *Hob.* 136. *2 Inst.* 674. *Cro. Jac.* 408. *1 Rol. Abr.* 627. *Owen* 149. *150.*

If *A.* bargains and sells Lands to *B.* and his Heirs, and before Inrolment *B.* reciting this Bargain and Sale to be by Indenture inrolled, bargains and sells to *C.* and his Heirs, all the Estate which he had by the said Indenture inrolled, and after the first, and then the second Deed is inrolled by *Daniel* and *Kingsmill*, the Lands are well conveyed to *C.* for when the first Indenture was inrolled, the Estate was in *B. ab initio* to bargain, sell, &c. and the Words in the second Deed are apt enough to pass the Land, and the Recital of the Inrolment immaterial; but *Anderfon* and *Warberton cont'*; for a Man cannot pass what he hath not, and till the Deed was inrolled *B.* had nothing, and he passed only what he had by Indenture inrolled: But *Walmsly* held, The Land passed not by reason of the Misrecital, but that otherways it would have passed; and it was adjudged for the Defendant, according to the Opinion of the three last Judges. *Cro. Jac.* 52. *Bellingham v. Alfop.* *2 Inst.* 675. *1 Vent.* 360.

If a Man bargain and sell his Manor, to which there is an Advowson appendant, the Bargainee can make no Title to Present before Inrolment. *2 Co.* 56.

If a Man bargains and sells his Land, and then suffers a Recovery, levies a Fine, or makes a Feoffment to the Bargainee, and then the Deed is inrolled, the Land passes by the Recovery, Fine or Feoffment; for since the Freehold and the Use is in the Bargainor till Inrolment, it must pass by the Recovery, &c. and when it has passed by the Recovery the Use cannot rise, nor Possession be executed from the Date of the Deed. *4 Co. Hind's Case.* *Mo.* 681. *2 And.* 3. *162, 203.* *4 Leon.* 4. *Feib.* 49. *Hob.* 222.

If the Bargainor or Bargainee die before Inrolment, it may notwithstanding be inrolled, for here are Parties to give and take the Interest when it begins to vest, for it vests from the Date of the Deed; otherwise in the Case of an Attornment. *2 Inst.* 674. *Hob.* 136. *1 And.* 229. *337.*

1 *Vent.* 361. If a Man bargains and sells his Land, the Bargainee may be Tenant to the *Præcipe* before Inrolment, and may receive a Release before Inrolment.

1 *Vent.* 206. But where the Commissioners of a Bankrupt had assigned the Bankrupt's Lands to the Lessor of the Plaintiff, which Indenture was afterwards inrolled, but the Declaration was upon a Demise made after the  
2 *Show. Rep.* 156. S. C. Indenture, and before the Inrolment; and it was adjudged, That this  
2 *Jones* 196. S. C. Declaration was not sufficient.  
*Carth.* 178. S. P. adjudged on the Authority of this Case. 1 *Show.* 207. S. C. Where it is said, that *Holt*, Ch. Just. held, That it was not amendable.

*Owen* 150. If a Man bargains and sells a Reversion, and the Rent is incurred, and afterwards the Deed is inrolled, the Bargainee shall have the Rent unpaid; but if the Rent be paid to the Bargainor, the Tenant is not only excused, but the Bargainor is not accountable, because the Contract had not any Effect to pass the Estate from the Bargainor before Inrolment; and the Relation of a Law cannot make void an Act that was lawful, for it cannot be set aside but by an express and positive Law.

*Owen* 69, 150. If a Man make a Lease for Life, reserving Rent, with Clause of Re-entry, and then bargains and sells the Reversion, the Bargainee demands the Rent, and the Lessee refuses, and then the Deed is inrolled, the  
*Godb.* 156. Bargainee cannot enter for the Forfeiture; for till Inrolment he is not  
*Litch* 157. 1 *Sid.* 310. Grantee of the Reversion within the Statute capable of the Duty, and consequently at the Day could make no legal Demand, which was precedently necessary to this Entry.

2 *And.* 160. If a Man seised in Fee is bound in a Recognizance, and then bargains  
*Owen* 69, 70. and sells all his Lands, and then the Recognizance is forfeited, and then  
2 *Inst.* 674. a *Scire Facias* is sued out against the Land in the Hands of the Bargainor,  
*Cro. Car.* 217. and then the Deed is inrolled, this *Scire Facias* is not maintainable.

*Co. Lit.* 147. b. If before Inrolment the Bargainor and Bargainee grant a Rent, &c. after Inrolment, by Operation of the Statute, it shall be the Grant of the Bargainee, and Confirmation of the Bargainor.

If Lands are bargained and sold, and the Bargainee die before Inrolment, his Wife shall not be endowed; so if a Man bargains and sells  
1 *And.* 161. Lands by Indenture, and then takes a Wife and dies, and after the Deed  
*Cro. Car.* 569. is inrolled the Wife shall not be endowed.  
But if Lands are bargain-  
ed and sold, ed and a Stranger enters, and then the Deed is inrolled, the Bargainee dies, his Wife shall be endowed; but for this *vide Tit. Dower.*

## 2. What Estates are to be inrolled, and herein of the Exception as to Lands in Cities, Boroughs, &c.

2 *Inst.* 671. All Estates of Freehold and Inheritance must be inrolled; but if a Man bargains and sells his Lands for any Number of Years, the Deed need not be inrolled.

7 *Co. Bedel's* Case. If a Man bargain and sell Land to his Son in Consideration of Money, the Deed must be inrolled; but if the Father, in Consideration of Natural Love and Affection, and also for Money grants Land to his Son, this need not be inrolled; for Covenants to stand seised are not within the Words of the Statute, and where the Consideration of Blood is expressed, it may enure as a Covenant to stand seised, but it is only a Sale when the Consideration of Money is alone expressed, for that excludes all other tacit Considerations.

2 *Inst.* 676. Lands in Cities, Boroughs, &c. that have the Privilege of Inrolments, are not within the Act, for though the Intent of the Statute be, to have  
*Dyer* 229. excepted them from Inrolments in the Courts of *Westminster* only, yet  
*Loff.* 63. the Statute is so worded that they are discharged from any Inrolment at  
*Yelv.* 124. all,

all, and therefore the Possession of such Lands is executed from the Date of the Deed.

### 3. The Time of Inrolment.

It must be inrolled within six Months from the Date, which shall be <sup>2</sup> *Inst.* 674. accounted according to the Computation of twenty-eight Days <sup>per</sup> <sup>6</sup> *Co.* 62. Month; for Month, in its proper and original Signification, is the Space of Time measured by the compleat Course of the Moon; as the Year is the Time measured by the Complement of the Sun's Course.

From the Date, and from the Day of the Date, in this Case, is taken *Hob.* 140. as all one, as it is in all other Cases of Computation, and therefore the *Mo.* 40, 42. Inrolment may be on the Day of the Date, or on the last Day of the <sup>2</sup> *Inst.* 674. sixth Month after the Day of the Date; for though when an Interest <sup>1</sup> *Co.* 6. passes from the Day of the Date, the Day it self is excluded; yet when *Dyer* 282. a Time is stinted, in which an Act ought to be done, it is in order to <sup>3</sup> *Lev.* 438. hasten the doing of that Act; and therefore the doing of it on the Day *Salk.* 413. from whence the Period is first reckoned within the Time appointed, and <sup>6</sup> *Mod.* 260. the last Day of the sixth Month, is within the Words of the Time given.

If the Deed has no Date, the six Months are to be reckoned from the Delivery, but not otherwise. *Hob.* 140.  
*2 Inst.* 674.  
*Mo.* 42.

## (F) The Manner of pleading Bargains and Sales.

**A** Bargain and Sale is a Deed inrolled, and as such must be pleaded, *Co. Lit.* 225, b. and the Deed it self, whereby the Use originally passes, being a <sup>251. b.</sup> Matter in *Pais*, must be produced, and not the Tenor of the Deed, <sup>2</sup> *Inst.* 673. which is on the Roll of *Record*; for though the Inrolment being on *Re-* <sup>4</sup> *Co.* 71. cord is of undoubted Veracity, being the Transaction of the Court, <sup>5</sup> *Co.* 53. yet the private Deed has not the Sanction of a Record, though publickly <sup>2</sup> *Rol. Rep.* 119. acknowledged and inrolled; for it might have been falsly and fraudulently dated, or ill executed.

The Party that claims by any Bargain and Sale, must shew in what *Yelv.* 213. Court the Deed is inrolled, because he must shew all Things in certain *Worly and* that make out his Title; otherwise his Adversary would be put to an in- *Purly.* finite Search before he could Traverse with Security. *Cro. Jac.* 291.  
*S. C.*

In Debt for Rent, the Plaintiff declared upon a Lease made by a Stranger, who after bargained and sold the Reversion to the Plaintiff *per Inden-* *Allen* 19. *turam debito modo irrotulat' in Curia Cancellariæ*; and after Verdict for *King and So-* the Plaintiff Judgment was arrested, because it was not alledged that the *merland.* Inrolment was within six Months, nor *secundum formam Statuti*, and *Carter* 221. *debito modo* will not help it, for it might be so at Common Law. *Style* 34. *S. C.* and Judgment arrest-

ed accordingly; for *debito modo* may be an Inrolment at Common Law.

If a Man makes a Lease for Years the 10th of *May*, and afterwards bargains and sells his Lands, and antedates the Deed by making it the 10th of *April*, and the Inrolment is also as of that Time, the Lessee is without Remedy, for he cannot aver against the Record. *For this vide* *Owen* 138.  
<sup>1</sup> *Leon.* 183.  
<sup>2</sup> *Leon.* 121.  
<sup>3</sup> *Leon.* 175.

176. *Savil* 91. *cont'*, and Head of Pleadings.

<sup>1</sup> *Leon.* 170. In pleading a Bargain and Sale, the Party ought regularly to aver Pay-  
*vide Moor* ment of the Money.  
 504.  
 But the Want thereof is helped after Verdict, upon *Non concessit*; for it must be intended proved at  
 the Trial. <sup>1</sup> *Lev.* 308.

## Barratry.

- (A) Who shall be said to be a Barrator.  
 (B) Of the Form of the Proceedings against such an  
 Offender.  
 (C) How punished.

### (A) Who shall be said to be a Barrator.

*Co. Lit.* 368.  
*a. b.*  
<sup>8</sup> *Co.* 36. *b.*  
<sup>1</sup> *Hawk. P.C.*  
 243.  
<sup>1</sup> *Dan.* 725.  
<sup>3</sup> *Inst.* 175.

**A** Barrator is described a Person who is a common Mover, Exciter or Maintainer of Suits or Quarrels, either in Courts or in the Country; and this Offence consisting in all Kinds of Disturbances of the Peace, and the spreading of false Rumours and Calumnies, whereby Discord and Disquiet may grow among Neighbours, it is not material whether the Suits commenced be in a Court of Record or not, or whether those Quarrels relate to a disputed Title of Possessions or not.

<sup>1</sup> *Rol. Abr.* 335.  
 But by <sup>1</sup> *Hawk. P.C.* 243. if such Suits are  
 merely groundless, and brought only with a Design to oppress the Defendants, such a Man may as properly be called a Barrator, as if he had stirred up others to bring them. *Vide* <sup>3</sup> *Mod.* 98. <sup>8</sup> *Co.* 36. *b.*

<sup>1</sup> *Hawk.* *P. C.* 343. An Attorney cannot be deemed a Barrator in respect of his maintain-  
<sup>1</sup> *Hawk.* *P. C.* 343. ing another in a groundless Action, to the commencing whereof he was  
 no way privy.

(a) In Respect to one or two one Act only; for every Indictment for such Crime must charge the De-  
<sup>8</sup> *Co.* 36. fendant with being *communis Barrator*.

<sup>2</sup> *Rol. Abr.* 39. A Feme Covert (b) cannot be indicted as a common Barrator.  
 (b) But this

Opinion Serjeant *Hawkins* says is justly Questionable; for since a Feme Covert is as capable of exciting Quarrels, in the frequent Repetition whereof the Notion of Barratry seems to consist, as if the were Sole, why should the not as properly be indictable for it? <sup>1</sup> *Hawk. P. C.* 243.

## (B) Of the Form of the Proceedings against such an Offender.

NO general Indictment, charging the Defendant with being a common Oppressor and Disturber of the Peace, and Stirrer up of Strife among Neighbours, is good, without adding the Words *Communis Barrator*, which is a Term of Act appropriated by the Law to this Purpose.

An Indictment of Barratry concluding *cont' formam Statuti* is good, though no Statute be made directly against it, but only for the Punishment of it, supposing it an Offence at Common Law.

1 *Mod.* 282.  
1 *Sid.* 282.  
*Cro. Jac.* 526.  
2 *Roll. Abr.* 79.  
*Cro. Jac.* 527.  
*Cro. Car.* 340.  
2 *Keb.* 409; 410. *Cro. Eliz.* 148. 1 *Hawk. P. C.* 244.

Also it hath been holden that an Indictment of this Kind may be good, without alledging the Offence at any certain Place; because from the Nature of the Thing, consisting in the Repetition of several Acts, it must be intended to have happened in several Places; for which Cause it is said that a Trial ought to be by a Jury from the Body of the County.

It hath been resolved that such an Indictment is not good, without concluding *cont' pacem, &c.* for this is an essential Part of it.

It seemeth to be the settled Practice at this Day, not to suffer the Prosecutor to go on in the Trial of an Indictment of this Kind, without giving the Defendant a Note of the particular Matters which he intends to prove against him; for otherwise it will be impossible to prepare a Defence against so general and uncertain a Charge, which may be proved by such a Multiplicity of different Instances.

## (C) How punished.

IF they are common Persons, the usual Punishment is by Fine and Imprisonment, and also by binding them to their Good Behaviour; but if they are of any Profession relating to the Law, they may be farther punished by being disabled to practice for the Future.

the Peace, as such, have Cognizance of Barratry, without any other Commission, by Virtue of the 34 E. 3. 1. *Quare, & vide* 1 *Hawk. P. C.* 243, 244. *Yelv.* 46. 2 *Roll. Rep.* 151. and 2 *Hawk. P. C.* 40.

*Hut.* 104.  
1 *Hawk.*  
*P. C.* 244.  
Whether  
Justices of

## Baron and Feme.

- (A) Who are esteemed Husband and Wife; and herein of the Legality of the Marriage, and Marriage Contracts.
- (B) Of the Power given the Husband by Law over the Person of his Wife; and therein of her Remedy for any Injury done her by him.
- (C) Of his Interest in her Estate and Property; and herein,
1. Of the Real Estate in her Right.
  2. Of her Chattels Real or Leasehold Interests.
  3. Of her Personal Estate in Possession, and *Choses in Action*.
- (D) Of the Husband's Right to Things accruing to the Wife during Coverture.
- (E) Of the Wife's Acts and Agreements before Marriage, in what Cases revoked and made void by the Marriage.
- (F) Where the Husband shall be liable to the Wife's Debts, contracted before Marriage; and therein of a Wife that is Executrix or Administratrix.
- (G) Where she alone shall be punished for a criminal Offence, and where the Husband shall be answerable for what she does in a Civil Action.
- (H) Of her Contracts for Necessaries; and how far the Husband is bound by such Contracts.
- (I) What Acts done by the Husband or Wife alone, or Jointly with the Wife, will bind the Wife; and therein of her Agreement or Disagreement to such Acts after the Death of the Husband.
- (K) Where the Husband and Wife must join in bringing Actions.
- (L) Where they must be jointly sued.
- (M) Where a Wife shall be considered as a *feme Sole*.

What Right accrues to the Representatives of either of them, on the Dissolution of the Marriage, *vide* Head of *Executors and Administrators*.

(A) Who are esteemed Husband and Wife; and herein of the Legality of the Marriage and Marriage Contracts.

**M**ARRIAGE is a Compact between a Man and a Woman, for the Procreation and Education of Children, which is to continue during both their Lives; it may be celebrated in a private House as well as in a Church; for it being an Exchange of mutual Vows in the Presence of GOD, if all other Circumstances are complied with, it cannot be supposed that GOD is less present at these Marriages than those made in the Church.

1 *Rel. Abr.*  
341, 359.  
1 *Sid.* 64.  
*Perk.* 306.  
*F. N. B.* 157.  
Before the  
Time of  
Pope Inno-  
cent the

Third, there was no Solemnization of Marriage in the Church; but the Man came to the House where the Woman inhabited, and led her home to his own House, which was all the Ceremony then used. *Moor* 170. *per Goldingham*, Doctor of the Civil Law, *arguendo*.

The Age of Consent to a Marriage in an Infant Male is (a) Fourteen, and in a Female Twelve; but they may marry before; and if they agree to them when they attain these Ages, the Marriage is good; but they cannot disagree before then; also if one of them be above the Age of Consent, and the other under such Age, the Party so above the Age may as well disagree as the other; for both must be bound or neither.

*Co. Lit.* 33,  
78, 79.  
2 *Inst.* 434.  
3 *Inst.* 83, 89.  
6 *Co.* 22.  
7 *Co.* 43.  
1 *Rel. Abr.*  
340.

(a) Before this Age the Husband may have *Trespas de muliere abducta*, *Moor* 741. 2 *And.* 208. 6 *Co.* 22. But if a Wife hath a Child before the Husband attains the Age of Fourteen, it is a Bastard. 4 *Co.* 29. *Godolp.* 484. What shall amount to a Disagreement, *vide* 1 *Rel. Abr.* 340, 341. *vide* *Head of Infants*.

By the Statute 32 *H. 8. cap.* 38. it is enacted, "That no Reservation or Prohibition (GOD's Law except) shall trouble or impeach any Marriage without the Levitical Degrees, and that no Person, of what Estate, Degree or Condition soever he be, shall be admitted to any of the Spiritual Courts within the King's Realm, or any his Grace's other Lands and Dominions, to any Process, Plea or Allegation contrary to the Statute.

For the Ex-  
position of  
this Statute,  
*vide* *Co. Lit.*  
24. a.  
2 *Inst.* 684.  
*vide* 25 *H. 8.*  
*cap.* 22.  
28 *H. 8.*

*cap.* 7. 28 *H. 8. cap.* 16. Before which the Ecclesiastical Courts had the sole Jurisdiction of matrimonial Causes. *Vide* 13 *E. 1.* The Statute *Circumspette agatis*. *Hob.* 181. *Co. Lit.* 235. 2 *Inst.* 683, 684. *vide* *Vaugh.* 214. But if a Man marries his Cousin within the Degrees, or his Mother or Sister, they continue Husband and Wife till a Sentence of Divorce be pronounced. 1 *Rel. Abr.* 340, 357.

In a Prohibition to the Consistory Court of *York*, for proceeding against a Person for Incest, who married the Relict and Widow of his Great Uncle, it was agreed by all the Judges at *Serjeants-Inn*, that the Prohibition should stand, and the following Points were resolved; first, That by the Statute 32 *H. 8. cap.* 38. no Marriage without the Levitical Degrees are unlawful upon the Account of Consanguinity nor Affinity, nor for that Reason can be proceeded against by the Ecclesiastical Court; and though the Words of the Statute are, *That no Prohibition (GOD's Law except) shall impeach such Marriages*, yet the Reservation for GOD's Law was not intended to leave Marriages at Large to the Determination of the Ecclesiastical Courts, as they were before; for then the Levitical Degrees need never have been spoken of, and then indeed the Statute would have been of no Signification; the proper Meaning therefore of these Words (*GOD's Law except*) must be this, that the Statute did not intend to restrain the Ecclesiastical Courts from Divorces upon other Accounts; as upon the Account of Insufficiency, Adultery, Precontract, &c. so that the Lawfulness of Marriage is hereby determined, but not

*Harrison and*  
*Ux' verli.*  
*Dr. Burwell.*  
2 *Vent.* 9.  
*Vaugh.* 206.  
*S. C.*

as to other Causes. Secondly, That this Marriage with the Great Uncle's Wife, was a Marriage without the Levitical Degrees, and therefore lawful.

1 *Rel. Abr.*

357.

*Moor* 169.

2 *Salk.* 437.

1 *Salk.* 119.

*Heydon and Gould.*

*Vide* 2 *Salk.*

438. *icems*

*cont.*

Marriage is to be solemnized *in Facie Ecclesiæ*, and therefore a private Contract without the Priest's Blessing will make no Marriage.

*A.* and *B.* being Sabbatarians, were married by one in their own Way, who used the Form of the Common Prayer, except the Ring, but was a mere Layman; the Wife dying, the Husband took out Administration to her; but upon the Application of her Sister, the Letters of Administration were repealed, and the Sentence of Repeal affirmed by the Delegates; for the Husband demanding a Right due to him as Husband, must bring himself within the Rules prescribed by that Jurisdiction to whom he applies; also the constant Form of pleading Marriage is, that it was *per Presbyterum sacris ordinibus constitutum*; and an Act of Parliament was made confirming the Marriages contracted during the Usurpation.

*Moor* 169.

4 *Co.* 29.

*S. C.*

1 *Sid.* 13.

*S. C.*

cited and denied by

*Twisden.*

If a Woman maketh a Contract of Matrimony with *F. S.* and then marrieth with *F. D.* who is seised of Lands and dieth, she shall have Dower of his Lands, because such Marriage was not void, but voidable only by Reason of the Precontract. *Moor* 226. *Perk.* 34.

But as to the Loyalty of Marriage to intitle a Woman to Dower, and how the Bishop must certify upon an Issue *Ne un-*

*ques accouple*

in loyal Matrimony,

*vide Bro.* 54.

*Co. Lit.* 53. *a.*

*Dyer* 313.

9 *Co.* 19.

*Cro. Car.* 351.

And note,

that neither the Contract nor the Sentence makes a compleat Marriage.

*A.* contracts *per verba de presenti* with *B.* and hath Issue by her, and after marries *C.* *in Facie Ecclesiæ*, *B.* recovers *A.* for her Husband, by Sentence of the Ordinary, and for not performing the Sentence *A.* is excommunicated, and after enfeoffs *D.* and then marries *B.* *in Facie Ecclesiæ*, and dies, and she brought Dower against *D.* and recovered, because the Peoffment was *per fraudem*, between the Sentence and solemn Marriage; but this was reversed *coram Rege. & concilio, quia prædictæ A. non fuit seorsus* during the Espousals between him and *B.*

*Swinb. of*

*Espousals* 74.

2 *Salk.* 438.

(a) Alto a

Marriage

in Fact or

Reputation,

is held good in the Temporal Courts; but when the Validity of the Marriage shall be

tried in the Spiritual Courts, and not by Verdict, *vide Tit. Bastardy.*

In Debt on a Bond, the Defendant pleaded *Ne unques accouple* in loyal Matrimony; Plaintiff demurred, and had Judgment;

for it alters the Trial; for instead of trying *per pais*, it puts the Trial on a Certificate from the Ordinary.

Secondly, It admits a Marriage, but denies the Legality of it; whereas a Marriage *de facto*

is sufficient, and whether Loyal or not Loyal, is no Ways material. 1 *Salk.* 437.

So in an Assault and Battery by Baron and Feme, the Defendant pleaded *Ne unques accouple* in loyal Matrimony;

and on Demurrer the Plea was held naught. *Comb.* 473.

So in Trespas for taking his Wife, and the like Plea, which was held naught. *Comb.* 131.

A Contract *in Futuro*, as *I will marry you*, &c. may be enforced in the

Words which Spiritual Court; but such Contract either Party may release; also if either

make a Con-

tract in *Pre-*

*senti*, or in *Futuro*, *vide Swinb. Sect.* 10 and 11.

But in these Cases the Temporal Courts have given

a Remedy by Action, for the Breach of Promise. *Cro. Eliz.* 79. *Carter* 273.

In an Action against

Husband and Wife, the Plaintiff declared that he promised to marry the Defendant's Wife whilst

Sole, and that she the same Time promised to take him for her Husband, and averred that he tendered himself, and that she refused, &c. It was objected that Marriage was no Advancement to a

Man, though it was to a Woman; also that no Time was laid when this Agreement was to be executed; but the Court over-ruled both the Objections. *Carth.* 467. *Harrison ver. Cage & Ux.* 1 *Salk.*

24. *S. C.*

ther Party marry another Person, the Spiritual Court can give no Remedy; for such second Marriage dissolves the Contract.

24. S. C.  
5 Mod. 411.  
6 Mod. 155.

*Vide* 2 Salk. 437, 438. If a Man and an Infant, at the Age of Fifteen, promise to intermarry, and the Man refuses, and after marries another, she may, notwithstanding her Infancy, maintain an Action; for this is a Contract which she may at these Years enter into, being for her Advantage; and though it may be voidable as to her, yet it is good against the Man, who must be presumed to have acted with as much Caution as if he had contracted with a Person of full Age. *Trin.* 5 Geo. 2. adjudged between *Holt* and *Ward*. Note; by the Statute of *Frauds* and *Perjuries*, these Contracts must be reduced into Writing.

If a Man takes *A. S.* to Wife, *per Durefs*, though the Marriage be solemnised *in Facie Ecclesie*, yet it is meerly void; and they are not Baron and Feme, because there is not any Consent; and it cannot be a Marriage without Consent.

1 Rol. Abr. 340. for this  
*vide* 11 H. 4. 14.  
Kelw. 52.  
Dyer 13.  
*Fitz. Abr.* 86. 1 Rol. Abr. 357. 1 Sid. 65. Cro. Car. 488, 493.

(B) Of the Power given the Husband by Law, over the Person of his Wife; and therein of her Remedy for any Injury done her by him.

THE Husband hath by Law Power and Dominion over his Wife, and may keep her by Force within the Bounds of Duty, and may (a) beat her, but not in a violent or cruel Manner; for in such Case, or if he but threaten to beat her outrageously, or use her barbarously, she may (b) bind him to the Peace, by suing out a Writ of *Supplicavit* out of Chancery, or may apply to the Spiritual Court for a Divorce *Propter scævitiā*.

(a) Crom 28, 136.  
E. N. B. 80.  
Hest. 149 cont.  
1 Sid. 113,  
116.  
(b) Dalt. cap. 68.  
Lamb. 78. Crom. 133.

But a Wife cannot, either by herself or her *Prochein Amy*, bring a *Homine Replegiando* against her Husband; for he has by Law a Right to the Custody of her, and may, if he think fit, confine her, but he must not imprison her; if he does, it will be good Cause for her to apply to the Spiritual Court for a Divorce *Propter Scævitiā*; and the Nature and Proceedings in the Writ *De homine Replegiando* shew that it cannot be maintained by the Wife against her Husband.

Preced. in Chanc. 492. per Curiam.

## (C) Of his Interest in her Estate and Property: And herein,

1. Of the Real Estate in her Right.
2. Of her Chattels Real or Leasehold Interests.
3. Of her Personal Estate in Possession, and Choses in Action.

## 1. Of the Real Estate in her Right.

10 Co. 42.  
2 Inst. 510.  
1 Sid. 11.  
1 Rol. Abr.  
347.

FROM the Time of the Intermarriage, the Law looks upon the Husband and Wife but as one Person, and therefore allows of but one Will between them, which is placed in the Husband, as the fittest and ablest to provide for, and govern the Family; and for this Reason the Law gives the Husband an absolute Power of disposing of her Personal Property, no Act of hers being of any Force to affect or transfer that which by the Intermarriage she has resigned to the Husband; but the Freehold and Inheritance of the Wife, is subject to other Rules and Regulations; for the Husband by the Marriage does not become absolute Proprietor of the Inheritance, but as the Governor of the Family is so far Master of it as to receive the Profits of it during her Life, but has no Power to make an absolute Sale of it without her Consent.

Co. Lit. 351. a.  
Where the  
Husband or  
Wife are attainted, and the Lord by Escheat shall enter, or the King have the Pernancy of the Profits, and how far such Freehold will work a Remitter to the Husband. Vide Title *Courtesy of England*.

If a Man marries a Woman seized in Fee, he gains a Freehold in Right of his Wife.

Where the Husband or Wife are attainted, and the Lord by Escheat shall enter, or the King have the Pernancy of the Profits, and how far such Freehold will work a Remitter to the Husband. Vide Title *Courtesy of England*.

## 2. Of her Chattels Real, or Leasehold Interests.

7 H. 6. 1. b.  
Bro. 24.  
Co. Lit. 46,  
351.

The Marriage is a Gift in Law to the Husband of all the Wife's Chattels Real, as a Term for Years in Right of the Wife; so of Estates by Statute-Merchant, Statute-Staple, Elegit, &c. and of these he may alone dispose, forfeit, or they may be extended for his Debts, but if he make no Disposition of them in his Life-time, they (a) survive to the Wife, and therefore he cannot devise them.

(a) The Husband is only the Wife, and therefore he cannot devise them. The Term in her Right, and the Term or legal Interest continues in her. 7 H. 6. 2. 1 Rol. Abr. 342. Co. Lit. 351.

2 Rol. Abr.  
495.

If a Woman Lessee for Years takes Husband, and he after purchases a new Lease to them both for their Lives, of the same Lands, this is a Surrender in Law of the first Term, and shall bind the Wife, because it amounts to an actual Disposition thereof, which the Husband had Power to make.

Po; b. 5, 97.  
145.  
Co. Lit. 46. b.  
351. a.  
Cro. Car. 344.  
Plowd. 418.  
Cro. Eliz. 33,

If the Husband possessed of a Term for seventy Years in Right of his Wife, makes a Lease of those Lands for twenty Years, to begin after his Death, this is good, and shall bind the Wife; because the Term being but a Chattel, he had Power to dispose of it wholly, and by Consequence may dispose of any lesser Interest thereof as he thinks fit; and

279. Co. Lit. 300. a. Bro. Tit. Charge. 111. 8 Co. 97. 1 Rol. Abr. 851, 343, 344. Godb. 279. 3 Keb. 299. 1 Vent. 259. Note; It appears by all the above cited Books, that if the Husband makes a Lease of Part of the Wife's Term, rendering Rent, and dies, that his Executors shall have the Rent, and not the Wife; though she hath the Reversion, because not Party or Privy to the Lease, and the Rent is not incident to the Reversion.

this being a present Disposition, which he cannot revoke, binds the Interest of the Lands immediately, though it takes not Effect in Possession till after his Death; and therefore this differs from a Devise of such Term, or any Part thereof, by the Husband, by his Will; for that not taking Effect, nor binding the Interest at all till after his Death, comes too late to prevent the Operation of Law, which at the Instant of Death immediately casts it upon the Wife surviving, and so defeats and destroys the Operation of the Devise; but as to the Residue of the Term, whereof the Husband makes no Disposition in his Life-time, the Wife, if she survives, will be intitled to it; because as to that the Law is left to take Place, as it would have done for the Whole, if he had not prevented it by such his Disposition of Part; but if the Husband had granted away the whole Term upon Condition, and died, though the Condition were afterwards broken, and his Executors entred for Breach thereof, yet would the Wife be for ever barred to claim any Interest in the said Term, because there was a total Disposition thereof by the Husband in his Life-time, and the Breach or Non-performance of the Condition was perfectly contingent and uncertain; besides that, the Breach of the Condition happened not till after his Death, and so the Disposition continued perfect and uninterrupted during his Life; for if the Condition had been broken during his Life, and he himself had entred for Breach thereof, it might be a great Question, if the Wife surviving should not have the Term after his Death, because by his Re-entry for the Condition broken, he is restored to the whole Term *in Statu quo*, and then being possessed of it in Right of his Wife, as he was before, it seems but reasonable the Wife should have it, if she survives the Husband, as she would have had if no such Disposition had been made, since that Disposition is now defeated and gone: Also such Term whereof the Husband is possessed in Right of his Wife, may be extended for the Debts, or forfeited for the Crimes of the Husband, for these are legal Dispositions thereof, which shall bind the Wife; but if the Husband should grant a Rent, Common; &c. out of such Term, and die, this would not bind the Wife surviving, because the Term or Possession it self being left to come intire to the Wife, all intermediate Charges or Grants thereout by the Husband determine with his Death; for the Title of the Wife to such Term has Relation to the Time of their Intermarriage, and so is paramount all collateral Charges or Grants made thereout by the Husband after; but a Grant by the Husband of the Herbage or Vesture of such Land which he held in Right of his Wife for Years, will be void after his Death, because they are Part of the Land it self, and not collateral to it.

If the Husband and Wife be evicted of a Term which he hath in Right of his Wife, and the Husband brings an Ejectment in his own Name, and hath Judgment to recover, this makes an Alteration in the Term, and vests it in the Husband; because not making his Wife a Party to the Recovery, he takes the whole Wrong to be done to himself, and consequently if he recovers, it must be by Virtue of that Right whereof he was dispossessed.

*Co. Lit. 46. b.*  
*1 Rol. Abr.*  
*345.*

If a Term for Years be granted to a Feme Covert and another, or if a Feme Sole and another are Jointenants of a Term for Years, and the Feme takes Husband, yet in both Cases the Jointenancy still continues; for the Marriage makes no Severance or Alteration of it, but gives the Husband the same Power his Wife had before, by an actual Disposition of her Moiety to break the Jointenancy, and bind his Wife's Interest therein; but without such Disposition the Jointenancy continues; and if the Husband dies, the Whole shall go accordingly; so if such Jointenants are ousted of the Term, the Wife shall join with the Husband and the other Jointenant in Ejectment, and the Wife shall have Judgment to recover as well as the Husband; and if in such Case, before any actual Disposition made by the Husband, his Wife die, the whole Term shall

*Plowd. 418.*  
*Co. Lit. 18 f.*

go to the surviving Jointenant, and no Part thereof to the Husband; because, though the Husband, if he survives, is by Law to have all Chattels Real and Personal of his Wife's, and this Term was a Chattel Real, yet the Title of the other Jointenant, to have the Whole by Survivorship, coming at the same Instant, and being the Elder Title, shall prevail against the Husband.

*Acceptance of a feoffment by the Husband as Surrender of a Term to the Wife.*  
 Cro. Eliz. 912. Downing and Seymour. Q. In Case of the Bargain and Sale, or Fine, if the Term in this Case would not be surrendered, because the Lease being made after Marriage, when there are no Moieties between Husband and Wife, the Husband cannot be said to be possessed thereof in her Right, more than in his own, but both are possessed by Intiretics; therefore it should seem in that Case likewise, that the Term would be merged.

A Lease was made to the Husband and Wife for Years, they enter, and the Lessor afterwards enfeoffs the Husband, who dies seised, the Wife survives and claims the Term; and betwixt her and the Heir of the Husband the Dispute was, Whether the Term were extinguished; and *per totam Curiam*, by Acceptance of the Feoffment the Husband hath surrendered the Term, and then it is extinguished, and the Wife barred of any Title thereto; but they held that it would have been otherwise if the Conveyance had been to the Husband by Bargain and Sale inrolled, or by Fine; for these meddle not with the Possession, but only carry such Interest as the Reversioner had in him, and then the Husband might have the Term in Right of his Wife, and the Inheritance in his own Right; but by the Feoffment he admits the Lessor to have Power to come upon the Possession to make Livery; which, if the Term should stand in his Way, he could not do; and therefore such Admittance amounts to a Surrender thereof.

Mo. pl. 304. A Husband possessed of a Term for Years in Right of his Wife, with Remainder to himself in Fee, by Deed inrolled bargains and sells the Land for Money, and dies, and his Wife enters, claiming the Residue of the Term; and the Opinion of the Book seems to be, that her Claim was good; for though a Feoffment, in such Case, by the Husband would have possessed the Term which he had in Right of his Wife by Way of Union and Extinguishment, yet by Bargain and Sale nothing passes <sup>but</sup> a Use, and by Creation and Grant of the Use, the Term which he had *in Jure Uxoris* shall not pass; so that this being no Disposition of the legal Interest of the Term, but only of a Use (which, in respect of his Inheritance in Remainder, he might well create) this was good as to the Term during the Life of the Husband only, and then the Wife after his Death shall have the Lease discharged of it; as if the Husband had granted a Rent, &c. out of the Wife's Term; but if there had been the Words *grant, assign*, or any other Word which would have passed the legal Interest of the Term, this would have barred the Wife; but the Words *Bargain and Sell*, by 27 H. 8. could have no Operation to raise an Use, which shall be executed in Possession, but only out of the Reversion, whereof the Husband was seised, as the Statute speaks; and therefore this being a Term in Gros, whereof the Husband was not seised, but only possessed, the Bargain and Sale passed only an Use thereof at Common Law, and not by Virtue of that Statute, and then not being executed in Possession, the Use at Common Law, which was collateral to the Land, fell off with the Death of the Husband, who created it, as other collateral Charges of his would do, and by consequence the Wife's Title to the Residue of the Term continues good; but if the Husband had been possessed of such Term in Gros in his own Right, without an Inheritance in him, and had made a Bargain and Sale thereof, though this would not have been executed by the Statute in Possession, for the Reason before mentioned; yet it would have passed a Use at Common Law, which would have made him Trustee in Equity for the Bargainee.

If a Man marries a Woman who has a Term for Years settled on her in Trust, the Husband may as well dispose of this Trust, as if the legal Interest was in her. For this *vide*  
1 Rol. Abr.  
343.

Lane 54, 55.  
Abr. Eq. 58.  
1 Chan. Ca. 225. 1 Vern. 7, 18. 2 Vern. 270.

3. Of her Personal Estate in Possession, and Choses in Action.

All the Personal Estate, as Money, Goods, Cattle, Household Furniture, &c. that were the (a) Property, and in the Possession of the Wife at the Time of the Marriage, are actually vested in the Husband; so that of these he may make any Disposition in his Life-time, without her Consent; or may by Will devise them, and shall without any such Disposition go to the Executors or Administrators of the Husband, and not to the Wife, though she survive him. Dr. and Stud.  
Dial. 1. c. 7.  
Co. Lit. 351.  
(a) And therefore  
Chattels Personal which  
she has in  
Auter droit as

Executrix, or Guardian in Socage, &c. shall not go to the Husband. *Co. Lit.* 351. Also a bare Possession of Personal Goods is not by the Marriage given to the Husband; for if Goods are bailed to a Feme Sole, or if she finds Goods, and after married, the Action of Detinue must be brought against both Husband and Wife. *Co. Lit.* 351. The Civil, or scarce any Law, gives so great a Power to the Husband over the Estate of the Wife, as the Common Law does. 1 *Sid.* 111. By three Judges *arguendo*.

But *Choses in Action*, as Debts due to the Wife by Obligation, &c. which are to be demanded by Action, though they are likewise so far vested in the Husband, that he may reduce them into Possession; yet if he dies before any Alteration made by him, they shall go to his Wife, nor shall they, without such Alteration, survive to the Husband upon the Death of the Wife, or he have any Right to them, but as he is intitled as (b) Administrator to his Wife. Co. Lit. 351.  
3 Mod. 186.  
But where  
the Goods of  
a Feme Sole  
are in the  
Possession of  
another by  
Trover or

Bailment, and she marries, the Property which continued in the Wife is vested in the Husband, and he alone, without his Wife, may bring Detinue for them. 1 *Sid.* 172. 1 *Keb.* 641. *Moor* 25. pl. 85. 1 *Vent.* 261. 2 *Lev.* 107. (b) Administration of Right is to be granted to the Husband. 1 *Rol. Abr.* 910. And by the Statute 29 *Car.* 2. cap. it is enacted, That the Statute of Distributions shall not extend to the Estates of Feme Coverts.

If a Feme Sole Obligee marries, and the Husband makes a Letter of Attorney to J. S. to receive the Money, who receives it accordingly, and the Feme dies, the Husband shall have an Action of Account for the Money; for by the Receipt this was become a Thing in Possession. 1 Rol. Abr.  
342.  
Moor 45.  
Goldf. 160.

If a Legacy be devised to a Feme, who takes Husband, and the Baron makes a Letter of Attorney to J. S. to receive the Legacy, and he receives it accordingly, this, by his Receipt, is become the Chattel of the Husband. Goldf. 160.  
1 Rol. Abr.  
342.

So if the Baron and Feme had made a Letter of Attorney to J. S. to receive the Legacy, and he had received it accordingly, by this Receipt this ceases to be a Thing in Action, and is become a Thing in Possession; and the Husband or his Executor, after the Death of the Feme, may have an Account upon this Receipt against J. S. Moor 452.  
1 Rol. Abr.  
342, 350.  
Goldf. 159,  
160.

## (D) Of the Husband's Right to Things accruing to the Wife during Coverture.

**H**usband and Wife are considered as one Person in Law, and to have but one Will between them, which is seated in the Husband, as the Head and Governor of the Family; and therefore the Law gives him the same Right over any Real Estate accruing to the Wife during Coverture, as if she were seised of it before Marriage; so of Chattels Real accruing to the Wife, and an absolute Power over any Personal Estate or Interest accruing to the Wife by Gift, Devise, or her Labour.

*Co. Lit.* 351. *1 Salk* 115. *Carth.* 251. Where they cannot take by Moieties, vide Head of *Fointenants.*

*Carth.* 251. *1 Salk* 114. *S. C.* *4 Mod.* 156. *S. C.* *Buckley & Ux' v. Collier.* *Indebitatus Assumpsit* was brought by Husband and Wife against the Defendant, in which they declared, that he was indebted to them in such a Sum of Money for Periwig-makers Work done by the Wife, *ad Damnum ipsorum*; and on Demurrer Judgment was given against the Plaintiffs; for this being a general *Indebitatus Assumpsit* implied by Law, the Law will not (a) imply any Promise made the Wife, for she is a Servant to the Husband, who is at all the Charges in furnishing Hair, &c. and therefore the Law implies, that the Promise was made to him only, for Breach of which he alone ought to have sued.

(a) But if a Special *Indebitatus Assumpsit* had been brought on an express Promise made the Wife, it seems it would be good, though they had both joined. *Vide Cro. Eliz.* 61, 96. *Cro. Jac.* 77. *Cro. Car.* 439. *2 Sid.* 128.

*1 Salk* 115. *Chamberlain and the Wife of Colonel Hewson.* If a Feme Covert sues a Woman in the Spiritual Court for Adultery with her Husband, and obtains a Sentence against her, and Costs, the Husband may release these Costs, for the Marriage continues, and whatever accrues to the Wife during Coverture belongs to the Husband: *Per Holt*, Ch. Just. on a Motion for a Prohibition.

*1 Rol. Rep.* 426. *3 Bulst.* 264. *1 Rol. Abr.* 343. *2 Rol. Abr.* 293. But if the Husband and Wife be divorced *a mensa & thoro*, and the Wife has her Alimony, and sues for Defamation or other Injury, and there has Costs, and the Husband releases them, this shall not bar the Wife, for these Costs come in Lieu of what she hath spent out of her Alimony, which is a separate Maintenance, and not in the Power of her Husband.

*1 Salk* 115. *1 Vern.* 261. Decreed in Chancery. A Legacy was given to a Feme Covert, who lived (b) separate from her Husband, and the Executor paid it to the Feme, and took her Receipt for it; yet on a Bill brought by the Husband against the Executor, he was Decreed to pay it over again, with Interest.

Separation had been by Agreement, and the Agreement and a separate Maintenance Decreed in Chancery. If Husband and Wife are Divorced *a mensa & thoro*, and a Legacy is left to her, the Husband may release it. *1 Rol. Abr.* 343. *2 Rol. Abr.* 301. *Moor* 665. *Cro. Eliz.* 908. *Noy* 45. *1 Rol. Rep.* 426. *3 Bulst.* 264. *Moor* 683. *1 Salk* 115. But a Man may by Deed or Will give any Thing in Truist for the separate Use of a Feme Covert; and this shall be out of the Power of the Husband. *2 Vern.* 659.

(E) Of the Wife's Acts and Agreements before Marriage, in what Cases revoked and made void by the Marriage.

BY the Marriage the Husband and Wife become one Person in Law, <sup>4 Co. 60.</sup> and therefore such an Union works an Extinguishment or Revocation <sup>5 Co. 10.</sup> of several Acts done by her before the Marriage; and this not only <sup>Kelw. 162.</sup> for the Benefit of the Husband, but likewise of the Wife, who, if she <sup>Co. Lit. 55.</sup> were allowed at her Pleasure to rescind and break through, or confirm <sup>Hestl. 72.</sup> several Acts, might be so far influenced by her Husband, as to do Things <sup>Cro. Car. 304.</sup> greatly to her Disadvantage.

But in Things which would be manifestly to the Prejudice of both Husband and Wife, the Law does not make her Acts void; and therefore <sup>5 Co. 10.</sup> if a Feme Sole makes a Lease at Will, or is Lessee at Will, and afterwards marries, the Marriage is no Determination of her Will, so as to <sup>Henshead's Case.</sup> make the Lease void; but she her self cannot without the Consent of her Husband, determine the Lease in either Case.

So where a Warrant of Attorney was given to confess a Judgment to <sup>1 Salk. 117.</sup> a Feme Sole; and the Court gave Leave, notwithstanding the Marriage, to enter up Judgment, for that the Authority shall not be deemed to be revoked or countermanded, because it is for the Husband's Advantage; like a Grant of a Reversion to a Feme Sole, who marries before Attornment, yet the Tenant may attorn afterwards; otherwise if a Feme Sole gives a Warrant of Attorney, and marries, for that is to charge the Husband.

But if a Feme Sole makes her Will, and devises her Land to *J. S.* and afterwards marries him, and then dies, yet *J. S.* takes nothing by the Will, because the Marriage was a Revocation of it; for as the Law will not allow a Woman under Coverture to make a Will, lest she should be influenced by her Husband in the Disposition of her Estate; so for the same Reason Wills made by a Feme Sole are countermanded by the Marriage, lest she should be influenced by her Husband (if it continued after the Coverture) to revoke it, or let it stand, as it best answered his Interest.

If *A.* on the one Part, and *B.* and *C.* a Feme Sole on the other Part, <sup>1 Rol. Abr. 332.</sup> submit themselves to the Award of *J. N.* and after *C.* takes *J. S.* to Husband, and after the Arbitrator, before any Notice of the Marriage, <sup>Ruled on Demurrer between White and Giffard.</sup> makes an Award that *B.* and *C.* shall pay 30 *l.* to *A.* yet this shall not bind *J. S.* and *C.* his Wife, nor *B.* for the Submission by the Marriage of *C.* is revoked as to *B.* also, and this without any Notice.

*A.* entred into a Bond with his intended Wife, conditioned to leave her at his Death 1000 *l.* if she survived him, &c. *A.* died Intestate, and the Wife took out Administration to him; in an Action of Debt brought against her as Administratrix for Rent incurred due in the Life-time of her Husband, she pleaded this Bond, and that 250 *l.* only came to her Hands, which she retains in Part of Satisfaction, and that she had not Assets *ultra*; on Demurrer the whole Court agreed, That Contracts and Debts *in Presenti*, also such as were contingent, and might happen during the Coverture, were extinguished by the Marriage; but two Judges in <sup>1 Salk. 329. Gage v. Athon. Comb. 242. Carth. 511. S. C. Where it is said, That a Writ of Error was brought in the Exchequer-Chamber.</sup>

ber, but the Plaintiff in Error perceiving the Court inclined to affirm the Judgment, did not proceed. Note; By the Cases on this Head, in which there are Variety of Opinions, the better Opinion seems to be, that such a Bond is extinguished; but if the Husband had entred into a Bond with a Stranger, conditioned to leave the Wife so much, it would be good; also a Promise or Covenant with the intended Wife is good, not being a Debt *in Presenti*. *Jenk. Rep.* 166, 221. *1 Rol. Abr.* 343. *2 Rol. Abr.* 407. *Hob.* 216, 227. *Hutt.* 17, 18. *Noy* 26. *Cro. Jac.* 571. *Palm.* 99. *2 Rol. Rep.* 162. *2 Sid.* 72. *Lit. Rep.* 32. *Hestl.* 122.

this Case, against *Holt*, Ch. Just. held, That this Bond with a Condition, was like a Promise or Covenant before Marriage, to leave the Wife so much (which were agreed to be good) and being to be paid *in futuro*, was not extinguished by the Marriage, but was *in Custodia Legis*, to preserve a Right, and answer the Intention of the Parties; but *Holt* held, That the Bond and Condition were distinct, and that upon the Execution of the Bond there was a Debt *in Praesenti*, which was extinguished by the Marriage; but the Defendant had Judgment.

1 Vern. 480. How far Equity will support such Contracts, vide 1 Chan. Ca. 21, 117. 1 Vern. 408. 2 Vent. 343. 2 Vern. 290. Preced. in Chan. 237.

A Man enters into a Bond to his intended Wife, conditioned to leave her 1000*l.* the Husband mortgages his Estate, and died, not leaving Personal Assets to discharge the Bond; and it was decreed in Equity, that though the Bond was void by Law, being extinguished by the Marriage, yet it should be made good in Equity; and that the Wife might redeem and hold the Land till she was satisfied her Debt.

For this vide 2 Chan. Rep. 81, 79. 2 Vern. 17.

Also Equity will set aside the intended Wife's Contracts, though legally executed, when they appear to have been entred into with an Intent to deceive and cheat the Husband, and are in Derogation of the Rights of Marriage; as where a Widow made a Deed of Settlement of her Estate, and married a second Husband, who was not Privy to such Settlement; and it appearing to the Court, that it was in Confidence of her having such Estate that the Husband married her, the Court set aside the Deed as fraudulent; so where the intended Wife, the Day before her Marriage, entred privately into a Recognizance to her Brother, and it was decreed to be delivered up.

1 Vern. 408. Hunt and Matthews.

But where a Widow before her Marriage with a second Husband, assigned over the greatest Part of her Estate to Trustees, in Trust for Children by her former Husband; and though it was insisted that this was without the Privy of the Husband, and done with a Design to cheat him, yet the Court thought, that a Widow might thus provide for her Children before she put her self under the Power of a Husband; and it being proved that 8000*l.* was thus settled, and that the Husband had suppressed the Deed, he was decreed to pay the whole Money, without directing any Account.

(E) Where the Husband shall be liable to the Wife's Debts contracted before Marriage, and herein of a Wife that is Executrix or Administratrix.

E. N. B. 265. 20 H. 6. 22. b. Moor 468. 1 Rol. Abr. 352. 3 Mod. 186.

THE Husband is liable to the Wife's Debts contracted before Marriage, whether he had any Portion with her or not; and this the Law presumes reasonable, because by the Marriage the Husband acquires an absolute Interest in the Personal Estate of the Wife, and has the Receipt of the Rents and Profits of her Real Estate during Coverture; also whatever accrues to her by her Labour, or otherwise, during the Coverture, belongs to the Husband; so that in Favour of Creditors, and that no Person's Act should prejudice another, the Law makes the Husband liable to those Debts with which he took her attached.

But if a Feme Sole indebted marries and dies, the Husband shall not be charged, for they must be recovered in the Life-time of the Husband. *Wife.*

So though there be a Judgment in Debt against a Feme Sole, and she marries and dies, the Baron shall not be charged therewith, for he is not liable to her Debts before Coverture, unless recovered in her Life-time.

Feme Sole bought Goods, but did not pay for them, and the Goods came to her Husband's Hands, and the Creditors, after her Death, brought a Bill in Equity against the Husband, to which he demurred; but the Demurrer was over ruled; my Lord Chancellor with Earnestness, saying, he would change the Law in that Point. 1 Chan. Ca. 295. But Q. for where a Man married a Woman Trader, who died, and at her Death was indebted to several Persons for Wares which she had bought of them, and which were by her in Specie at the Time of her Death, and came to the Hands of her Husband; on a Bill brought against him, that he may either pay for these Goods, or let the Person have them again; it was held, that he may plead that he is neither Executor nor Administrator to his Wife, and therefore not liable to her Debts, and that all her Goods belong to him by Law. *Abr. Ca. Eq. 60.*

If Baron and Feme are sued on the Wife's Bond, entred into by the Feme before Marriage, and Judgment is had thereupon, and the Wife dies before Execution, yet the Husband is liable; for the Judgment has altered the Debt.

Wife, and had Judgment, the Husband might sue out Execution after the Death of the Wife. *Cro. Car. 208. 1 Sid. 337. 1 Salk. 116. Comb. 45. Carth. 415.*

If there be Judgment in Debt upon a Bond against a Feme Sole, and she marries, and after upon two *Sci. Fa.* against the Baron and Feme, and *Nibils* returned, Judgment is thereupon had against the Baron and Feme, and so it rests for a Year and a Day, and then the Wife dies, a *Scire Facias* will lie against the Baron, to shew Cause why Execution should not go against him upon the first Judgment, for the Award of Execution was absolute against the Baron and Feme, and so it became his Debt, whereas before, it was only the Debt of the Wife.

If a Man marries an Administratrix to a former Husband, who in her Widowhood wasted the Affets of her Intestate, the Husband is liable to the Debts of the Intestate, during the Life of the Wife; and this shall be deemed a *Devastavit* in him.

*Executors and Administrators*, and 1 *Rol. Abr. 351. Moor 761. Cro. Car. 208, 227, 458. 1 Sid. 337.* Note, That in Equity the Creditors of the first Husband may follow the Affets in the Hands of a second Husband, although the Wife be dead. 1 *Chan. Ca. 50. 1 Vern. 309. 2 Vern. 61, 118.* A. married an Administratrix to her former Husband, to a Share of whose Personal Estate the Plaintiff was intitled; the Administratrix was likewise intitled to a Third; and before her second Marriage had wasted great Part of the Estate, and then died; and a Bill was brought against her Husband, to have an Account of the Estate, and a Satisfaction for his Share; an Account was decreed to be taken of what Estate had come to the Hands of the Administratrix before her second Marriage, and the Plaintiff to have Satisfaction against the Defendant absolutely for so much as came to his, or his Wife's Hands after Marriage, and for what came to her Hands before her second Marriage, to have Satisfaction against the Defendant, so far as he had any Estate of his Wife's. *Abr. Ca. 60, 61.*

10 H. 6. 10.  
12.  
20 H 6 22.  
1 Rol. Abr.  
351.  
3 Mod. 186.  
Agreed per  
Curiam; but  
where a

1 Sid. 337.  
So if Husband and  
Wife had recovered in  
Right of the

*Husband liable if  
the wife die after judgment*

*Carth. 30.  
O'Brien and  
Ram.  
3 Mod. 186.  
S. C.  
1 Salk. 116.  
Comb. 45.  
Carth. 415.  
S. C. cited,  
and allowed  
to be Law.*

*Cro. Car. 603.  
King v. Hil-  
ton. For this  
vide Head of*

(G) Where she alone shall be punished for a criminal Offence, and Where the Husband shall be answerable for what she does in a Civil Action.

*Kelv.* 31. *S. P. C.* 26, 142. *H. P. C.* 65. *27 Aff.* 401. *Hawk. P. C.* 2. she shall not be deemed Accessory to a Felony for receiving her Husband who has been Guilty of it, as her Husband shall be for receiving her. *3 Inf.* 108. *H. P. C.* 65. *2 Hawk.* 320.

A Feme Covert is so much favoured in Respect of that Power and Authority which her Husband has over her, that she shall not suffer any Punishment in committing a bare Theft in Company with or by Coercion of her Husband.

*H. P. C.* 65. *Dalt.* 104. *27 Aff. Pl.* 40. *Fitz. Coron.* 199. But if she commit a Theft of her own (a) voluntary Act, or by the bare Command of her Husband, or be Guilty of Treason, Murder or Robbery, in Company with, or by Coercion of her Husband, she is punishable as much as if she were Sole.

(a) But she is not Guilty of Felony in stealing her Husband's Goods; because a Husband and Wife are considered but as one Person in Law, and the Husband by endowing his Wife at the Marriage with all his worldly Goods, gives her a Kind of Interest in them, for which Cause even a Stranger cannot commit Larceny in taking the Goods of the Husband by the Delivery of the Wife, as he may by taking away the Wife by Force and against her Will. *1 Hawk. P. C.* 93.

*9 Co.* 71. *Hawk. P. C.* 3. *vide Moor* 813. *Hob.* 93. *Noy* 103. *Savil.* 25. *Cro. Jac.* 482. A Feme Covert generally shall answer as much as if she were Sole, for any (b) Offence not Capital against the Common Law or Statute; and if it be of such a Nature, that it may be committed by her alone, without the Concurrence of the Husband, she may be punished for it without the Husband, by Way of Indictment, which being a Proceeding grounded merely on the Breach of the Law, the Husband shall not be included in it for any Offence to which he is no Way privy.

*11 Co.* 61. That the Husband is not liable to pay the Forfeiture recovered on an Indictment against the Wife; and therefore *Quare* whether a Conviction of a Feme Covert, upon an Indictment, can be pleaded to an Information against her and her Husband. *1 Hawk. P. C.* 18. (b) She cannot be indicted for Barratry. *1 Rol. Rep.* 39. Whether she may be indicted for Forestalling, *Quare 1 Sid.* 410. *2 Keb.* 634. may be indicted for a Scold, and Judgment against her to be ducked; but Scolding once or twice is not sufficient to constitute this Offence, which lies in the frequent Repetition of it, to the Disturbance of the Neighbourhood. And the Indictment must set forth that she is *communis Rixatrix*, and not *Rixa*. *6 Mod.* 213, 239. A Feme Covert may be Guilty of a Forceible Entry, by entering in Person, and may be imprisoned for it. *1 Hawk. P. C.* 147. Where the Husband may be proceeded against for the Recufancy of his Wife, *vide 1 Hawk. P. C.* 17, 18. She may be indicted together with her Husband, for keeping a Bawdy-House. *1 Hawk. P. C.* 2. If a Woman bring a malicious Appeal for the Death of her Husband, known by her to be alive, she may be imprisoned for her false Appeal, till she make Fine to the King, and the Husband shall go at Large. *8 H.* 4. 17. *Fitz. Coron.* 73. *Bro. Imprisonment* 100.

*Skin.* 348. *Barnet and Ton plins.* A Feme Covert lent 20*l.* to be paid at 20*s.* by the Week, and 1*s.* 6*d.* Interest, the Borrower paid the Interest, which amounted to 30*s.* which the Wife exacted and received; and this appearing on Evidence, in an Action brought by the Husband for the Money, *Holt, Ch. Just.* ruled it to be an Usurious Contract by the Husband, sufficient to discharge and avoid the Obligation *civiliter*, though not sufficient to charge the Husband *criminaliter*.

*Vide 1 Hawk. P. C.* 3. and the Authorities there cited. If the Wife incur the Forfeiture of a Penal Statute, the Husband may be made a Party to an Action or Information for the same, as he may be generally to any Suit for a Cause of Action given by his Wife, and shall be liable to answer what shall be recovered thereon.

If a Feme Covert pretending herself to be Sole, marries a second Husband, he shall have no Action against the first, because this Action is founded upon the Communication and (a) Contract of the Wife, which will not bind the Husband; besides this is Felony.

1 Sid. 575.  
1 Lev. 247.  
Shall be answerable for a Trespass done by her,

or for slanderous Words spoken by her. Vide 2 H 6. 22. Kelw. 61. 1 Rol. Abr. 251. 1 Leon. 122. Cro. Cur. 376. (a) Where the Husband shall be bound by some of her Acts, as in selling of Goods, receiving Money for him, vide the next Head and 2 Inst. 713. 1 Sid. 114. Cro. Eliz. 245. 3 Leon. 267. 1 Chan. Ca. 38. 6 Mod. 162. Comb. 450. Jenk. Rep. 4, 23.

Several Goods were devised to A's Wife for Life, and after her Decease to J. S. in this Case, though A. and his Wife were parted, and there had been great Suits for Alimony, and she, during the Separation, had wasted the Goods, yet the Lord Keeper thought it reasonable that the Husband should be charged for this Conversion of the Wife's, B.'s Title being paramount the Feme's.

1 Verm. 143.

### (H) Of her Contracts for Necessaries, and how far the Husband is bound by such Contracts.

IT is clear that a Husband is obliged to maintain his Wife, and may by Law be compell'd to find her Necessaries, as Meat, Drink, Clothes, Physick, &c. suitable to the Husband's Degree, Estate or Circumstances; it seems also settled that the Wife is not to be her own Carver, and that she hath not an innate or absolute Power of binding the Husband by any Contract of hers, though for Necessaries, without his Assent, precedent or subsequent; the Law therefore in these Cases, which seems established by Usage and Practice, is to leave it to Jury to find whether the Husband consented or not; and though no express Consent or Agreement of his be proved, yet if it appears that she cohabited with her Husband, and bought Necessaries for herself, Children or Family, the Husband shall be chargeable, and the Jury may find, on their Oaths, that they came to the Husband's Use, he being by Law obliged to provide for those; also if she cohabits with her Husband, and is ever so lewd, he shall be liable to her Necessaries; for he took her for better for worse; so if he runs away from her, or turns her away, or Forces her by Cruelty or ill Usage to go away from him; but if he allows her a separate Maintenance, or prohibits particular Persons from trusting her, he shall not be liable during the Time that he pays such separate Maintenance, nor for Necessaries taken up of those Persons particularly prohibited; for in these Cases no Consent, but rather the contrary appears; but a general Warning or Notice in the Gazette, or other News-Paper, not to trust her, is not a sufficient Prohibition. Also the Jury are to determine as to the Wife's Necessity, the Husband's Degree and Circumstances, and the Value of the Things sold and delivered, and give a Verdict, and assess Damages accordingly.

11 H 6. 30.  
Fitz. Debt 41.  
Brownl. 47.  
All 61.  
Lit. Rep. 307.  
Hutt. 105.  
Jenk. Rep. 4.  
1 Rol. Abr. 350, 351.  
1 Sid. 109, 110, &c.  
1 Mod. 128.  
2 Vent. 155.  
1 Keb. 69, 80, 87.  
2 Vent. 42.  
1 Lev. 4, 5.  
1 Salk. 116, 118.  
6 Mod. 171.  
2 Show 283.  
Skin. 348.

But the Learning on this Head, will be best explained by inserting the celebrated Case of *Scot and Manby*, with my Lord Chief Baron *Hale's* Argument at length.

A Woman departs from her Husband without his Consent, and during her Absence, the Husband prohibits several Persons, and among the Chamber on a Special Verdict, by eight Judges against three; but *Aikins*, one of the eight, agreed with the three, if there had been no Special Prohibition; and *Bridgman*, Ch. Just. one of the eight, held

*Manby and Scot*, adjudged in the Exchequer.

held that admitting otherwise, viz. that the Husband was liable, yet he might

the rest *ſ. S.* to trust her; and after ſhe makes a Requeſt to cohabit again with her Husband, and he refuſes to receive her, and yet *ſ. S.* ſells to her Silk and Velvet to the Value of 40 *l.* which is found ſuitable to the Degree of her Husband, the Husband ſhall not be charged.

make ſuch Special Prohibition to a particular Perſon, and it would excuſe him. 1 *Sid.* 109, 110, &c. and 1 *Mod.* 128. 1 *Lev.* 4, 5. 1 *Keble.* 69, 80, &c. *S. C.*

Lord Chief Baron Hale's Argument in the Exchequer-Chamber, in the Caſe of *Manby* and *Richard* ver. *Scott.*

1. I will ſay ſomething of the Nature of Contracts.
2. I will apply it to our Caſe, in Conſideration of the Verdict, as it is found.
3. I will ſhew in what Particulars we all agree, and where we differ, and ſo ſtate the Queſtion.
4. I will ſpeak to the Queſtion as it ſhall be ſo ſtated.

1. A Contract is the Conſent of two or more, whereby to bring in an Obligation of one to the other; and the Parts requiſite to ſuch a Contract, are 1ſt, Parties, 2dly, Conſent, 3dly, an Obligation.

1ſt, It is requiſite that the Parties be not diſabled to Contract; and as to that, in Law ſome are diſabled to Contract *quoad hoc* and *ex parte*, as an Infant, *non compos*, &c. and ſome have an abſolute Diſability; as a Feme Covert, who can no way in our Law contract.

2dly, As to the Conſent, that muſt be either expreſs or implied; expreſs muſt be either Precedent, Concomitant or Subſequent; implied is raiſed by Law; as where a Man is made Bailiff, Steward or Houſe-keeper, a general Authority is given him; when Goods come to a Man's Uſe, he having had Notice of the Contract, it is an Affent the Law will imply, and make the Contract oblige him; and if either of theſe had been found in this Special Verdict, it had been well; for then there had been Fact enough for the Law to have made Conſtruction upon. There is, beſides all this, Evidence of a Conſent in Fact, which muſt induce a Jury, if there be no Circumſtances againſt it. As if I ſend a Servant always with ready Money, and he buys upon Truſt, here is no Evidence; but if I uſually ſend him upon Truſt, and where he takes up Goods I ſtand to his Bargain, and pay for them, this is Evidence that I would have all the World truſt him; and this a Jury may apply to make a Conſent to any particular Contract; but then they muſt find the Affent in Fact; for that which is the Evidence to them we cannot judge upon.

3dly, As to the Obligation, it is neceſſary that this be upon the Party conſenting. I know that in ſome Caſes the Obligation of a Contract may be transferred by Way of Concomitancy; as to the Husband, it is carried with the Chattels and Perſon of the Wife; and it lies upon the Heir and Executor when they have Aſſets; but for a Man to be originally bound by a Contract, it is neceſſary that there be his Conſent; and the Conſent of no other Perſon will ſerve.

2. To conſider what is in the Verdict, and apply what has been ſaid to it: I find in it no Affent of the Husband's found, nor any Authority he gave his Wife, but only Matter of Evidence. I confeſs that when a Wife, though not particularly appointed, contracts for Neceſſaries for herſelf, her Family, her Husband or her Children, this is great Evidence to a Jury to make them find the Affent of the Husband; for it cannot be reaſonably thought that any Man would be ſo barbarous as to deny his Affent to have the Neceſſities of his Family ſupplied; and ſo it may be believed and found he did Affent; but this is only in Caſe of Cohabitation; for it may be well imagined, that when a Wife leaves her Husband, that he may reſuſe to ſupply her; and ſo in the Verdict, this Matter of Evidence is answered by finding that ſhe departed from him; but then there is an Answer on the other Side, that ſhe afterwards, and before

before this Contract, desired to cohabit with him; to this it is replied again with a flat Bar to any Evidence that can be given of an Assent, viz. that the Husband did expressly prohibit those Tradesmen to trust her; the Judges in their Directions to a Jury direct them to be guided by such Evidence of an Assent, when nothing appears to the contrary; because it would be very hard in Point of Proof to shew express Evidence of Assent to every Particular; but when there is an express Prohibition or Denial of Assent, this takes off all Circumstances of Evidence on the other Side.

3. I am to shew in what Points we all agree, and where we differ.

1st, We all agree that it is not the Contract of the Wife's to bind her; for in our Law, she has no Will, nor Power to bind herself; the Civil Law as it allows her a Property distinct from the Husband's, so it gives her Power to bind herself by Contract.

2dly, It is agreed of all Hands the Wife ought to be maintained; the Civil Law, though it allows the Wife a separate Property, yet the Husband ought to maintain her out of her Dowry; it is more necessary for the Common Law, that takes away all Property from her, to make Provision for her Subsistence, else that which we pretend to be the most reasonable and provident Law in the World, would be the most barbarous; but in this we differ. It is said by those who argue that the Husband should be charged, that she may be maintained by a Power the Law gives her to charge her Husband by Way of Contract; which is altogether denied by us.

3dly, We all agree that when the Wife contracts for the Necessaries of her Husband, Children or Family, that this shall not charge him by any inherent Power in the Wife, but by a reasonable and implicate Assent, which must be found by a Jury; but we differ in the charging him; when she contracts for the Supply of her own Necessities, we say it is not by a Power she has, but there must be his Consent, either express or implied. Secondly, we confess, that in Case of Cohabitation, there is great Evidence of his Assent, till the contrary appears; but it is not so binding as will amount to a Presumption. Thirdly, Therefore we say it must be found by the Jury. Fourthly, That it is countermandable by Prohibition, where it is said on the other Side, and must be maintained, else they can make nothing of the Case, that there is in the Wife, upon the Intermarriage, an original inherent Primogenial, and uncountermandable Power to charge the Husband for her Necessities, which the Husband can no ways repeal, though there be no Cohabitation or Consent, but an express Prohibition; and this is the true State of the Question betwixt us; if there be such a Power in the Wife or no, independent upon any Consent of the Husband's; I shall consider,

1st, If there be such a Power during Cohabitation; 2dly, If for Necessaries; and here I shall make a second Question, If there be such a finding of Necessaries as is requisite in a Verdict; 3dly, If the Departure makes nothing in the Case; 4thly, Admitting all this, whether it be countermandable *quoad* one Man.

1st, I shall hold there is no such Power in the Wife; my Reasons are,

1st, By the Law of GOD, of Nature, of Reason, and by the Common Law, the Will of the Wife is subject to the Will of the Husband; and therefore an Indictment for being a Joint-Receiver with her Husband was held ill; but if the Law were with those who argue on the other Side, this would be inverted, and the Will of the Husband would be subject to the Will of the Wife.

2dly, Because no Man can be originally bound in a Contract, but by his own Consent.

3dly, To prove the Law on their Side lies upon them, which they have not, nor no ways can do, there being but one Semblance of an Authority they can alledge, which is 11 H. 6. which is the Opinion of Judge *Martin*, and must be intended by way of Evidence, but they say, they prove it by Reason and Inconvenience.

1. I answer, *Argumentum ab inconvenienti* will not change or alter the Law when it appears to be so; but it is only to prove and interpret the Law when we are in doubt whether it be so or no.

2dly, I answer, The Inconvenience of the other Side outweighs, and is far greater, for it will bring into the Law a manifold Uncertainty.

1. What Things are necessary, what kind of Necessity, and when, and how often this Necessity may happen; as if the Husband should give the Wife Cloaths, and she give them away the next Day, she is in as much Necessity the next Day as she was before, and *Quicquid necessitas cogit debetur*.

2dly, There would be great Uncertainty which Way she should supply her Necessities; as this Way, 1. Of taking up Goods, and if she can find no Credit with the Mercer, but has the Usurer for her Friend, then the Law sure that provides against her Necessities, will give her Leave to take up Money; and if that fails, it is reasonable that she should sell Goods; for the two other Ways failing, the Law will not let her perish; if there were no Goods, then it were as reasonable she might receive Rents, which would be against Sir *Paul Tracy* and *Dutton's Case*, Cro. Ja. and if there were none such, she might raise Money upon the Demise of the Land; if the Law will give Way to her Necessities in the first Case, it must yield in all the rest, for the Case may else be so that the Provision of Law would be defective; but I hold; that in none of these Cases the Wife can provide for her self; but say there must be a Trust somewhere; as a Father is bound by the Law of Nature to provide for his Son, and the Son is bound to provide for the Father, but the Law will not give the one Leave to oblige the other by way of Contract, because the Law supposes that they will not be so unnatural, and entrusts them with it, viz. before the 43 Eliz. for the Poor, if this Trust must be somewhere, the Husband knows best how to manage Affairs, and so is fitter to be entrusted by the Law, than any Body else: I add, that although the Law will not presume so much Ill, as that a Husband should not provide for his Wife's Necessities; yet there is a severe Obligation on him, not only to supply her in Case of Exigencies and extreme Necessity, but according to Conveniency; but the Law has not made her her own Judge, but provided her a Judicature sufficient to reform the Close-Handedness of her Husband; where she is driven to an extream Necessity and want of Subsistence, the Law has appointed a Judge to compel the Husband to supply her, I mean the Chancellor; for upon a *Supplicavit* he may be bound to the Peace, and *bene & honeste tractare*, which I hold not to be understood only, that he must use her gently, and forbear beating of her, but that he must supply her Exigencies; then for her Conveniencies the Law has appointed the Bishops Courts; and whereas it is said, that this is not the Common Law, I answer, that they are Jurisdictions appointed by the Common Law, and though their Coercion and Proceedings are after another Law, yet their Derivation, as to their Use here, was from the Common Law; and concerning the Amplitude of their Power, which is said not to be able to administer a Medicine sufficient for this Disease; I say, as it is aided by the *Brachium Seculare*, the Power of it falls as severely upon them that disobey it, as the Common Law can use when Men will not pay their Debts; for they may Excommunicate, and upon that follows Imprisonment, and a Disability to sue any Action.

The second Objection made on the other Side, by comparing the Case of a Feme Covert with the Case of an Infant; but I answer, an Infant is disabled only *Quoad hoc*, and may oblige himself for Necessaries; but

here

here the Wife would bind her Husband also; in the Case of an Infant there is no Body intrusted by the Law to provide for him (for Guardian in Socage is only where there is Land) immediately, and therefore he must do it himself, whereas the Husband is intrusted for the Wife; so the Cases are not parallel.

3dly, It is objected, that it comes to the Use of the Husband; I answer, it would then bind the Husband in Superfluities, which may so come to his Use; which how inconvenient, I leave any Man to judge.

4thly, It is objected, that the Husband is bound by the Wrongs of his Wife, and may be charged in Trover and Conversion upon her Act; I say, that in Case of a Wrong she binds her self, for she must be joined in the Action, and so she will be more careful not to subject her self, than when the Husband is charged alone; but I hold, that in this Case no Trover and Conversion lies; for the Delivery of the Party, knowing the Fact, and intending a Sale and Contract, translates the Property at the Peril of him that delivers them. If a Man knows one to be an Infant, and sells him Goods, it is at his Peril, for if they be not Necessaries he shall never charge the Infant for the Conversion; and so of a Feme Covert, if there be no Consent of the Husband; for it has been held, that what the Wife eats or wears comes to the Use of the Husband, and will maintain a Conversion; and if the Law should not be taken thus, we should let in a Flood of Inconveniencies, which would make all those Disabilities the Law has raised for the Protection of Infants and Feme Coverts, meer Words and of no Effect.

2dly, I shall lay no Strefs upon the imperfect finding of the Verdict, lest it might be said that that was the Reason of the Judgment, but only name some Particulars, wherein it seems to be imperfect.

1. They should have found what the Stuffs were; for it has been adjudged that Velvets were not necessary for an Infant; they ought to have found the Circumstances of the Necessity; as where Manslaughter is committed *se defendendo*, or in Execution of an Office; they should have set forth of what Kind the Necessity was, as there is a Necessity of Cloaths, of Meat, of Medicine, and of Habitation; they have found that these Goods were necessary and convenient for his Degree, they should have said also for his Estate; for a high Degree may have a low Estate, and then the Wife cannot expect to be maintained according to the Height of her Husband's Degree; but I lay no hold on these Defects in the Verdict.

3dly, Upon her Departure all Evidence of any Obligation of the Husband to maintain her ceases; it would else be very unreasonable, for whilst they are both in one House, the same Provision will serve for both; in Case of a Bailiff, if he goes away no Contract of his will bind the Master, though he had no express Discharge; and here we must presume some unreasonable Cause of her Departure, for a Wife in no Case ought to do it, and she might have had Alimony without any Separation. *Mo. 874.*

4thly, Admitting all this, I hold that the Prohibition here takes away all Presumption of any Consent of the Husband to the Contract, either express or implied, and though the Wife should be allowed such a Power to charge her Husband, as is affirmed on the other Side, yet it may be discharged as to one particular Man, by the Prohibition and Countermand of the Husband; it would be a very hard Case else, for she may make him liable to the greatest Enemy he had in the World. *12 E. 4. 18.* The King may grant to *7. S.* to be exempt of Juries; but if he grants it to a whole County, Hundred or Township, the Grant is void; and by this Prohibition of the Husband here is no Discharge of the whole Power, but only it is taken of those particular Persons. If a Man enters into an Obligation not to use his Trade, it is against Law, and void, but if it be not to set up his Trade in such a Street or Town, it is good.

*Note;*

*Note* ; He added, that as to the charging the Husband by way of Evidence, which he had restrained to Cohabitation, he said, the Law is the same where the Husband departs from the Wife ; as upon going beyond Sea, &c.

But if a Woman takes up Goods and Pawns them before they are made into Cloaths, the Husband shall not pay for them, because they never came to his Use ; *secus* if made up and worn, and then pawned. 1 *Salk.* 118. If she pawns her Cloaths, and borrows Money to redeem them, Husband not liable. 2 *Show.* 283. If Husband and Wife by Agreement live separate, and she has a separate Maintenance, it will be presumed that those who deal with her Trust her on her own Credit. 1 *Salk.* 116. *Vide Skin.* 348. Warning a Tradesman's Servant not to Trust her, sufficient Warning to the Master. 1 *Salk.* 118. A Tradesman who sold Lace and Silver Fringes for a Petticoat and Side-Saddle, which amounted to 94 *l.* and all within four Months, to the Wife of a Serjeant at Law, formerly a Judge ; recovered against him. *Skin.* 349.

1 *Salk.* 118. Ruled on Evidence. An ordinary working Man married a Woman of the like Condition, and after Cohabitation for some Time, the Husband left her, and during his Absence, the Wife worked ; and this Action being brought for her Diet, it was held, that the Money she earned should go to keep her.

1 *Vern.* 71. Where a Person who lent a Feme Covert Money, which was actually laid out in Necessaries, was allowed to stand in the Place of the Tradesmen, and to have Satisfaction, as far as they could, if they had been Plaintiffs. *Preced. in Chan.* 502, 503. Where Equity will decree a Wife a separate Maintenance, *vide Abr. Eq.* 68.

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### (I) What Acts done by the Husband and Wife alone, or jointly with the Wife, will bind the Wife, and therein of her Agreement or Disagreement to such Acts after the Death of her Husband.

1 *Rol. Abr.* 346, 347. 2 *Inft.* 510. 10 *Co.* 42. 1 *Sid.* 11. THE Husband, as Head and Governor of the Family, has an absolute Power over the Chattels Real and Personal which he is possessed of in Right of his Wife, to dispose of them as he thinks proper, and no Act or Concurrence of hers is of any Avail, either in confirming or controuling such Disposition ; but the Real Estate is under a different Regulation, and not under the Power of the Husband, longer than during the Coverture ; and therefore any Disposition of it made by him alone may be defeated, also all Charges laid on it by him, fall off with his Death.

At Common Law, any Alienation made by the Husband of the Wife's Land, whether by Feoffment, (a) Fine or (b) Recovery, was a Discontinuance, and after his Death she was put to her *Cui in vita*, to reinstate her self; but now by the Statute of 32 H. 8. cap. 28. it is provided, *That no Fine levied by the Husband alone, of Lands, being the Freehold and Inheritance of the Wife, shall in any wise be or make a Discontinuance, or be otherwise prejudicial to her or her Heirs, but that the Wife and her Heirs shall and may lawfully enter into the said Lands, according to their Rights and Titles therein.*

Entry is taken away, and her Right for ever extinguished; for this *vide Co. Lit. 326. Plead. 573. 8 Co. 72. 2 Inst. 681. 9 Co. 140.* If Lands be given to Husband and Wife, and the Heirs of their Bodies, and the Husband alone levies a Fine thereof, the Wife may enter after his Death by Force of this Statute. *9 Co. 138. 2 Inst. 681. Cro. Car. 477.* (b) That a Recovery suffered by the Husband alone is void, *vide F. N. B. 468. Booth 185. 2 Inst. 343. Plead. 57.*

If a Feme Covert levies a Fine of her own Inheritance without her Husband, this shall bind her and her Heirs, because they are estopped to claim any Thing in the Land, and cannot be admitted to say she was Covert against the Record; but the Husband may enter and defeat it, either during the Coverture, to restore him to the Freehold he held *jure Uxoris*, or after her Death, to restore himself to his Tenancy by the Courtesy, because no Act of a Feme Covert can transfer that Interest which the Intermarriage has vested in the Husband; and if the Husband avoids it during the Coverture, the Wife or her Heirs shall never after be bound by it.

the Husband and Wife, he may stop the Execution, because no Act of hers can prejudice him; and if in this Case the Husband makes Default, and she be received, she may for the Benefit of her Husband disturb the Execution of her own Fine; but after the Death of her Husband she cannot avoid it. *Bro. Tit. Fine 79. Co. Reading 9.*

If a Husband and Wife join in a Fine to convey her own Inheritance, it ought to be received, if upon her (c) Examination it appears to be voluntary and free from Constraint, and if she be of full Age, the Fine shall bind her as if she had been Sole.

(c) Note; The Books which say, that a Fine shall not bind a Woman under Coverture, unless she be examined, must not be construed as if it were in her Power to reverse the Fine for want of her Examination; but they are to be understood in this Sense, that the Judge ought not to receive a Fine without examining her. *2 Inst. 515.*

The Examination of a Feme Covert is not always necessary in levying of Fines, because that being provided that she may not at the Instance of her Husband make any unwary Disposition of her Property, it follows, that when the Husband and Wife do take an Estate by the Fine, and part with nothing, the Feme need not be examined; but where she is to convey or pass any Estate or Interest, either by herself or jointly with her Husband, there she ought to be examined; therefore if *A.* levies a Fine *come eeo* to Baron and Feme, and they render to the Conuzor, the Feme shall be examined; so it is where she takes an Estate by the Fine, rendring Rent.

If Husband and Wife levy a Fine, and the Wife is within Age, they may join in a Writ of Error to reverse it during the Minority of the Wife, not by any Privilege of Coverture, but because during her State of Infancy, no Act of hers can be so Obligatory as not be cancelled, if she thinks it prejudicial to her.

If a Man makes a Jointure on his Wife, either before or after Marriage, and they both join in a Fine, she is bound thereby; and if the Jointure was made before Marriage, she is barred to claim Dower in any other Lands of the Husband's; but if the Jointure was made during Coverture, she may claim Dower in the other Lands.

2 Sand. 177. If Baron and Feme by Fine *sur concessit* grant Land to *J. S.* for 99  
 1 Sid. 466. Years, and warrant the said Land to *J. S.* during the said Term, and the  
 S. C. Baron dies, and *J. S.* is evicted by one that hath a prior Title, he may  
 1 Mod. 290. thereupon bring Covenant against the Feme, notwithstanding she was  
 2 Keb. 684, threupon bring Covenant against the Feme, notwithstanding she was  
 703. covert at the Time when the Fine was levied.

A Recovery, as well as a Fine by a Feme Covert, is good to bar her,  
 because the *Præcipe* in the Recovery answers the Writ of Covenant in  
 the Fine, to bring her into Court, where the Examination of the Judges  
 destroys the Presumption of Law, that this is done by the Coercion of  
 her Husband, for then it is to be presumed they would have refused  
 her.

2 Inst. 673. But if a Wife alone, or with her Husband, bargain and sell her Lands  
 Hob. 225. by Deed indented and inrolled, yet it shall not bind her, for a Wife  
 cannot be examined by any Court without Writ, and there is no Writ  
 allowed in this Case.

But where If a Feme Covert joins with her Husband in levying a Fine to raise a  
 the Money Sum of Money by way of Mortgage, this shall bind her.  
 shall be paid

out of the Personal Estate of the Husband, *vide* 2 Vern. 436, 689. 1 Vern. 41, 213. But for this *vide*  
 Head of Mortgages; where she shall be bound to a Specifick Performance of her Agreements in  
 Equity, *vide* Title Agreements, and 2 Vern. 61.

1 Rol. Abr. If a Husband disseise another to the Use of his Wife, this does not  
 660. make her a Disseisorcs, she having no Will of her own, nor will any  
 Bro. Disseisin Agreement of hers to the Disseisin during the Coverture, make her  
 67. guilty of the *Disseisin* for the same Reason; but her Agreement after  
 her Husband's Death will make her a Disseisorefs, because then she is ca-  
 pable of giving her Consent, and that makes her Tenant of the Free-  
 hold, and so subject to the Remedy of the Disseisee.

1 Rol. Abr. So if a Man disseises another to the Use of a Feme Covert, her Agree-  
 660. ment to it signifies nothing, though the Husband's Agreement to it set-  
 Bro. Disseisin tles the Estate in the Wife, yet it makes her no Sharer in the Guilt of  
 67. the Disseisin.

Co. Lit. 357. But if a Feme Covert actually enters and commits a Disseisin, either  
 1 Rol. Abr. solely or together with her Husband, then she is a Disseisoreis, because  
 660. she thereby gains a wrongful Possession, but yet such actual Entry can-  
 Bro. Disseisin not be to the Use of her Husband or a Stranger, so as to make them  
 15. 67. Disseisors, because though by such Entry she gains an Estate, yet she has  
 Vide 8 H. 6. no Power of transferring it to another.  
 14. cont.

Bro. Accept- If the Husband seised of Lands in Right of his Wife, makes a Lease  
 ance 10. thereof for Years by Indenture or Deed Poll, reserving Rent; all the  
 Bro. Leases 24. Books agree this to be a good Lease for the whole Term, unless the  
 Cro. Jac. 332. Wife by some Act after the Husband's Death, shews her Dissent thereto,  
 2 And. 42. for if she accepts Rent which becomes due after his Death, the Lease is  
 Co. Lit. 45. thereby become absolute and unavoidable; the Reason whereof is, that  
 Plow. 137. the Wife after her Intermarriage being by Law disabled to Contract for,  
 Cro. Jac. 563. or make any Disposition of her own Possessions, as having subjected her-  
 Yelv. 1. self and her whole Will to the Will and Power of her Husband; the  
 Cro. Eliz. 769. Law thereupon transfers the Power of Dealing and Contracting for her  
 Possessions to the Husband, because no other can then intermeddle there-  
 with, and without such Power in the Husband they would be obliged to  
 keep them in their own Manurance or Occupation, which might be great-  
 ly to the Prejudice of both; but to prevent the Husband's Abusing such  
 Power, and lest he should make Leases to the Prejudice of his Wife's In-  
 heritance, the Law has left her at Liberty after his Death, either to af-  
 firm and make good such Lease, or to defeat and avoid it, as she finds  
 it subservient to her own Interest; and this she may do, though she joined  
 in such Lease, unless made pursuant to the Statute 32 H. 8. cap. 28.

As to Leases  
 made by  
 Husband and  
 Wife, either  
 at Common  
 Law, or by  
 Virtue of 32  
 H. 8. *vide*  
 Head of  
 Leases.

Husband and Wife made a Lease for Years, by Indenture, of the Wife's Lands, reserving Rent; the Lessee enters, the Husband before any Day of Payment dies, the Wife takes a second Husband, and he at the Day accepts the Rent, and dies; and it was held, that the Wife could not now avoid the Lease, for by her second Marriage she transferred her Power of avoiding it to her Husband, and his Acceptance of the Rent binds her, as her own Act before such Marriage would have done, for he by the Marriage succeeded into the Power and Place of the Wife; and what she might have done either as to affirming or avoiding such Lease before Marriage, the same may the Husband do after the Marriage.

The Husband being seised of Copyhold Lands in Right of his Wife in Fee, makes thereof a Lease for Years not warranted by the Custom, which is a Forfeiture of her Estate, yet this shall not bind the Wife or her Heirs after the Husband's Death, but that they may enter and avoid the Lease, and thereby purge the Forfeiture; and the Diversity seems between this Act, which is at an End when the Lease is expired or defeated by the Entry of the Lord, or the Wife after the Husband's Death, and such Acts as are a continuing Detriment to the Inheritance, as wilful Waste by the Husband, which tends to the Destruction of the Manor; so of Non-payment of Rent, Denial of Suit or Service; for such Forfeitures as these bind the Inheritance of the Wife after the Husband's Death; but in the other Case the Husband cannot forfeit by this Lease more than he can grant, which is but for his own Life.

A Woman Guardian in Socage marries, and joins with her Husband by Indenture in making a Lease for Years of the Ward's Lands, yet after her Husband's Death she may avoid the same; for though the Husband has absolute Power to dispose of all Chattels, either Real or Personal, whereof he is possessed in Right of his Wife, and the Wardship of the Body, and Land in this Case is but a Chattel, yet the Wife being possessed of it in Right of the Infant, and accountable to him for the Profits when he comes of Age, the Husband's Disposition shall not bind her after his Death, but that she may avoid it in Right of the Infant, whose Guardian she still continues to be; and her own Joining in the Lease was not material, because she was then under Coverture.

A Feme Covert is capable of Purchasing, for such an Act does not make the Property of the Husband liable to any Disadvantage, and the Husband is supposed to assent to this, as being for his Advantage, but the Husband may disagree; and it shall avoid the Purchase; but if he neither agrees nor disagrees, the Purchase is good, for his Conduct shall be esteemed a tacit Consent, since it is to turn to his Advantage; but in this Case, though the Husband should agree to the Purchase, yet after his Death she may waive it, for having no Will of her own at the Time of the Purchase, she is not indispensibly bound by the Contract; therefore if she does not, when under her own Management and Will, by some Act express her Agreement to such Purchase, her Heirs shall have the Privilege of departing from it.

## (K) Where the Husband and Wife must join in bringing Actions.

<sup>1</sup> *Rol. Abr.* 347. *Moor* 432. That a Feme Covert can in no Case sue without her Husband, *vide* Letter (M).

**I**N those Cases where the Debt or Cause of Action will survive to the Wife, the Husband and Wife are regularly to join in the Action; as in recovering Debts due to the Wife before Marriage, in Actions relating to her Freehold or Inheritance, or Injuries done to the Person of the Wife.

*Cro. Eliz.* 439. *Owen* 82. S. P. *Moor* 584. S. C. But if a Feme Sole hath a Rent-charge, and Rent is Arrear, and she marries, and the Baron distrains for this Rent, and thereupon a Rescous is made, this is a Tort to the Baron himself, and he may have an Action (a) alone.

(a) Or may join his Wife therein, because it arises upon a Duty due unto her before Coverture. *Cro. Eliz.* 459. *per Cur.*

<sup>2</sup> *Bulst.* 14. adjudged. (b) The Baron seised of a House for Life, and in the Right of his Feme, leased for Years to the Defendant, who burnt the House, and the Baron alone brought an Action for this; and whether it lay *dubitatur*; because the Damage was done to the Estate of the Feme; and if she dies, the Baron is not chargeable over in Waste, in regard of which only any Action lies; because it was the Folly of the Plaintiff that he made no special Provision against Waste. *Cro. Eliz.* 461. — If A. demises a House to B. for Years, and B. covenants to repair the said House, during the Term, and after A. grants the Reversion to Baron and Feme, &c. the Baron may have an Action alone upon this Covenant; for therein Damages only are to be recovered. *Cro. Jac.* 319. adjudged. *3 Bulst.* 163. *1 Rol. Rep.* 359. S. C. adjudged.

So if a Feme Sole hath Right to have Common for Life, and she takes Husband, and he is hindred in taking the Common, he may have an Action alone without his Wife, (b) it being only to recover Damages.

<sup>1</sup> *Bulst.* 21. They must join in *De- rive* for Charters concerning the Wife's Inheritance. *38 H.* 6. 4. *1 Rol. Abr.* 347. So in *Trower* for a Deed by which a Rent-charge was granted to her *dum sola*, though it came to the Hands of the Defendant after Coverture. *Noy* 70. For Rent due to her before Coverture as Tenant in *Dower*. *1 Rol. Abr.* 318. 348. *Vide* *1 Bulst.* 135, 136. *Cro. Jac.* 283. and *Quare* if since *32 H.* 8. c. 37. there is any Difference where the Avowry is made for Rent due before, and where after Marriage. — Whether the Husband alone may bring a *Quare Impedit*, *vide* *Co. Lit.* 351. a. *Owen* 82. *Lit.* 13, 375. *Winch* 73. *2 Bulst.* 14. *Jenk* 2, 3. *1 Bulst.* 110.

*Cro. Eliz.* 608. *15 Co.* 47. S. C. *Moor* 912. S. C. *2 Inst.* 650. S. C. cited. If the Baron be possessed of a Rectory for Years, in the Right of his Feme, he and his Feme may join in an Action upon the *2 Ed.* 6. for not setting forth of Tithes; for the Possession of the Baron is in the Right of the Feme, and the Action is given by the Statute to the Proprietor.

*2 Med.* 276. S. C. cited. *Jenk. Reb.* 273. S. C. said to be adjudged that the Baron might have the Action alone. *Vide* *1 Brownl.* 9. *1 Jones* 325. — If a Stranger cuts Trees upon the Land of the Feme, they may join. *15 E.* 4. 9. b. *Lit. Rep.* 285. *Yelv.* 375. S. P. *cont. arguendo*. — So they may join in *Trespas Quare clausum fregit*.

<sup>1</sup> *Bulst.* 110. <sup>2</sup> *Ver.* 197. *Cro. Car.* 419. adjudged. *2 Med.* 217. S. C. cited. *arguendo*, as if adjudged that she must join. *1 Jones* 367. S. C. but S. P. does not appear. (c) For, inclosing twenty Acres of Waste, in

because  
which

because the Wrong was done to the Feme, and the (a) Baron had the which the Clofe in her Right. Feme had Common,

*ita quod* they could not, as before, take the Profits with their Cattle, &c. and because a Feme Covert cannot have Cattle, *Lit. Rep.* 284, 285. the Court inclined for the Defendant; but it does not appear what Judgment was given. (a) So in an Action for not grinding at the Wife's Mill. *Hob.* 189. — So where the Feme had Right to all the Lop of certain Trees during Life, and the Owner cut them down. *Cro. Car.* 437. adjudged, 1 *Jones* 376. in which last Book it is said the Exception was, That the Action was brought by the Baron alone, and yet adjudged for him.

If *A.* declares that he was seised, in Right of his Wife, of a Messuage, 2 *Mod.* 269. Bake-house, &c. and that the Defendant erected two Houses of Office *Frosdick* and so near the said Bake-house, which foundred the Walls thereof, and by *Sterling*, ad- which the Air was so unwholesome that he lost his Custom, &c. the Ac- judged; and tion lies for the Husband alone. that the Cafes *Cro. Car.* 419.

1 *Jones* 367. *Lit. Rep.* 284. *Hob.* 189. warrant no more than that the Wife might be joined, nor that of Necessity she must.

If *A.* leases to *B.* for Years, rendring Rent, and after grants his Re- 2 *Bulst.* 233. version to Baron and Feme, and *B.* attorns, and then Rent is Arrear, 1 *Rol. Rep.* and the Term expires, the Baron may bring an Action alone for this 52. S. C. ad- Rent, because this Action is grounded upon the Duty, and not upon the judged. Nature of their Estate; and the Money must come to the Baron; and there is no Difference where Baron and Feme are (b) Joint-Lessors, and (b) And then where (c) Joint-Purchasers. it was never questioned

but the Baron might bring the Action alone; but when brought by both it hath been doubted. 1 *Bulst.* 21. *per Yelw.* and *vide Lit. Rep.* 13. *Palm.* 207. (c) But in that Case 2 *Bulst.* 234. *per Dod.* he must bring the Action generally, and not shew himself to be Assignee; but yet 1 *Rol. Rep.* 52. it appears the Action was so brought; and yet held *per Cur'* to be only *Surplussage*.

But if *A.* conveys Lands to *B.* in Fee, and covenants with him, his 1 *Rol. Abr.* Heirs and Assigns to make further Assurances, and these Lands are af- 348. signed to *J. S.* and his Wife, and the Heirs of *J. S.* they must both *Cro. Car.* 503, join in an Action on the Covenant for further Assurances. 505. 1 *Jones* 406, 407. S. C.

adjudged, *vide* 3 *Bulst.* 164. 1 *Rol. Rep.* 300. *Cro. Jac.* 319.

But if a Bond is made to a Feme Covert, during Coverture, condi- 3 *Lev.* 403. tioned to pay Money to the Feme, the Baron (d) alone may bring an adjudged Action upon this Bond. upon a De- murrer to

the Declaration; and a Case was cited by *Powel*, where upon a Judgment obtained by Baron and Feme, the Baron only sued a *Scire facias* for the Damages and Coists, and had Judgment. (d) If a Bond be entred into to Baron and Feme, the Baron may sue it alone, and thereby he shews his Dissent to his Wife's taking any Thing by it. *Vide* 2 *Mod.* 217. *Cro. Car.* 285, 443. *All.* 37. *Bro. Baron and Feme* 55. *Lit. Rep.* 13. *Stil.* 9.

If *A.* in Consideration that *B.* a Feme Covert, will cure a certain *Cro. Jac.* 77, Wound, assumes and Promises to *B.* to pay unto her 10*l.* if *B.* does 205. cure it accordingly, she may join with her Husband in an *Assumpsit* for Adjudg'd and this Money, (e) for this Promise arising upon a Matter of Skill and affirmed in Performance of the Wife, she is the Cause of the Action; and such an *Cam. Seacc.* Action will survive to the Wife. 1 *Sid.* 25. S. C. cited to be ad-

judged that they ought to join. 2 *Sid.* 128. like Point; and *per Glyn Ch. Just.* it may be in the Name of both, or of the Husband alone. (e) But whatever the Consideration be, where there is an express Promise made to the Wife, she may join. *Cro. Eliz.* 61. — But without an express Promise the Action does not lie; for the Fruit and Labour of the Wife belongs to the Husband; for which he only shall bring the Action. 1 *Silk.* 114. 4 *Mod.* 156. S. C. and S. P. *Carth.* 251. *Allen* 3, 6. *Stile* 9.

If *A.* in Consideration that Baron and Feme had intermarried at his Request, assumes and promises to them to pay unto the Feme *8l. per Ann.* during the Coverture, &c. notwithstanding the whole Benefit redounds to the Husband, yet in an Action thereupon they (*a*) may join, *a fortiori*, because it is an Executory Promise, and hath Continuance, and is not to be done *unica vice* only.

(*a*) Or the Baron may bring the Action alone *Allen 36.*

It seems clearly agreed, that for Debts (*b*) due to the Wife, and all Causes of Action before Coverture, the Husband must join in the Action.

1 *Rol. Abr.* 347.  
*Mo.* 422. S.P. laid down as a Rule. *Owen* 52. *Lit. Rep.* 13. 1 *Keb.* 440. The Husband alone cannot bring an *Indebitat' Assumpsit*, or an *Insimul Computasset*, for a Debt due to the Wife herself before Coverture, much less when it is due to her as Executrix or Administratrix. 1 *Sid.* 299. 2 *Keb.* 89. (*b*) In Consideration that *A.* will marry his Daughter, *B.* assumes to give her as much as he gives any other of his Daughters, &c. and because this Promise was made before Marriage, whether the Baron and Feme must not join in an Action thereupon, *dubatur.* 1 *Sid.* 25.

In an Action upon a *Trover* before Marriage, and a *Conversion* after, the Baron and Feme ought to join, for this Action, as a *Trespas*, disaffirms the Property; but the Baron ought alone to bring a *Replevin*, *Detinue*, &c. for these Actions admit and affirm a Property in the Feme at the Time of the Marriage, which by Consequence must have vested in the Baron.

1 *Sid.* 172.  
 1 *Keb.* 641.  
 S. C.  
 1 *Vent.* 261.  
 2 *Lev.* 107.  
 S. P. and that he may join the Wife at his Election.

But if *A.* declares that the Defendant being indebted to him and his Wife, as Executrix to one *J. S.* in Consideration that *A.* would forbear to sue him for three Months assumed, &c. and avers that he forbore, and that his Wife is still alive, the Action is well maintainable by the Husband alone, for this on a new Contract, to which the Wife is a Stranger.

*Caith.* 462.  
 and *Ellard*, ad judged.  
 1 *Salk.* 117.  
 S. C. ad-judged.  
*Yelv.* 84.  
*Cro. Jac.* 110. S. P. adjudged, whether such a Recovery will be direct Assets, or a *Devastavit* for so much, *vide* Head of *Executors* and *Administrators*.

For a Battery or other Personal Tort done to the Wife, they (*c*) must join, and if the Wife dies, the Action dies with her.

1 *Rol. Rep.* 360.  
*Lit. Rep.* 285.  
 1 *Brownl.* 205. *Noy* 18.—Not for Personal or other Wrongs done to them both, unless where they have a joint Interest, and they have Wrong in Respect thereof. *March* 47. *Cro. Car.* 553. 1 *Jones* 440.  
 2 *Rol. Rep.* 51. *Cro. Jac.* 355. 1 *Rol. Rep.* 108. 2 *Mod.* 66. 1 *Vent.* 328. 2 *Vent.* 29. *Hard.* 166. *Stile* 128. *Cro. Car.* 175. 1 *Lev.* 3. 2 *Lev.* 20. (*c*) And the Judgment must be that the Baron and Feme shall recover, notwithstanding the Baron only is to have the Damages. *Godb.* 369.

But the Baron (*d*) may bring an Action alone for the Battery, Carrying away and Detaining of his Wife, *per quod solamen & consortium* of his said Wife *amisit*, because the Action is founded upon the Special Damage done to himself, and will be no Bar to another Action brought by Baron and Feme, or by the Feme after the Death of the Baron, for the same Battery.

*Cro. Car.* 89, 90. adjudg'd and affirm'd in *Cam Scacc.*  
*Cro. Jac.* 538.  
 S. P. ad-judged.  
 2 *Rol. Abr.* 556. 1 *Jones* 440. *Lit. Rep.* 339. 2 *Rol. Rep.* 51. S. P. adjudged. (*d*) Where an Action is brought for Words spoke of, or other Tort done to the Wife, and founded upon the Special Damage of the Husband, she must not join. 1 *Sid.* 346. 1 *Lev.* 140.

In *Trespas* by Baron and Feme, they declared for a Battery of the Feme, & *quod* the Defendant *alia enormia eis intulit*; and though objected, the Feme cannot join for a Wrong done to the Baron, yet because the *alia enormia*, &c. was but Form, and only in Aggravation of Damages, and altered not the Substance of the Declaration, it was adjudged for the Plaintiffs.

*Cro. Jac.* 664.  
 Adjudged after Verdict, and affirmed in *Error.*  
*Vide Stile* 236.  
 1 *Sid.* 225.  
*Stile* 202.

So in Trespass and False Imprisonment by Baron and Feme, *per quod negotia domestica* of the Husband *remanserunt infecta ad grave damnum ipsorum*; and it was objected that this being laid as a Special Damage to the Husband, the Action ought to have been brought by him alone, but adjudged for the Plaintiffs after Verdict, being only Matter in Aggravation of Damages.

1 Salk. 119.  
Russel and  
Corne.

In (a) Trespass by Baron and Feme for (b) beating the Feme, they may declare that it was (c) *ad damnum ipsorum*, (d) notwithstanding a Feme Covert can have no Damages, for this Action will Survive.

(a) 1 Sid. 387.  
Adjudged;  
and said per  
Cur' it could  
not be other-

wife. 2 Keb. 454. S. C. Palm. 339. 3 Mod. 120. So in Debt upon a Bond made to the Feme *dum sola*; for the Nonpayment to her *dum sola* was to her Damage, as the Nonpayment since is to the Damage of the Baron. Stile 134. adjudged, and said it is the usual Way of Declaring in such Case. (b) So for Words spoke of the Feme. March 212. (c) Vide Cro. Jac. 473, 644. Stile 155. 2 Keb. 387. (d) But where she joins with her Baron, they both shall have Judgment to recover. Jenk. 28.

But if in *Trover* by Baron and Feme, they declare *quod cum possessionat fuerunt*, &c. and that the Defendant converted, *ad damnum ipsorum*, this is naught after Verdict; for the Possession of the Wife is the Possession of her Husband, and so is the Property; so that the Conversion cannot be to the Damage of the Wife, but of the Husband only.

1 Salk. 114.  
Nethrop and  
Ux' vert.  
Anderson.

(L) Where they must be jointly sued.

THE Husband is by Law answerable for all Actions for which his Wife stood attached at the Time of the Coverture; and also for all her Torts and Trespasses during Coverture, in which Cases the Action must be joint against them both; (c) for if she alone were sued, it might be a Means of making the Husband's Property liable, without giving him an Opportunity of defending himself.

Co. Lit. 133.  
Dr. Plit. 3.  
2 H. 6. 4.  
Vide infra  
Letter (M).  
(c) And  
therefore if  
a Man re-

covers against a Feme Covert as Sole, the Husband may avoid it by Writ of Error, and may come in at any Time and plead it; but for this vide 17 Aff. Pl. 17. Stile 254, 280. 2 Rel. Rep. 53. 22 H. 6. 31. and Tit. Error and Abatement.

If Goods come to a Feme Covert by *Trover*, the Action may be brought against the Husband and Wife, but the Conversion must be laid only in the Husband, because the Wife cannot convert Goods to her own Use; and the Action is brought against both, because both were concerned in the Trespass of taking them.

For this vide  
Co. Lit. 351.  
1 Rol. Abr. 6.  
Pl. 7.  
Yelv. 166.  
Noy 79.  
1 Leon. 312.

Cro. Car. 494, 254. 1 Rol. Abr. 348. Where it was laid *quod ad usum proprium*, or *ad usum suum converterunt*; for this must be intended to the Use of both, and not of the Husband only. 1 Vent. 33. In Debt upon a *Devastavit* against Baron and Feme Executrix, it shall not be laid *quod devastaverunt*; for a Feme Covert cannot Waste. 2 Lev. 145.

An Action on the Case was brought against Baron and Feme, for retaining and keeping the Servant of the Plaintiff, and Judgment accordingly.

2 Lev. 63.  
And note,  
by the Re-  
porter no

Notice was taken that a Feme Covert may not make a Retainer or Contract; but perhaps the receiving and keeping the Servant without any Contract is a Trespass of which a Feme Covert may be Guilty.

If a Lease for Life or Years be made to Baron and Feme, reserving Rent, (f) an Action of Debt for Rent Arrear may be brought against both, for this is for the Advantage of the Wife.

17 E. 4. 7.  
2 H. 4. 19. b.  
3 H. 4. 1.  
1 Rol. Abr.

348. (f) But an *Assumpsit* lies not against Baron and Feme on a Promise made by the Wife, during Coverture; for *quoad* the Wife, it is void. Palm. 313. But if a Feme Covert takes up Goods from a Tradesman, affirming herself to be a Feme Sole, *Quare* if this be not such an injurious Take as will subject the Husband and Wife to an Action, though neither can be charged on the Contract.

If

For this *vide* If an Action be brought against the Husband and Wife, and the Wife  
 1 *Salk.* 114. be arrested, she shall be discharged upon Common Bail; for no Body can  
*Comb.* 355. be supposed to undertake for a Wife who hath no Property of her own.  
 6 *Mod.* 17,  
 105. and *Title Bail.* How she may reverse an Outlawry, *vide Tit. Outlawry.*

### (M) In what Cases a Feme Covert is considered as a Feme Sole.

*Ero. Baron* A Husband who has abjured the Realm, or who is Banished, is there-  
 and *Feme* 66. by *civiliter mortuus*; and being disabled to sue or be sued in Right  
*Co. Lit.* 133. of his Wife, she must be considered as a Feme Sole; for it would be un-  
 a. reasonable that she should be Remediless on her Part, and equally (a)  
 1 *Roll. Rep.* 400. hard on those who had any Demands on her, that not being able to have  
*Moor* 851. any Redress from the Husband, they should not have any against her.  
 3 *Bull.* 188.  
 1 *Bull.* 140. 2 *Vern* 104. (a) In *Assumpsit* the Defendant proved that she was married, and her  
 Husband alive in *France*; the Plaintiff had Judgment, upon which as a Verdict against Evidence, she  
 moved for a new Trial, but it was denied; for it shall be intended that she was divorced; besides,  
 the Husband is an Alien Enemy; and in that Case, why is not his Wife chargeable as a Feme Sole?  
 1 *Salk.* 116. *Deerly* vers. *Dutchess of Mazarine*, *Comb.* 402. S. C. and *Quare* whether a Wife, who  
 by Agreement lives separate from her Husband, and who has a Separate Maintenance; and also a  
 Woman divorced *a mensa & thoro*, may not be sued without the Husband; and *vide* 1 *Vern.* 326.  
 how far Equity will interpose in Behalf of such Creditors.

But for this By the Custom of *London*, if a Feme Covert trades by herself in a  
*vide Title* Trade with which her Husband does not intermeddle, she may sue and  
*Customs of* be sued as a (b) Feme Sole.  
*London*, and  
 1 *Leon.* 131. *Lit. Rep.* 31. *Heth.* 9. 2 *Brownl.* 218. 1 *Mod.* 26. 1 *Show.* 183. (b) Where she may exe-  
 cute a Power without her Husband, *vide Head of Power.*

## Bastardy.

**A**LL well regulated Governments have laid down and settled certain Rules of Propagation, as necessary to the very Being of human Society. Hence the Solemnity of Marriage was established, not only as it prevents Lewdness, but as a Regulation, without which there would be no Distinction of Families, and consequently no Encouragement for Industry, or Foundation for acquiring Riches; the Children therefore that are born in these Societies, and are to enjoy any Privileges by the Laws, must be such as are born according to their Rules of Copulation; for it is absurd that the Laws should give Sanction and Privilege to Things done contrary to the Law, since that would take away the Distinction of Right and Wrong, Lawful and Unlawful; and therefore Bastards by our Law, lie under several (a) Disabilities.

In ancient Days Bastardy was so Disgraceful, that to retain a Bastard in a Man's House was a Reflection, and the Stain and Reproach of the Parents Crime dwelt always upon the Issue;

so that he could not be admitted to a Feudal Service; and therefore when the Bishops requested that our Law should be changed in the Particular of Bastard *Eignes*, the Statute says that all the Barons and Earls answer'd *una vo e nolumus leges Anglie mutare. Merton 9. 2 Inst. 93.* (a) He is *quasi nullius filius*, and can be Heir to no Man. *Dof. & Stud. Dial. 1. cap. 7. 1 Inst. 143.* but though he cannot inherit any Ancestor, yet when he hath gotten a Name of Reputation, he may purchase by it; for all Surnames were originally acquired by Reputation. *George Shelly* conveyed Lands to the Use of himself, the Remainder to *George Shelly* his Son; whereas in Truth *George* was born of one *B.* in Matrimony of one *C.* yet was reputed the Son of *George*, and educated by him; though the Boy was but six Years old, it was ruled that he should take the Remainder; for having got by Reputation the Name of *George Shelly*, these Words are a certain Designation of the Person to take the Remainder. But if a Remainder be limited to the eldest Issue of *F. S.* whether Legitimate or Illegitimate, *F. S.* hath Issue a Bastard, he shall not take this Remainder; for it is not vested in *F. S.* as it was in the other Case, but is in Contingency, and the certain Time is not defined when this Contingency shall happen; for the Bastard at his Birth does not acquire the Reputation of being the Issue of *F. S.* and since the Bastard, when first in Being, cannot take by Virtue of this Limitation, he can never take it; for he cannot be understood to be the Person designed and marked out by these Words, if after his Birth it depends on the Uncertainty of popular Reputation, whether he should take the Remainder or not, and such a Designation of the Person as contains no Certainty in itself, or no Relation to any other certain Matter that may reduce it to Certainty, is a void Limitation. *Co. Lit. 3. b. 6 Co. 65.* But where a Remainder is limited to the eldest Son of *Fane S.* whether Legitimate or Illegitimate, and she hath Issue, a Bastard shall take this Remainder, because he acquires the Denomination of her Issue, by being born of her Body; and so it was never uncertain who was designed by this Remainder. *Noy 35.* If Parents are married, and afterwards divorced, this gives the Issue the Reputation of Children; and so doth a subsequent Marriage of the Parents. *6 Co. 65. Hughs Abr. 363.* If the Mother Dispose of all her Lands holden in Chivalry, to her Bastard Son, she is not within the *32 H. 8. cap. 1.* which forbids the Owners to Dispose of above two Thirds of such Land for Preferment of Children; for Children in any Law must be intended such as are lawfully begotten. *Dyer 345. Co. Lit 123. b. 2 Rol. Abr. 785.* If a Man, in Consideration of natural Affection and Love, covenants to stand seised to the Use of a Bastard, this is not good; for he is not *de sanguine patris*; but it is said that a Woman may give Lands in Frank-marriage with her Bastard, because he is of the Blood of the Mother; but he hath no Father, but from Reputation only. *Dyer 374. And. 79. 6 Co. 77. Noy 35.* A Court of Equity will not supply the Want of a Surrender of a Copyhold Estate, in Favour of a Bastard, as it will for a Legitimate Child. *Preced. Chan. 475.*

Under this Head we shall consider

(A) Who are Bastards.

(B) Where Bastardy is to be tried, and the Rules concerning such Trial; and therein of General and Special Bastardy.

(C) Of Bastard Eigne and Mulier Puisne.

(D) How Bastards are to be provided for; and herein of the Duty and Power of Justices of the Peace.

### (A) Who are Bastards.

47 E. 3. 14. b.  
11 H. 4. 81.  
Brañ. lib. 5.  
fol. 416.  
1 Rol. Abr.  
624.

ALL Persons born out of lawful Matrimony are Bastards by the Common Law, but by the Civil Law, those that are born before Marriage are Legitimated by a subsequent Marriage; for by the Civil Law, all Persons adopted into a Man's Family, were inheritable; and the Canonists have allowed of this Notion, because the subsequent Marriage, they say, takes away the preceding Guilt, and shews a Consent from the Beginning. This Difference between the Civil Law may likewise be ascribed to the Power which the Father, by the Roman Law, had over his Children, because he was the Author of their Being, and had the Care of their Education; if therefore a Child should not be Legitimated by a subsequent Marriage, the Parent would not have had him under his Power; for no Man had a Power over the *Vulgo Quæsitæ*; and consequently the Father would not have commanded that to which he gave Being; nor would the Child have had the Benefit of the Parents Education; which would have cut a Member from the Commonwealth.

All Persons born within Marriage are Legitimate, unless there is an apparent Impossibility that they should be generated by the Husband; for there is the strongest Presumption that can be, that they are Legitimate, because the Husband hath the Power and Dominion over his Wife; and therefore may by the Law keep her by Force within the Bounds of Duty; to which the Canonists have added a fanciful Reason, to wit, the Husband, having the Ownership of his Wife, hath the Property of the Fruit of her Body, though planted by another; *Quicumque semen apposuit marito acquiritur quia est Dominus ventris*. Now the Presumption thus being that it is the Husband's Child, it must be destroyed by contrary Proof; and this Negative, that it is not the Husband's Child, is capable of no other Proof than this only, that it must be shewn impossible it should be the Husband's Child; if therefore the Husband be proved Castrate, the Issue are Bastards.

1 Rol. Abr.  
358.

18 H. 6. 31.  
54.  
29 Aff. 54.

If the Husband be under the Age of Fourteen, the Issue are Bastards; for before the Age of Puberty, Generation is naturally impossible.

Bro. Bastardy

36. Co. Lit. 244. 1 Rol. Abr. 359.

1 Rol. Abr.  
358.

Co. Lit. 244.  
Frañ. 239.

If the Husband be in Ireland, during the Time the Wife goes with Child, the Issue is *Quære*.

If the Husband be not within the four Seas, during the Time that passes between the Conception and Birth of the Child, it is a Bastard. This was settled when the King's Dominions extended to the four Seas only; for to pass and repass in the King's Dominions was possible, without any Knowledge or Proof; but to pass out of another's Dominions into the King's, without some Knowledge or Proof of the Matter, was supposed by the Law not possible; for there is no such Passage in a Realm well governed without Examination.

no Bastard, because the Husband was within the King's Dominions. 1 Rol. Abr. 358.

An Order of two Justices, which was affirmed on Appeal, adjudged *Carth. 469.*  
 7. S. the reputed Father of a Bastard-Child; the Order recited specially, *1 Salk. 122.*  
 That *Mary*, the Wife of *Jonathan Spence*, Mariner, was delivered of a *5 Mod. 419.*  
 Male Bastard-Child, and that it appeared to them upon Oath of, &c. *S. C. Note;*  
 that *Jonathan Spence*, her Husband, was in the King's Service at *Cadix* Bastardy at  
 in *Spain*, and not within the King of *England's* Dominions at the Time this Day, if  
 when the said Child was begotten or born; and because it did not appear the Jury find  
 that the Husband was absent all the Time, as well as at the Time of that the Hus-  
 Conception and the Child's being born, the Order was quashed. *band had not*  
*Access, tho'*  
*the Husband*

and Wife lived in *England*, the Child is a Bastard; but this Proof must be clear, otherways Access  
 will be presumed in Favour of Legitimation. *Vide 1 Salk. 123.*

If the Marriage is made null by Divorce, the Issue is illegitimate; as *1 Rol. Abr.*  
 if the Parties be divorced for Pre-contract, Consanguinity, Affinity or *358, 359, 360.*  
 Frigidity; for where the Marriage is nullified, it is a Copulation without  
 Marriage, and consequently the Issue are Bastards; and it is the same by  
 our Law, whether they have Notice or not of the Consanguinity, be-  
 cause we look no further than the Dissolution.

If a Man marry his Cousin within the Degrees, or his Sister, the Issue *1 Rol. Abr.*  
 got between them is not a Bastard till there be a Divorce; for though *357.*  
 such a Marriage be unlawful, yet it remains good till Sentence of Di-  
 vorce be pronounced, and consequently the Issue must be esteemed liti-  
 gimate till such a Dissolution.

If a Man be divorced from one Woman *propter perpetuam Generandi im-* *5 Co. 98. b.*  
*potentiam*, and then marry another, and have Issue by the second Mar- *Burie's Case,*  
 riage, which continues without Divorce, the Issue are lawful; for a Man *2 Leon. 169.*  
 may be *habilis & inhabilis diversis Temporibus*, and the second Marriage *S. C.*  
 is not avoided by any Divorce, and therefore stands good in Law. *Fenk. Rep.*  
*268.*  
*Noy 72.*

*Moor 225. pl. 366. S. C. by the Name of Morris and Webber.*

A Bed-rid Person marries a Woman that is Pregnant in his Chamber, *2 Rol. Abr.*  
 the Woman is delivered twelve Weeks after; the Child adjudged a Ba- *353.*  
 stard, for the apparent Impossibility of his being the Father of it. *Excroft's*  
*Case.*

If a Woman marry *Grossment ensient* it is the Child of the Husband, *1 Rol. Abr.*  
 for when they testify their Consent by a publick Marriage before the *358.*  
 Birth of the Child, it is a publick Acknowledgment that the Child is his;  
 for at that Time the Child is one with the Mother, and therefore in  
 taking the Mother he takes the Child with her.

If a Man be married within the Age of Consent, and when he comes *7 Co. 41.*  
 to that Age he is divorced by reason of his Dissent from the Marriage, *Kenn's Case.*  
 and then he marries again, and hath Issue, and dies; it cannot be averred *1 Rol. Abr.*  
 that he cohabited with his first Wife to avoid the Divorce and disanul *360.*  
 the second Marriage, and Bastardize the Issue, for the Ecclesiastical *Cro. Jac. 186.*  
 Courts are proper Judges in this Case; and when by Sentence they have *4 Co. 29.*  
 declared the Marriage void, it cannot belong to the Temporal Courts to *Godolp. 484.*  
 inquire into and set aside their Sentence, for that is to take away their  
 Jurisdiction; the same Law if the first Wife had been divorced *causa*  
*Præcontractus.*

If there be a Separation for Adultery *a mensa & Thoro*, the Issue born *11 H. 7. 27. a.*  
 afterwards are presumed *Prima facie* not to be the Husband's, unless it *1 Rol. Abr.*  
 appear upon Proof that the Husband after such Separation did cohabit *359.*  
 with his Wife. *7 Co. 42.*  
*1 Salk. 123.*

If *A.* takes *B.* to Wife, and has Issue by her, and they are afterwards *1 Rol. Abr.*  
 divorced, because they were within the Age of Consent at the Time of *360.*  
 Marriage, and afterwards disagreed; and then *A.* takes *D.* to Wife, by *7 Co. 43. b.*  
 whom he had Issue, and died; upon the Suit of the Issue of *B.* the Ec-  
 clesiastical Commissioners, upon a Commission directed to them, cannot  
 inquire into the Marriage between *A.* and *D.* because they are dead; for  
 though

though a Sentence of Divorce may be repealed after the Death of the Parties, by Suit in the Spiritual Courts, yet no Sentence of Divorce can pass there after the Death of the Parties; for a Divorce in the Ecclesiastical Courts, after the Death of the Parties, can be only made to Bastardize the Issue of that Marriage, which being a Thing that concerns the Inheritance, is properly cognizable in the Temporal Courts; therefore a Prohibition shall be granted to stop their Proceeding upon it.

*Palm. 9.*  
*1 Rol. Abr.*  
*356.*  
*Godolp. 281.*  
*Style 277.*

As to the Legitimation of Children born after the Death of the Husband, it is agreed, That the usual Time of Birth is nine Solar Months and ten Days; but it may be hastened or prolonged by Accident; as by hard Usage, want of Sustenance, &c. because the Nourishment of the Child in the Womb, depends on that of the Mother; so that a Child hath been allowed Legitimate nine Months and twenty Days after the Death of the Father; but if the Child is born eleven Months after the Death of the Husband, and it is proved the Father could not enjoy his Wife within a Month before his Death, it was adjudged a Bastard.

*Palm. 9.*  
*Co. Lit. 8.*

A lewd Woman after her Husband's Death married her Adulterer, and within six Months and a Day after her first Husband's Death had a Child; it was adjudged the first Husband's, because he had the Dominion of the Woman at the Time of her Conception.

*21 E. 3. 39.*  
*Co. Lit. 8. a.*  
*Bro. 97.*  
*1 Rol. Abr.*  
*357. But to*  
*prevent this*  
*Doubtfulness*  
*in Heirs, and*  
*chuse his Father*  
*to hinder the*

A Wife marries immediately after her Husband's Death, and hath a Child nine Months and eleven Days after the Death of her first Husband, it was adjudged the second Husband's, because it was born one Day after the usual Time, and the usual Time is the only Measure to discern between them; but if it be born at the End of nine Months and ten Days, the Father is doubtful, and some have said, that the Child might

Wife from putting false Children upon her deceased Husband; the Law hath provided the Writ *de Ventre Inspecendo* for the Husband's Heir, and if the Wife be found with Child, or suspected to be so, she must be removed to a Castle, and there safely kept till her Delivery; and by this Writ the Heir may take her away from her second Husband; but it lies not for the Heir apparent, who hath no Interest in the Estate in the Life of the Ancestor. *Co. Lit. 8. 1 Rol. Abr. 357.* This Power of removing the Relict of the Ancestor to a Castle, in Case she really is, or is suspected to be with Child, seems only to be used where the Woman continues unmarried; for if she takes another Husband, and the Sheriff returns that he caused her to be searched by such Women, and found her to be *ensient*, the Course seems to be this, *viz.* for the Husband to enter into Recognizance that she shall not remove from the House where they then Inhabit; after which a Writ is to be awarded to the Sheriff, to cause her to be viewed every Day till her Delivery, by two at least of the said Women returned by him; and that three or more of them should be present with her at her Delivery. *Cro. Jac. 685, Mo. 523. Co. Lit. 8. Cro. Eliz. 566. Reg. 227.*

## (B) Where Bastardy is to be tried, and the Rules concerning such Trial, and therein of General and Special Bastardy.

*2 Rol. Abr.*  
*361.*  
*Bro. Tit. Ea-*  
*stardy 97.*  
*That where*  
*general Ba-*

**B**astardy, in relation to the several Manners of its Trial, is distinguished into General and Special Bastardy. General Bastardy is the Bastardy tried by the Bishop, which in its Notion contains two Things. 1. It should not be a Bastard made legitimate by a subsequent Marriage. Bastardy is pleaded, the Court, though the Parties conclude to the Country, must direct a Writ to the Bishop. *Rast. Ent. 105.* The Issue on general Bastardy runs in this Manner, *Prædict' J. R. dicit quod J. S. est Bastardus & natus fuit apud C. in Com' Præd' in Diocesi de W. & hoc paratus est verificare viis & modis quibus convenit ac prout curia Regis hic consideraverit & Prædict' J. S. dicit quod sine objectione Prædict' Præcludi non debet quia dicit quod ipse est legitimus & non Bastardus & hoc Paratus est verificare ubi & Quomodo & prout curia Regis hic considerabit & Prædict' J. R. Similiter. Rast. Ent. 29, 279, 289.*

2dly, That it should be a Point collateral to the original Cause of Action.

Formerly Bastards had a Way in such Issues to trick themselves into Legitimation, for they used to bring feigned Actions, and get suborned Witnesses before the Bishop to prove their Legitimation, and then got the Certificate returned of Record, and after that their Legitimation could never be contested; for being returned of Record as a Point adjudged by its proper Judges, and remaining among the Memorials of the Court, all Persons were concluded by it; but this created great Inconveniencies, as it is taken Notice of in the Preamble of the 9 H. 6. cap. 11. in the Case of several Persons of Quality; for the Evidence of the contrary Parties concerned were never heard at the Trial, and yet their Interest was concluded; to remedy this Inconvenience without altering the Rules of Law, it was enacted, That before any Writ to the Bishop there should be a Proclamation made in the same Court, and after that the Issue should be certified into Chancery, where Proclamation should be made once in every Month for three Months, and then the Chancellor should certify it to the Court where the Plea depends, and afterwards it shall be again proclaimed in the same Court, that all that are concerned may go to the Ordinary to make their Allegations; and without these Circumstances, any Writ granted to the Ordinary, and all Proceedings thereupon, shall be utterly void.

If the Ordinary certify or try Bastardy without a Writ from the King's Temporal Courts, it is void, for the Spiritual Jurisdiction within these Kingdoms is derived from the King, and therefore it must be exercised in the Manner the King hath appointed; for it would be injurious if they should declare Legitimation where the Rights of Inheritance are so nearly concerned, without an apparent Necessity.

The Certificate must be under the Seal of the Ordinary, and not under the Seal of the Commissary only, for the Command is to the Bishop himself to certify, and therefore the Execution of the Command must appear to be by the Bishop in proper Person.

If a Man be certified Bastard, this binds perpetually, though the Person so adjudged a Bastard is not Party to the Action, for all Persons are (a) estopped to speak against the Memorial of any Judicatory; because the Act of the Publick Judicatory under which any Person lives, is his own Act; and were they not thus bound, there might be Contradiction in Certificates.

less he was Party to the original Suit; for no Man can be bound by a Judicatory from whence there lies an Appeal, unless he be capable of that Appeal, for it would be a Contradiction where there is an Appeal supposed to conclude a Person that is incapable of bringing his Appeal; as all Persons who are not Parties to the Suit are; and therefore on a Certificate, which is the highest Act of that sort of Judgment, every Stranger is concluded, but not by Verdict, because an Attaint lies for him that is Party to the original Action.

If a Man be certified Bastard, that doth not bind a Stranger till returned of Record, because it is no Judicial Act till recorded in the Place appointed to record such Transactions, nor doth it bind the Party to the Action till Judgment thereon, because if he avoid the Action he avoids all the Consequences of the Action; and therefore if the Defendant be certified Bastard by the Ordinary, yet if the Plaintiff be nonsuit they cannot go on to Trial, and so the Bishop's Certificate never appears of Record, and therefore is not binding.

If a Man be certified *Mulier*, no Man is estopped to Bastardize him, for though he may be a *Mulier* by the Spiritual Law, yet he may be a Bastard by our Law; and therefore any Man, notwithstanding the Certificate, may plead the Issue of Special Bastardy.

Bro. 76.  
4 E. 3. 39.  
Rast. 289.

When a Writ is awarded to the Bishop to certify Bastardy, Day is given in Court to attend such Certification, otherwise the Parties would be without Day in Court, in waiting for the Bishop's Certificate, and this would create a Discontinuance, and therefore the Parties must attend the Day, and not expect that the Proceedings should be revived by Resummons, though some have held the contrary, because the Bishop is Judge, and so not held to a certain Day.

11 H. 4. 78.  
Bro. Bastardy  
27. n.

*Ne unques accouple in Loyal Matrimony* is no Plea but in Dower, and in Appeal for to Bastardize any Person, Bastardy General or Special must be pleaded; for the Matrimony is there to be questioned, where there is a Claim under the Relation of Wife, but there is more than Marriage in question in the Point of Legitimation.

1 Rol. Abr.  
361.  
Bro. 97.  
Bro. 98.

The Plea of Bastardy may be tried by the Bishop in Actions Personal, as well as in Real.

If there be no Bishop the Certificate must be made by the Guardian of the Spiritualties, for he is to sustain the Office in the mean Time.

28 E. 3. 27.  
Bro. 97.  
In *Mordant* the Tenant pleads Bastardy in the Demandant, this shall be certified by the Bishop of the Diocese where the Writ is

In an Affize the Tenant makes Bar as Heir, the Plaintiff says the Tenant is a Bastard, the Tenant says he is a *Mulier*, born at *London*, and prays a Writ to the Bishop of *London*; the Plaintiff says, that he was born at *L.* in *Surrey*, (the County also where the Land lies) and prays that it may be tried by Affize; but this could not be granted, because here Bastardy was particularly pleaded, and not left at large upon the Issue; but the Certificate in this Case was directed to the Bishop of *Winchester*, within whose Jurisdiction *Surrey* is, because where the Place of Birth is in Dispute, the Trial must be in the Place where the Land lies, for where the Place of Birth is controverted it is uncertain, and so is the same as if not alledged.

brought, though the Demandant says he is a *Mulier* born in another Diocese; for he may bring his Proofs and Evidences to the Diocese where the Writ is brought. Bro. Bastardy 97.

Bro. Bastardy  
98.

In an Affize the Bishop certified directly that the Defendant was a Bastard, and it was indorsed on the Certificate that *A.* the Mother of the Defendant, left her Husband for seven Years, in which Time the Defendant was begot by one *B.* a Priest, and so a Bastard; but because the Defendant was made a Bastard in the Certificate, they gave no heed to the Indorsement, as a Thing foreign and immaterial.

(a) The Issue is in this Manner, *Et Prædict' P. dicit quod Prædict' W.*

Special Bastardy, which is always tried by a Jury in the Temporal Courts, is twofold: 1st, Where the Bastardy is the Gift of the Action, and the material Part of the Issue. (a) 2dly, Where those are Bastards by the Common Law that are *Muliers* by the Spiritual Law, and such are those that are born before Marriage, whose Parents afterwards intermarry.

*actionem versus eum habere non debet quia dicit quod ubi Prædict' W. per breve suum Prædict' præsupponit & asserit se fuisse filium & heredem Præd' T. idem W. natus fuit extra omnia sponsalia & hoc paratus est verificare unde Petit Judicium si Præd' W. ut filius & heres Prædict' T. seu alterius cujuscunque, &c. versus eum habere debeat & Prædict' W. dicit quod Prædict' T. Pater suus habuit Quendam uxorem sibi desponsatam A. nomine de qua ipse natus fuit infra sponsalia inter ipsum T. & A. celebrat' & verificat' unde Petit Judicium.* So that when the Party avers the Birth within Esponsals by way of Reply, he doth not offer an Issue, because that were to take an Issue too much at large; but it is necessary to set forth the Manner of the Birth, viz. Of whom he was born, that they may go to Issue upon a particular Matter; otherwise, he that takes this Plea would be put on the Proof of an universal Negative, which cannot be proved; and then the Party that objected the Defect must offer an Issue in this Manner: *Et Prædict' P. dicit ut prius quod Prædict' W. natus fuit extra omnia Sponsalia & non infra Sponsalia ut Prædict' W. superius allegavit & de hoc ponit se super Patriam & Prædict' W. similiter, ideo, &c.* Rast. Ent. 387. Dyer 97. Pl. 51.

1 Brownl. 1.  
Hob. 179.  
Godolp. Eccel.  
Law 479.  
Co. Ent. 29.

If a Man receives any Temporal Damage by being called a Bastard, and brings his Action in the Temporal Courts, and the Defendant justifies that the Plaintiff is a Bastard, this must be tried at Common Law, and not by Writ to the Bishop; for otherwise you suppose an Action brought

brought in a Court which hath not a Capacity to try the Cause of Action.

If it be found by an Assise taken at large that a Man is a Bastard, the Temporal Courts are Judges of it, for the Jury cannot be estopped to speak Truth which may fall within their own Knowledge, and what they find becomes the Record of the Temporal Courts, and so within their Conuzance.

In an Assise of *Mordancestor*, one of the three Points inquirable is, Whether the Demandant be Heir to *f. S.* the Ancestor, in which Case, if the Tenant plead he is ready to hear the Recognizance of the Assise, (*& hoc paratus est per assisam inquirere*) he cannot give in Evidence that the Demandant is a Bastard, but he ought to have pleaded the same; for if this were given in Evidence and not pleaded, the Spiritual Court would be ousted of their Jurisdiction.

### (C) Of Bastard Eigne, and Mulier Puisne.

A Man who hath Issue a Son by a Woman before Marriage, and afterwards marries the same Woman, and hath Issue a second Son born after the Marriage; the first of these is termed in Law a *Bastard Eigne*, and the second a *Mulier*; by the Common Law, as has been said, such *Bastard Eigne* is as incapable of inheriting, as if the Father and Mother had never married; but yet there is one Case in which his Issue was let into the Succession, and that was by the Consent of the Lord and Person legitimate; as if upon the Death of the Father the *Bastard Eigne* enters, and the *Mulier* during his whole Life never disturbs him, he cannot upon the Death of the *Bastard Eigne* enter upon his Issue.

No Man can Bastardize another after his Death, that was a *Mulier* by the Laws of Holy Church, and who carried the Reputation of Legitimate during his Life; for a Man must be Bastardized by the Rules of the Civil or Common Law; by the Rules of the Civil Law, this Person is by Supposition Legitimate; and if the Common Law be made the Judge he cannot be Bastardized; for it is a Rule of Common Law, that a Personal Defect dies with the Person, and cannot after his Death be (a) objected to his Successor that represents him; and this Rule of Law was taken from the Humanity of the Antients, which would not allow the Calumny of the Dead, as also from an important Reason of Convenience, for Pedigrees are often derived through several Persons, concerning whom there remains little Knowledge or Remembrance of any Thing, but only of their Being; and therefore it were an easy Matter to throw on them the Aspersions of Bastardy by any forged Evidence, which cannot be confronted by opposite Proof; and so it is fit to limit a Time in which all Proofs of Bastardy are to be disallowed.

Earls of Bath and Mountague; *Pride* made Title as Heir to *George*, Duke of *Albemarle*, proving himself the Son of one who was Brother to the Duke, and that the Duke died without Issue; the Defendant gave Evidence that Duke *George* had Issue Duke *Christopher*, who Conveyed to him; Plaintiff gave Evidence that Duke *Christopher* was a Bastard, begotten of such a Woman, who at the Time of her Marriage with the said *George*, Duke of *Albemarle*, was married to another Man, who was then, and yet living: Upon which it was objected, That since Duke *George* and this Woman lived together as Man and Wife, and were now dead, the Plaintiff could not be admitted to Bastardize the Issue, who was dead also; and who, during his whole Life, was reputed and taken to be the legitimate Son of the Duke, and so stiled by the Duke himself in his Deed of Settlement, and in his Will, his Son and Heir; *& quod justum non est aliquem post mortem facere Bastardum*. The Court held this true of such a Bastard as is meant by *Littleton*, in his Case of *Bastard Eigne*, and *Mulier Puisne*, i. e. such a Bastard as is born before the Espousals of a Father and Mother, who may afterwards marry; and said, the Rule extended only to that Case. *1 Salk. 120. Pride v. Earls of Bath, &c. 7 W. & M. 5 Lev. 410. S. C.* who tells us, That though the Evidence was admitted by *Hill*, and *Gil. Eyre*, who were only in Court, the Jury were not satisfied with it, and gave a Verdict for the Earl of Bath.

*Lit. Sect. 399;*  
*Co. Lit. 245.*  
*Vide supra*  
Letter (B).

*7 Co. 44.*  
*Fenk. Rep.*  
*268.*  
*1 Brownl. 42.*  
*Co. Lit. 33. a.*  
*Lit. Sect. 399.*  
*Co. Lit. 245.*

(a) Though this seems to be the Doctrine of the old Books, yet there is this modern Case; an Ejectment was brought by one *Pride*, against the

- Co. Lit. 244.  
1 Rol. Abr.  
624. To exclude the *Mulier* from the Inheritance, there must not only be an uninterrupted Possession of the *Bastard Eigne* during his Life, but a Descent to his Issue.
- Co. Lit. 244.  
Hughes 365. If the *Bastard Eigne* die, leaving Issue *in Ventre sa mere*, and the *Mulier* enter, and then the Son is born, the Son of the *Bastard Eigne* is for ever excluded, because there was no Descent; and so our Law in this disagrees with the Civil Law, which, for the Benefit of the Infant, reputes a Child in its Mother's Womb, in the same Condition as if it were born.
- Co. Lit. 244. If the *Bastard Eigne* enter and die without Issue, yet the Lord by Escheat cannot claim it against the *Mulier*, for there is no Descent cast to extinguish his Right.
- Co. Lit. 244. If the *Mulier* enter into the Land after the Decease of the Bastard, before the Heir of the *Bastard Eigne*, yet he is barred; for the Land is cast upon the Issue of the Bastard immediately after his Death, and the Descent to him is made without any Entry, and consequently he is within the Benefit of the Rule.
- Co. Lit. 244.  
8 Co. 101.  
Sir Richard  
Pembell's  
Case.  
Plowd. 372. If the *Mulier* be an Infant during the Possession of the *Bastard Eigne*, yet he is barred by the Descent; for though no Laches can be imputed to an Infant, because not being of the Age of Consent, his Permission cannot be taken for a Consent; yet in such Cases where Time is limited by the Law for Pleas and Actions, Infants are included, unless specially excepted, for here their Permission is taken for a Consent, because they are supposed to consent to the established Law, to which they are obliged for Protection during Minority; and the Law hath not thought fit to except, because it is a Publick Mischief in a very tender Point, for it might be any Man's Case, to suffer by the Bastard of an Ancestor, and the Law hath given the Infants Guardians to plead by; but it cannot revive the Evidence of Legitimation, which so easily perishes with the Life of the Party.
- Co. Lit. 244.  
8 Co. 101. If a Man hath Issue a Son *Bastard Eigne*, and a Daughter, being *Mulier Puisne*, and the Daughter is married, the Father dies, and the Son enters and dies seised, this shall bar the *Mulier*, for she might have claimed by her Husband; the same Law if the *Bastard Eigne* enters and enjoys peaceably during his Life, while the *Mulier* is imprisoned or beyond Sea, or of nonsane Memory; for the constant and quiet Possession of the *Bastard Eigne*, together with the Character he had, during Life, of being Legitimate, shall in a Case of such nice Consequence outweigh at a Trial, any Evidence that can be brought to the contrary.
- Co. Lit. 244.  
8 Co. 101. The Descent of Services, Rents, or Reversions expectant upon Estates Tail, or for Life, whereon Rents are reserved, shall bind the *Mulier*; for the Enjoyment of these do equally suppose the Character of Legitimate, as the Possession of any Corporal Rights; but such a Descent would not drive the Party that hath Right to an Action, for it is a Contradiction in Terms, that a Man should be dispossessed of a meer Right.
- Co. 244.  
8 Co. 101. If the *Bastard Eigne* die seised, and the Son endow the Wife, yet the Descent takes away the Right of the *Mulier*; the *Bastard Eigne's* entering into Religion is such a Descent as takes away the Right of the *Mulier*.
- 29 E. 3. 38.b.  
Hughes 366.  
1 Rol. Abr.  
625. Tenant in Tail, the Remainder in Tail, the Remainder in Fee; Tenant in Tail hath Issue *Bastard Eigne* and *Mulier Puisne*, and dies, the Bastard entreteth and continueth his Possession, and hath Issue and dies, the Issue enters, the *Mulier* dies, he in Remainder shall have a *Formedon* against the Issue of the Bastard, and the Continuance of the Possession of the Bastard shall not prejudice him; for the Statute *Westm. 2.* says, That the Will of the Donor manifestly expressed in his Gift must be observed; now the Bastard cannot bring himself within the Intention of the Donor, for he is neither the Heir, nor a Person begotten by Tenant in Tail, since, in Law, he is the Son of no Man, and consequently the  
express

express Words of the Statute exclude him from the Inheritance, which sets aside the Rules of Common Law in this Case.

If a Man hath Issue *Bastard Eigne* and *Mulier Puisne*, the Bastard in Co. Lit. 244. the Life of the Father dies, leaving Issue, and then the Father dies, and the Son of the Bastard enters and dies seised, and it descends to his Issue, the Descent shall bind the *Mulier*; for if otherwise, it would be Bastardizing the Ancestor after one Descent, which is contrary to the Rule.

If *Bastard Eigne* and *Mulier Puisne* Daughters enter and occupy in Co. Lit. 244. Coparcenary, the Law will not suppose the Whole in the *Mulier*, but by a more easy Construction presume, that the *Mulier* admits the other into the Inheritance; so if there be *Bastard Eigne* and *Mulier Puisne*, and the *Mulier* enters to Hunt or Hawk, this doth not disturb the Bastard's Possession, for a Man's Intention does always govern and denominate his Actions; and in this Case he did not enter to Claim.

If the *Bastard Eigne* enters after the Decease of his Father, and the Co. Lit. 245. King seises the Land for a Contempt, (whereby the Profits only are taken) without Cause, and the Bastard dies, and the Issue petitions and is restored, he shall hold it against the *Mulier*; for when the King seises Land without Cause he shall only hold it as a Substitute to the Possessor.

The Bastard being impleaded shall have his Age, for the dilatory Plea Co. Lit. 244. must be determined before the Pleas in Chief can come on; so that the Plea of Infancy will stay the Suit before it can be inquired whether he is or is not a Bastard; also he shall be vouched as Heir to the Father, for 20 E. 3. Voucher 129. Hughs 365. *qui sentit Commodum sentire debet & onus.*

### (D) How Bastards are to be provided for, and herein of the Duty and Power of Justices of the Peace.

BY the 18 *Eliz. cap. 3.* it is enacted, " That (a) two Justices of the (a) A single Justice may Peace, whereof one to be of the (b) Quorum, in or next unto bind to the good Behaviour him that is charged or suspected to have the Limits where the Parish Church is, within which Parish the Bastard shall be (c) born, upon (d) Examination of the Cause and Circumstance, shall and may by their Discretion take Order, as well for " the

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begotten a Bastard Child. *Lam. 122 Crom. 196. Dalton 44.* But the two Justices cannot make any Order pursuant to this Statute, unless the Child has been a Charge to the Parish. *Comb. 39. 1 Vent. 37, 363.* If the two Justices disagree, so that they make no Order, the two Justices of the next Division, being of the same County, may make the Order. *Dalt. 45.* If five Justices make the Order it is good, for the Statute is not restrictive, but requires two at least. *2 Salk. 477.* If *J. S.* is adjudged the Father of a Bastard Child, and by the Order it appears, that the Examination of the Woman was by one Justice only, though the Ordering Part thereof is said to be made by two, the Court will quash it. *Rex v. Beard. 2 Salk. 478.* We the said Justices *doth,* instead of *do,* an Order was quashed for this Fault. *1 Salk 122.* (b) One of the Justices must be of the *Quorum.* *Dalton 47.* An Order quashed because it did not appear that one of the Justices was of the *Quorum.* *2 Salk. 477. 1 Sid. 222. S. P. but Comb. 63. cont.* and there said, That this Exception had been over-ruled several Times. (c) The Place of Birth must be set forth in the Order, because it may be born in a Parish where the two Justices who made the Order had no Jurisdiction; and that it may appear that it was born in that Parish to which the Relief is ordered. *Style 368. Dalton 47.* (d) And therefore not only the Mother, but likewise the putative Father should be summoned to appear, and both Parties examined before any Order is made; but this, however agreeable it seems to natural Justice, is not always practised, the Justices being apprehensive that such Warning would tend to no other Use, but to make the Father keep out of the Way: However, it has been resolved that such Summons is necessary. *Dalt. 52.* An Order made by two Justices of the Peace was quashed, because it was made on an Affidavit brought

brought to the Punishment of the Mother, and (e) reputed Father of such Bastard Child, as also for the better Relief of every such Parish, in Part them with. " or in all; and shall and may likewise by like Discretion take (f) Order out the Examination of any Witness. " Order for the keeping of every (g) such Bastard Child, by charging any Witness. " such Mother or reputed Father with the Payment of Money weekly, *Comb.* " or other Sustainment for the Relief of such Child, in such wise as 103. (e) They " must adjudge " they shall think meet and convenient; and if, after the same Order by him the Father " them subscribed under their Hands, any the said Persons, *viz.* Mother of the " Mother, or reputed Father, upon Notice thereof, shall not for their Part Child. 1 *Sid.* " observe and perform the said Order, that then every such Party so 363. *Style* " making Default, in not performing the said Order, to be committed 154. *Dalt.* 52. " to Ward to the Common Gaol, there to remain without Bail or Main- (f) An Order " prize, except he, she, or they, shall put in sufficient Surety to per- der that the " form the said Order, or else Personally to appear at the (b) next reputed Father " General Sessions of the Peace to be held in that (i) County where should " such Order shall be taken, and also to (k) abide such Order as the pay so much " said Justices of the Peace, or the more Part of them, then and there till further " shall take in that Behalf, if they then and there shall take any; and Order, was " that if at the said Sessions the said Justices shall take no other Order, quashed; for " then to abide and perform the Order before made, as is above- that further " be 40 Years " hence. " 2 *Show.* 129. " said.

An Order that the reputed Father should give such Security as Overseers or Church-wardens shall think fit, is nought; for by such Order the Justices delegate their Authority to others. *Salk.* 477. *Dalt.* 47. An Order to pay so much Money a Week till the Child is fourteen Years of Age, is naught; for the Justices have no Power but to indemnify the Parish, and that is done by obliging the Father to maintain the Child as long as it may be chargeable to the Parish. 1 *Salk.* 121. *Comb.* 232. S. P. An Order that the Father should pay so much a Week to the Parish till the Child was twelve Years old, quashed; for the Father may take it away and maintain it himself. 1 *Vent.* 48, 158. 1 *Sid.* 222. S. P. 1 *Mod.* 20. An Order that the Father should pay so much weekly, without saying for how long, is naught; for it should be so long as it is chargeable to the Parish. *Style* 134. S. P. 2 *Keb.* 575. 2 *Salk.* 480. The Justices may order the Payment of a Sum in Gros, for the Charges the Parish has been already at to Midwife, Nurse, &c. *Dalton* 47. 1 *Vent.* 336. 1 *Salk.* 124, 477. But an Order that the Father should pay 4 s. to the Midwife, and 7 s. a Week until the Child was able to get its Living by working, was quashed. 1st, Because it did not appear that the Parish procured the Midwife, or were at any Charge with respect to her; and they have no Power to order any Money but for the Indemnity of the Parish. 2dly, 7 s. a Week is excessive, and uncertain as to the Time, for the Father may, if he pleases, maintain it cheaper; and the Order should have been for so long Time as it shall be chargeable to the Parish. 1 *Vent.* 210. An Order that the Father should pay 2 d. a Week is too little and unreasonable. 1 *Sid.* 363. When they order a Sum in Gros, they must shew for what, and the Charges the Parish had been at. *Comb.* 103. They cannot order a Sum in Gros for putting out the Child Apprentice. *Comb.* 448. An Order to pay so much weekly to the Overseers of the Poor for, &c. is good; for before the Institution of these it might have been ordered to be paid to two or three of the Inhabitants. *Salk.* 122. The Order directed that Security should be given for the Performance of it, and because the Statute directs, that the Security should be either to perform Order or appear at the next Sessions; for this the Order was quashed. 2 *Show.* 258. 2 *Bulst.* 242. S. P. (e) If the Child is no Bastard, and yet they adjudge him such, an Action lies against them. *Comb.* 482. Where the Husband was seven Years absent beyond Sea, and they adjudged the Child, which the Wife had in that Time, a Bastard. 5 *Mod.* 419. 1 *Salk.* 122, 123. *vide supra.* (b) Must be intended that the Order made by the two Justices must be confirmed or discharged at the next Quarter-Sessions of that Part of the County where it was made, and not at the Sessions in the County, for that would be mischievous in many Counties, where there are several Sessions in distinct Parts of the County. *Dalton* 48. 1 *Sid.* 149. Must be the next after Notice of the Order. 1 *Sid.* 325. (i) Exemption was taken to an Order, that it was made *ad Sessionem Pacis in Com' Praed'*, and did not say *pro com'*, but over-ruled. 1 *Vent.* 37. (k) It seems by the better Opinions, that the Justices in their Sessions have no Power to make an original Order, and are only to reverse or affirm the Order made by the two Justices; but for this *vide* 2 *Bulst.* 342, 355. *Dalt.* 48, 49. *Cro. Car.* 337, 341. 2 *Show.* 132. 1 *Vent.* 59, 48. But upon the Removal of the Cause by *Certiorari*, the Court of King's Bench may either reverse the Order in Whole, or in Part; and though they reverse the Order for Irregularity, yet will they oblige the Father to give Security to appear at the next Sessions, to abide such further Order as shall then be made. *Comb.* 286, 264. 2 *Salk.* 477.

Bastard Children gain a Settlement in the Parish where they are born; but if a Woman Big with Child of a Bastard, is by Order of two Justices removed from the Parish of *A.* to *B.* as her last Place of Settlement; *Carth.* 397. *Boreham and Waltham.* 1 *Salk.* 121. 5 *Mod.* 204. *Comb.* 360. *Vide* 2 *Bulst.* 349, 350. *Dalton* 49.

ment; from which Order *B.* Appeals, but before the next Sessions she is delivered of a Bastard Child in *B.* and afterwards the Order of the two Justices is vacated, the Child must follow the Mother, and gains a Settlement in *A.*

By the 7 *Fac. 1. cap.* it is enacted, “ That every lewd Woman which shall *(a)* have any Bastard which may be *(b)* chargeable to the Parish, the *(c)* Justices of the Peace shall commit such lewd Woman to the House of Correction, there to be punished and set to hard Work during the Term of one whole Year; and if she shall offend *(d)* again, then to be committed to the said House of Correction as aforesaid, and there to remain till she can put in good Sureties for her good Behaviour not to offend again.

*(a)* The Woman must be delivered of such Bastard-Child before she can be sent to the House of Correction,

and the Child is not to be sent with her. *Dalton 48.* *(b)* The Child must be chargeable to the Parish, therefore if the Father, or any other maintains it, it seems she is not to be punished by this Statute. *Vide Dalton 46.* *(c)* Must be by two Justices at least. *Dalton 46.* *(d)* But she shall not be punished upon this Part of the Statute, unless she were before convicted and punished on the First. *Q.* If she were before proceeded against pursuant to the Statute, 18 *Eliz. 2 Bulf. 348, 349.*

By the 13 and 14 *Car. 2. cap. 12. Par. 19.* “ Whereas the putative Fathers and lewd Mothers of Bastard Children run away out of the Parish, and sometimes out of the County, and leave the said Bastard Children upon the Charge of the Parish where they are born, although such putative Father and Mother have Estates sufficient to discharge such Parish; it is therefore enacted, That it shall and may be lawful for the Church-wardens and Overseers for the Poor of such Parish where any Bastard Child shall be born, to take and seize so much of the Goods and Chattels, and to receive so much of the annual Rents or Profits of the Lands of such putative Fathers or lewd Mothers, as shall be ordered by any two Justices of the Peace, for or towards the Discharge of the Parish, to be confirmed at the Sessions, for the bringing up and providing for such Bastard-Child, and thereupon it shall be lawful for the Sessions to make an Order for the Church-wardens or Overseers of the Poor of such Parish, to dispose of the Goods by Sale or otherwise, or so much of them for the Purposes aforesaid, as the Court shall think fit, and to receive the Rents and Profits, or so much of them as shall be ordered by the Sessions as aforesaid, of his or her Lands.

By the 6 *Geo. 2.* it is enacted, “ That if any single Woman shall be delivered of a Bastard-Child, which shall be chargeable, or likely to become chargeable to any Parish or Extraparochial Place, or shall declare herself to be with Child, and that such Child is likely to be born a Bastard, and to be chargeable to any Parish or Extraparochial Place, and shall in either of such Cases, in an Examination to be taken in Writing upon Oath, before any one or more Justice or Justices of the Peace of any County, Riding, Division, City, Liberty, or Town Corporate, wherein such Parish or Place shall lie, charge any Person with having gotten her with Child, it shall and may be lawful to and for such Justice or Justices, upon Application made to him or them by the Overseers of the Poor of such Parish, or by any one of them, or by any substantial Householder of such Extraparochial Place, to issue out his or their Warrant or Warrants, for the immediate apprehending such Person so charged as aforesaid, and for bringing him before such Justice or Justices, or before any other of his Majesty's Justices of the Peace of such County, &c. and the Justice and Justices before whom such Person shall be brought, is and are hereby authorized and required to commit the Person so charged as aforesaid, to the Common Gaol or House of Correction of such County, &c. unless he shall give Security to indemnify such Parish or Place, or shall

“ enter

“ enter into a Recognizance with sufficient Surety, upon Condition to  
 “ appear at the next General Quarter-Sessions, or General Sessions of  
 “ the Peace, to be held for such County, &c. and to abide and perform  
 “ such Order or Orders as shall be made in Pursuance of an Act passed  
 “ in the 18th Year of Queen *Elizabeth*, concerning Bastards begotten  
 “ and born out of lawful Matrimony.

“ Provided, That if the Woman so charging any Person as aforesaid,  
 “ shall happen to die, or be married before she shall be delivered, or if  
 “ she shall miscarry of such Child, or shall appear not to have been with  
 “ Child at the Time of her Examination, then, and in any of the said  
 “ Cases, such Person shall be discharged from his Recognizance at the  
 “ next General Quarter-Sessions, or General Sessions of the Peace to be  
 “ holden for such County, &c. or immediately released out of Custody,  
 “ by Warrant under the Hand and Seal, or Hands and Seals of any one  
 “ or more Justice or Justices of the Peace residing in or near the Limits  
 “ where such Parish or Place shall lie.

“ Provided also, that upon Application made by any Person who shall  
 “ be committed to any Gaol or House of Correction by Virtue of this  
 “ Act, or by any Person on his Behalf, to any Justice or Justices re-  
 “ siding in and near the Limits where such Parish or Place shall lie ;  
 “ such Justice or Justices is and are hereby authorized and required to  
 “ summon the Overseer or Overseers of the Poor of such Parish, or one  
 “ or more of the substantial Housholders of such Extraparochial Place,  
 “ to appear before him or them at a Time and Place to be mentioned in  
 “ such Summons, to shew Cause why such Person should not be Dis-  
 “ charged ; and if no Order shall appear to have been made in Pursu-  
 “ ance of the said Act of the 18th of *Elizabeth*, or within six Weeks  
 “ after such Woman shall have been delivered, such Justice or Justices  
 “ shall and may discharge him from his Imprisonment in such Gaol or  
 “ House of Correction, to which he shall have been committed.

“ Provided always, That it shall not be lawful for any Justice or Ju-  
 “ stices of the Peace, to send for any Woman whatsoever, before she  
 “ shall be delivered, and one Month after, in order to her being examin-  
 “ ed concerning her Pregnancy, or supposed Pregnancy, or to compel  
 “ any Woman before she shall be delivered, to answer to any Questions  
 “ relating to her Pregnancy,

## Bigamy.

**M**ATRIMONIAL Causes are properly Cognizable in the Spiritual Courts, and Offences against the Rights of Marriage punishable by the Ecclesiastical Law; but this Offence of *Bigamy*, or marrying a second Wife, the first being alive, is made Felony by Statute, but the Offender is not ousted the Benefit of his Clergy.

By the 1 Jac. 1. cap. 11. it is enacted, "That if any Person or Persons within his Majesty's Dominions of *England* and *Wales*, being married, do marry any Person or Persons, the former Husband or Wife being alive, that then every such Offence shall be Felony, and the Person or Persons so offending, shall suffer Death as in Cases of Felony; and the Party and Parties so offending shall receive such and like Proceeding, Trial and Execution in such County where such Person or Persons shall be apprehended, as if the Offence had been (a) committed in such County where such Person or Persons shall be taken or apprehended: *But it is provided*, That nothing in this Statute contained shall extend to any Person or Persons whose Husband or Wife shall be continually remaining beyond the Seas by the Space of seven Years together, or whose Husband or Wife shall absent him or her self the one from the other by the Space of seven Years together, in any Parts within his Majesty's Dominions, the one of them not knowing the other to be living within that Time. *Also Provided*, That the said Statute shall not extend to any Person or Persons who shall be at the Time of such Marriage (b) divorced by a Sentence in the Ecclesiastical Court; or to any Person or Persons where the former Marriage shall be by Sentence in the Ecclesiastical Court declared to be void and of no Effect; nor to any Person or Persons, for or by reason of any former Marriage had or made within (c) Age of Consent. *Also provided*, That no Attainder for this Offence, shall make or work any Corruption of Blood, Loss of Dower, or Disinheritance of Heir or Heirs.

(a) It is agreed, that if the first Marriage were beyond Sea, and the latter in *England*, the Party may be indicted here; but if the first were in *England*, and the latter beyond Sea, it is said that the Party cannot be indicted, because the second Mar-

riage, which made the Offence, was not within any County here. 1 Sid. 171. *Kely*. 3. But 1 *Hawk.* P. C. 111. holds, That the Party may in the last Case be indicted, and relies on the express Words of the Statute. (b) Divorces *a mensa & thoro causa adulterii* and *sevitie* are within the Exception in the Statute, though the Word *Separamus*, and not *Divortimus*, be made use of in the Sentence; for the Statute being Penal, shall be construed favourably; and such Separations are taken for Divorces in common Understanding. 1 *Hawk.* P. C. 111. 3 *Inst.* 89. *H. P. C.* 122. *Kelynge* 27. *Cro. Car.* 461. Q. (c) If one of the Parties only were under the Age of Consent at the Time of such Marriage, the Exception extends as well to the Party above the Age of Consent, as to the other; because the Power of disagreeing was equal on both Sides. 1 *Roll. Abr.* 340. 3 *Inst.* 89. *Co. Lit.* 79. *H. P. C.* 121. 1 *Hawk.* P. C. 111

## Bills of Sale.

*Yelv.* 196.  
*Cro. Jac* 270.  
*1 Brown* 111.  
*6 Co.* 18.

**A** *Bill of Sale* is a solemn Contract under Seal, whereby a Man passes the Right or Interest that he has in Goods and Chattels; for if a Man promises or gives any Chattels without valuable Consideration, or without delivering Possession, this alters no Property, because it is *Nudum Pactum unde non oritur Actio*; but if a Man sells Goods by Deed under Seal duly executed, this alters the Property between the Parties, though there be no Consideration or no Delivery of Possession, because a Man is estopped to deny his own Deed, or affirm any Thing contrary to the manifest Solemnity of Contracting.

*13 Eliz. c.* 5.

But what is chiefly to be considered under this Head, is the Statute of *13 Eliz. cap. 5.* by which it is enacted, “ That all fraudulent Conveyances of Lands, &c. Goods and Chattels to avoid the Debt or Duty of another, shall (as against the Party only, whose Debt or Duty is so endeavoured to be avoided) be utterly void, except Grants made *bona fide*, and on a good (which is construed) *a valuable Consideration.*” And by the latter Clause of that Statute it is provided, “ That all Parties to such fraudulent Conveyance, who being privy thereunto shall wittingly justify the same to be done *bona fide* and on good Consideration, or shall alien or assign any Lands, Lease or Goods so to them conveyed as aforesaid, shall forfeit one Year’s Value of the Lands, Lease, Rent, Common, or other Profit out of the same, and the whole Value of the Goods, and being thereof convicted shall suffer Half a Year’s Imprisonment without Bail; the Forfeiture to be divided between the Queen and the Party grieved.

*Dyer* 351.  
*pl.* 23.  
*2 Leon.* 8.

For the Explanation of this Statute I shall consider the following Cases.

*3 Co.* 80.  
*Mo.* 638.  
*2 Bulst.* 226.  
*Twine’s Case.*

*A.* being indebted to *B.* in 400 *l.* and to *C.* in 200 *l.* *C.* brings Debt against him, and hanging the Writ, *A.* being possessed of Goods and Chattels to the Value of 300 *l.* makes a secret Conveyance of them all, without Exception, to *B.* in Satisfaction of his Debt; but notwithstanding, continues in Possession of them, and sells some of them, and others of them, being Sheep, he sets his Mark on; and resolved, that it was a fraudulent Gift and Sale within the aforesaid Statute, and shall not prevent *C.* of his Execution for his just Debt; for though such Sale hath one of the Qualifications required by the Statute, being made to a Creditor for his just Debt, and consequently on a valuable Consideration; yet it wants the other; for the Owner’s continuing in Possession is a fixed and undoubted Character of a fraudulent Conveyance, because the Possession is the only *Indicium* of the Property of a Chattel, and therefore this Sale is not made *bona fide.*

*3 Co.* 81.  
*Mo.* 639.

Upon the same Reasons the following Case turns: *A.* is indebted to five several Persons in the Sums of 20 *l.* each, and having Goods to the Value of 20 *l.* makes a Gift of them to one of the Five, in Satisfaction of his Debt, but upon this secret Trust between them, That the Grantee, in Compassion to his Circumstances, should deal favourably with him, in permitting him or some other for him, to use and possess the said Goods, paying this Creditor as he was able, and could afford it, the said Debt of 20 *l.* and resolved to be a fraudulent Conveyance and Deed of Sale.

So in that Case, if *A.* makes a Bill of Sale of all his Goods, in Consideration of Blood and Natural Affection to his Son, or one of his Relations, it is a void Conveyance in respect of Creditors; for the Considerations of Blood, &c. which are made the Motives of this Gift, are esteemed in their Nature inferior to valuable Considerations, which are necessarily required in such Sales, by 13 *Eliz. cap. 5.* and this is a Construction suitable to the strictest Rules of Equity; for if Considerations of Blood or Natural Affection were allowed to be of equal Dignity with, or to come under the Notion of, valuable Considerations required by this Statute, then it would be in the Power of any Debtor, by such Conveyances of his Personal Estate to his Kindred, to build a Family upon a Conduct to his Creditors, which carries in it all the Strains of Injustice and collusive Dealing; moreover, there is a strong Presumption that such Sales to Relations are constantly attended with a secret Trust and Personal Confidence of reconveying Part of the Goods to the Vendor for his Subsistence; so that they are intirely inconsistent with the Scheme laid down by the Statute, and therefore void and illegal.

2 *Rel. Abr.*  
779.  
3 *Co. 31.*  
*Palm. 214.*

*A.* possessed of divers Goods to the Value of 250 *l.* by Covin to defraud his Creditors, made a Gift thereof to his Daughter, on Condition to be void on Payment of 20 *s.* adjudged that it was apparently a fraudulent Conveyance, and void.

*Cro. Eliz. 516.*  
*Bestell v. Stanhop.*

As the Owner's continuing in Possession of his Goods after his Bill of Sale of them, is an undoubted Badge of a fraudulent Conveyance, because the Possession is the only *Indicium* of the Property of a Chattel, which is a Thing unfixed and transitory; so there are other Marks and Characters of Fraud; as a general Conveyance of them all without any Exception; for it is hardly to be presumed, that a Man will strip himself intirely of all his Personal Property, not excepting his Bedding and wearing Apparel, unless there was some secret Correspondence and good Understanding settled between him and the Vendee, for a private Occupancy of all, or some Part of the Goods for his Support; also a secret Manner of transacting such Bill of Sale, and unusual Clauses in it; as that it is made honestly, truly, and *bona fide*, are Marks of Fraud and Collusion, for such an artful and forced Dress and Appearance give a Suspicion and Jealousy of some Defect varnished over with it.

3 *Co. 81.*  
*Mo. 638.*

If Goods continue in the Possession of the Vendor after a Bill of Sale of them, though there is a Clause in the Bill that the Vendor shall Account annually with the Vendee for them, yet it is a Fraud; since if such Colouring were admitted, it would be the easiest Thing in the World to avoid the Provisions and Caution of the aforesaid Act.

*Mo. 638.*

A Man takes a Wife, and afterwards marries another, his first Wife living, and by Deed gave Part of his Goods to his pretended second Wife, it seems this is a fraudulent Gift within 13 *Eliz.* and by the Common Law too, in respect of Creditors, because made without any valuable Consideration; for the second pretended Marriage is so far from coming under the Notion of a Consideration, that it is a Crime punishable by Law.

2 *Leon. 223.*  
*Stamford's Case, Per Dyer.*

Where there is an absolute Conveyance or Gift of a Lease for Years, and the Person who makes it continues in Possession after such Sale, the Gift is fraudulent, because attended with that distinguishing Character of a Fraud; but if the Conveyance or Sale be Conditional, as that upon Payment of so much Money the Lease shall go to the Vendee, there Continuance in Possession after the Gift does not make it fraudulent, because the Vendee is not to have the Lease in Possession till he performs the Condition.

2 *Bull. 226.*  
*Stone v. Graham.*

*A.* has a Lease of certain Lands for sixty Years, if he so long live, and forges a Lease for ninety Years absolutely, and by Indenture reciting this forged Lease, bargains and sells it for valuable Consideration, together

*Co. Lit 3.*  
*Sir Richard Gresham's Case.*

gether with all his Interest in the Land to *B.* in this Case *B.* is not a Purchaser within 27 *Eliz. cap. 4.* for though there were general Words in the Sale to pass the true Interest, yet it is plain that it was never contracted for, or originally included in the Bargain; so that the Bargain being made of an imaginary Interest, the Bargainee can never come under the Character of a real Purchaser, to defeat the Purchaser of the true Lease of sixty Years, which *A.* was really possessed of.

2 *Vern. 490.*  
decreed in  
Equity be-  
tween *Fletch-*  
*er* and *Lady*  
*Lidley.*

*A.* by Bill of Sale made over his Goods to a Trustee, for *B.* who lived with him as his Wife, and was so reputed, and he also purchased a Lease of the House wherein he dwelt, in the Name of a Trustee, and declared the Trust thereof to himself for Life, then in Trust for *B.* during the Residue of the Term; and this Bill of Sale was held fraudulent as to Creditors; but as to the Declaration of the Trust of the Term, the Court held it good, and not liable to *A.*'s Debts, the Term being never in him, and being so settled at the Time it was purchased, and *A.* might have given the Money to *B.* who might have purchased it for herself, and in her own Name.

*Alr. Eq. 148.*  
*Baker v. Lloyd.*  
*Per Holt,*  
*tamen Quare.*

If *A.* makes a Bill of Sale to *B.* a Creditor, and afterwards to *C.* another Creditor, and delivers Possession at the Time of the Sale to neither, after, *C.* gets Possession of them, and *B.* takes them out of his Possession, *C.* cannot maintain Trespass; because the first Bill of Sale is fraudulent against Creditors, and so is the second, yet they both bind *A.* and *B.*'s is the elder Title, and the naked Possession of *C.* ought not to prevail against the Title of *B.* that is Prior, where both are equally Creditors, and Possession at the Time of the Bill of Sale is delivered over to neither.

5 *Co. 60.*  
*Goobes's Case.*

Fraud may be given in Evidence to defeat a fraudulent and covinous Conveyance, and the Party that offers it need not plead it; for the Acts to prevent Fraud are to be construed literally in Suppression of the Mischief; besides, it were an Hardship to force the Party to plead a Thing that is managed with so much Subtlety that he cannot attain a competent Knowledge of it to plead it in due Time.

## Bill of Exceptions.

**A**T Common Law a Writ of Error lay for an Error in Law, apparent in the Record, or for an Error in Fact, where either Party died before Judgment; yet it lay not for an Error in Law not appearing in the Record; and therefore, where the Plaintiff or Demandant, Tenant or Defendant, alleged any Thing *ore tenus*, which was over-ruled by the Judge, this could not be assigned for Error, not appearing within the Record, nor being an Error in Fact, but in Law; and so the Party grieved was without Remedy. And therefore,

“ By the Statute (a) *Westm. 2.* When one impleaded before any of the Justices, alleges an Exception, praying they will allow it, and if they will not, if he that alleges the Exception writes the same, and requires the Justices will put to their Seals, the Justices shall so do; and if one will not another shall; and if, upon Complaint made of the Justices, the King cause the Record to come before him, and the Exception be not found in the Roll, and the Plaintiff shew the written Exception, with the Seal of the Justices thereto put, the Justice shall be commanded to appear at a certain Day, either to confess or deny his Seal, and if he cannot deny his Seal, they shall proceed to Judgment according to the Exception, as it ought to be allowed or disallowed. (a) *Viz. 13 E. 1. c. 30.* For Precedents of Bills of Exceptions, and Proceeding thereupon, *vide Raft. Ent. 275, 323. Brownl. Ent. 129. Lutw. 906.*

In the Construction of this Statute, the following Opinions have been holden,

That the Statute (b) extends to the Plaintiff as well as Defendant, also to him who comes *in Loco Tenentis*, as one that prays to be received, or the Vouchee; and in all Actions whether Real, Personal, or Mixt. (b) But it does not extend to one not Party to

the Record, as Bailiff of a Franchise, who demands Conuſance. 2 *Inst.* 427.

It seems agreed, that no *Bill of Exceptions* is to be allowed in Treason or Felony, for the Words of the Statute are, *cum aliquis Implacitatur coram aliquibus Justiciariis, &c.* and if such Bills were allowed, it would be attended with great Inconveniency, because of the many frivolous Exceptions that might be put in by Prisoners, to the Delay of Justice; besides, in Criminal Cases the Judges are of Counsel with the Prisoner, and are to see that Justice is done him. 1 *Sid.* 84. Sir Henry Vane's Case. 1 *Lev.* 68. S. C. 1 *Keb.* 324. S. C. *Raym.* 486. S. C. cited.

*Kelynge* 15. S. C. resolved; But whether on Indictments for Offences not Capital, a *Bill of Exceptions* is to be allowed. *Q. & vide 2 Hawk. P. C. 428. 1 Vent. 136.*

The Statute extends not only to all Pleas dilatory and peremptory, but to Prayers to be received, Oyer of Records and Deeds, &c. also to Challenges of Jurors, and any material Evidence offered and over-ruled. 2 *Inst.* 427. *Dyer* 231. pl. 3. *Raym.* 486.

But if with respect to these a Falsity be inserted in the Bill, the Judges are not bound to seal it, but may return the Special Matter, for the Command of the Writ is Conditional, *quod si ita est tunc sigilla vestra apponatis. Show. P. C. 122.*

*Raym.* 404. If in a Trial upon a Title to a Lease for Years, the Judges (though *Chichester* and insisted upon) will not direct the Jury that the Probate of a Will is conclusive Evidence, but will only tell the Jury that it is good Evidence; *Philips.* and thereupon the Jury find there is no such Will; yet a Bill of Exceptions will not lie; for though the Evidence be conclusive, the Jury, if upon a Writ they will, may run the Hazard of an Attaint. of Error of a Judgment in *C. B.* in *Ireland*, which was affirmed in *B. R.* there; and it was said, the proper Method had been to demur to the Evidence. *Vide Show. P. C.* That if the Evidence allowed be not believed by the Jury, no Bill of Exceptions lies.

*Cro. Car.* 341. If one offers to demur upon Evidence, and is over-ruled, and after *Cort* and the Judgment a Writ of Error is brought, this cannot be assigned for Error, *Bishop of St. David's.* but it is a proper Case for a Bill of Exceptions, and the Remedy which the Statute in that Case appoints. *1 Jones* 331. *S. C.* By which it appears, that a Bill of Exceptions was tendred and signed. *Vide Farel.* 53. where it is said, That if the Judge erroneously over-rule a Matter offered in Evidence, though the Tendring of a Bill of Exceptions be the most regular Method, yet it is good Cause of a new Trial.

*2 Inst.* 427. My Lord *Coke* is of Opinion, that the Statute, notwithstanding these Words, *Et si forte ad Querimoniam de facto Justic' Venire Fac' Dominus Rex recordum coram eo*, extend not only to the Common Pleas, but to (a) all other Courts of Record, on whose Judgments a Writ of Error lies to the King's Bench, but also to the County-Court, the Hundred, and Court-Baron; for therein, says he, the Judges are most likely to err, and albeit of Judgments given in them a Writ of Error lieth not, but a Writ of False Judgment in the *C. B.* yet the Case being in the same or greater Mischiefe, the Purview of this Statute doth extend to these Inferior Courts. *Coram Rege.* *2 Jones* 117. *2 Lev.* 237. *Skin.* 356. *2 Show. Rep.* 147. cont', *2 Show. Rep.* 287. A Bill of Exceptions lies upon a Trial in the Exchequer, though that Record cannot be removed in *B. R.* but by Error will be brought before other Justices. *2 Lev.* 238.

*1 Inst.* 427. If one of the Justices sets his Seal to the Bill, it is sufficient; but if *Raym.* 182. they all refuse, it is a Contempt in them all; for which the Party *S. P.* grieved may have a Writ grounded upon the Statute, commanding them *2 Lev.* 237. to put their Seals, &c. *S. P.* *Vide Show. P. C.* 116. Where a Petition was exhibited to the Lords in Parliament, to oblige the Judges to Sign, and there said, That the proper Remedy against them was an Action grounded on the Statute, which was to be tried by a Jury.

*2 Inst.* 427. Although no Time be appointed by this Act when the Justices shall put their Seals, the Party must pray the same before Judgment; but if they deny it, then may they be commanded after Judgment to put their Seals, and then the putting of their Seals after Judgment shall be sufficient.

*1 Salk.* 288. But where a Corporation-Book was offered in Evidence at the *Wright v. Sharp.* *Asizes*, to prove a Member of the Corporation not in Possession, and refused, and no Bill of Exception was then tendred, nor was the Exception then reduced to Writing, so the Trial proceeded, and a Verdict was given for the Plaintiff; the Court being the next Term moved for a Bill of Exceptions, it was urged for the Bill, that the Law requires *quod proponat exceptionem suam*, and no Time is appointed for the reducing it into Writing, and the Party is not grieved till a Verdict is given against him; and the same Memory, that serves the Judges for a new Trial, will serve for a Bill of Exceptions. On the other Side it was said, That this Practice would prove a great Difficulty to Judges, and Delay of Justice, that the Precedents and Entries suppose the Exception

to be written down upon its being disallowed, and the Statute ought to be construed so as to prevent Inconvenience; besides, the Words of the Act are in the Present Tense, and so is the Writ formed on the Act. *Holt*, Ch. Just. If this Practice should prevail, the Judge would be in a strange Condition; he forgets the Exception, and refuses to sign the Bill; so an Action must be brought; you should have insisted on your Exception at the Trial, you waive it if you acquiesce, and shall not resort back to your Exception after Verdict against you, when perhaps, if you had stood upon your Exception, the Party had other Evidence, and need not have put the Cause on this Point; the Statute indeed appoints no Time; but the Nature and Reason of the Thing requires the Exception should be reduced to Writing when taken and disallowed, like a Special Verdict, or a Demurrer to Evidence; not that they need be drawn up in Form, but the Substance must be reduced to Writing whilst the Thing is transacting, because it is become a Record; so the Motion was denied.

When this Bill is signed, there goes out (a) a *Scire Facias* to the Judge who signed it, *ad Cognoscendum Scriptum*, and the *Scire Facias* to the Judge, his Return with the Bill must be entred on the Issue-Roll, and made Part of the Record, which is to be removed by Writ of Error.

*Vide 1 Lutw.*  
905, 906.  
(a) Where  
the Record  
is in the  
same Court,  
there is no

Occasion for a *Scire Fac' ad cognoscend'*. 2 *Jones* 117. 2 *Lev.* 237. If the Judge dies, a *Scire Fac'* lies against his Executors to, &c. 2 *Inst.* 428. If the Judge denies his Seal, the Party may prove it by Witnesses. 2 *Inst.* 428. Though the Party grieved be dead, his Heirs or Executors may have Error upon the Bill of Exceptions. 2 *Inst.* 427.

When a Bill of Exceptions is allowed, the Court will not suffer the Party to move any Thing in Arrest of Judgment on the Point on which the Bill of Exceptions was allowed; for his proper Redress is by Writ of Error, and it is presumed that the Court was satisfied in the Point when the Party tendred his Bill of Exceptions.

1 *Vent.* 366,  
367.  
2 *Lev.* 237.  
2 *Jones* 117.

## Borough English.

*Lit. Sect. 165.*  
*Noy 106.*  
 It is called  
 Borough  
 English, be-  
 cause, as  
 some hold,  
 it first pre-  
 vailed in  
 England.  
*Co. Lit. 110.b.*  
 (a) Others  
 have told us,  
 that the Reason of this Institution was, because the Lord demanded the first Night with the Bride,  
 fo that they thought the eldest not Legitimate. *Preface to 3 Mod. Rep.*

*Co. Lit. 110.b.*  
*2 Lev. 138.*  
*3 Keb 475.*  
 Resolved  
 between  
 Baxter and  
 Dodswell.  
*Vaugh. 201.*

If Land in Borough English be given to *A.* and his Heirs, for the Life of *B.* and *A.* dies in the Life of *B.* leaving two Sons, the youngest shall be the special Occupant, because the Heir that is Representative of the Father, as to Land of that Nature, must be the Occupant, since the Heir must take by Descent, and not by Purchase.

*Co. Lit. 53,*  
*111.*  
*F. N. B. 150.*  
*Cro. Eliz. 415.*  
*Mo. Pl. 566.*  
 She shall have Dower of Rent, Common in Borough; for these ensue the Nature of the Land. *Bro. Custom 44, 58.* The Husband shall be Tenant by Curtesy of Borough English Land. *Vide Head of Courtesy.*

By the Custom of Borough English, the Widow shall have the whole of her Husband's Lands in Dower, which is called her Free-Bench; and this is given to her the better to provide for the younger Children, with the Care of whom she is intrusted.

*Cro. Eliz. 204.*  
*Plow. 28.*  
*Vide Head*  
*of Gavel-*  
*kind.*

For a Condition broken, the Heir at Common Law shall enter; because the Condition is a Thing of new Creation, and Collateral to the Land; but when the eldest Son enters, the youngest Son shall enjoy the Land; for by Breach of the Condition he is restored to the antient Estate.

*Vide Head of*  
*Warranty.*

The Benefit of a Warrant annexed to Lands in Borough English, shall go to the youngest Son.

*Co. Lit. 242.*

If a Man be seised of Land of the Nature of Borough English, and hath Issue two Sons, and die, and the eldest Son before any Entry made by the youngest, enters into the Land by Abatement, and dies seised, this shall not take away the Entry of the youngest Brother, because the eldest shall be presumed to enter to preserve the Estate in his Family, which he or his Heirs may some time or other, upon Failure of his Brother's Line, happen to enjoy.

*N. Dyer 179.*  
*b.*  
*Fenk. Rep.*  
*220.*

If a Man seised of Borough English Lands, makes a Feoffment in Fee, to the Use of himself and the Heirs Males of his Body (*secundum cursum communis legis*) and dies, leaving Issue two Sons, the youngest, notwithstanding the Feoffment and these Words, shall inherit those Lands.

The Law takes Notice of the (a) Customs of Gavelkind and Borough English; and therefore it is sufficient to alledge generally, that the Lands are of the Custom of *Gavelkind* or *Borough English*. Co. Lit. 175. b. (a) But as to such Customs as are

no Part thereof, but merely Collateral, they must be shewed in Pleading; as that the Lands are devisable, &c. but for this *vide* *Cro. Car.* 562. 2 *Sid.* 154. 1 *Sid.* 77, 138. 1 *Lev.* 80. *Raym.* 77. and *Tit. Gavelkind*.—For other Customs in the Nature of Borough English, *vide* *Tit. Descents*, and *Co. Lit.* 110. 1 *Dan.* 548, 549.

If *A.* hath Issue five Sons, and the youngest dies in the Life-time of the Father, leaving Issue a Daughter, after which the Father purchases Lands in Borough English, and dies, the Daughter of the fifth Son shall *jure representationis* inherit those Lands, and not the fourth Son. 1 Salk. 243. Clemens and Scudmore, adjudged, 6 Mod. 129. S. C. adjudged.

## Bridges.

**P**UBLICK Bridges which are of general Conveniency, are of Common Right to be repaired by the whole Inhabitants of that County in which they lie 10 E. 3. 28. 1 Rol. Abr. 567. 2 Inst. 701. 13 Co. 33. Hale's P. C. 143. Cro. Car. 363.

But a Corporation Aggregate, (b) either in Respect of a Special Tenure of certain Lands, or in Respect of a Special Prescription; also any other Person, by Reason of such a Special Tenure, may be compelled to repair them. Hale's P. C. 143. Dalt. cap. 14. (b) A Body Politick

may be bound either *Ratione Tenura sive Prescriptionis*. 2 *Inst.* 700. 13 *Co.* 33. But a private Person, though he may be bound *ratione Tenura*, is not bound *ratione Prescriptionis*. *Vide* 1 *Hawk. P. C.* 203. *Farell.* 54. If a Bishop, &c. hath once or twice of Alms repaired a Bridge, this binds not; but yet it is Evidence against him, that he ought to repair, unless he proves the contrary. 2 *Inst.* 700.

Any particular Inhabitant or Inhabitants of a County, or Tenant, or Tenants of Land, chargeable with the Repairs of a Common Bridge, may be made Defendants to an Indictment for not repairing it, and be liable to pay the whole Fine assessed by the Court, for the Default of such Repairs, and shall be put to their Remedy at Law, for a (c) Contribution from those who are bound to bear a proportionable Share in the Charge; for Cases of this Nature require the utmost Expedition; and Bridges being of absolute Necessity, are not to lie unrepaired till Law Suits are determined. 1 Jones 173. Pop. 192. 6 Mod. 307. Salk. 358. (c) Where the Party grieved may in such Case have a Writ to the Ju-

stices, *De oneranda pro rata portione*. *F. N. B.* 235. *Reg.* 268. 2 *Inst.* 700. Where he may bring his Bill in Equity. *Hard.* 131.

If a Manor held by the Service or Tenure of Repairing a Common Bridge, comes by the Alienation of the Lord, into the Hands of several Persons, every Alienee being Tenant of any Parcel, either of the (d) a Demesne or Services, shall be liable to the whole Charge, and put to their Remedy for a Contribution from the rest; and though the Lord on such Alienation, agreed that the Purchasers should be exempt from the Charges, 1 Salk. 358. Per Cur', on a Trial at Bar. (d) If charged ratione Tenura of a Manor, the ancient Free-

holders and Copyholders are not liable to contribute for nothing in Part of the Manor but the Demesnes

mesnes and Services; but those who have any Part of the Demesne Land by Purchase, must contribute. *Hard. 131. per Cur'.*

*1 Salk. 258. Per Cur'.* So if a Manor subject to such Charge comes into the Hands of the Crown, yet the Duty upon it continues; and any Person claiming afterwards under the Crown, the whole Manor, or any Part thereof, shall be liable to an Indictment or Information, for want of due Repairs.

*Hawk. P. C. 221.* If Part of a Bridge lie within a Franchise, those of the Franchise may be charged with the Repairs for so much; also by a Special Tenure, a Man may be charged with the Repairs of one Part of a Bridge, and the Inhabitants of the County are to repair the rest.

*Raym. 384, 385.* It hath been resolved, that it is not sufficient for the Defendant to an Indictment for not repairing a Bridge, to excuse themselves by shewing that they are not bound either to repair the whole, or any Part of the Bridge, without shewing what other Person is bound to repair the same; and it is said, that in such Case the whole Charge shall be laid upon such Defendants, by Reason of their ill Plea.

*1 Hawk. P. C. 221.* It is said that where such Defendants plead that *A. B.* ought to repair the Bridge mentioned in the Indictment, and take a Traverse to the Charge against themselves; the Attorney General in this Special Case, may take a Traverse upon a Traverse, and insist that the Defendants are bound to the Repairs, and traverse the Charge alledged against *A. B.* and that an Issue ought to be taken of such 2. Traverse; and that the Attorney General may afterwards surmise that the Defendants are bound to repair it, and that the whole Matter shall be tried by an indifferent Jury.

*2 Lev. 112.* It seems clear that those who are bound to repair such Bridges, must make them of such Height and Strength as shall be answerable for the Course of the Water, whether it continue in the old Channel or make a new one; and that they are not punishable as Trespassers for entering on any adjoining Land for such Purpose, or for laying on the Materials requisite for such Repairs.

*6 Mod. 307.* No Inhabitant of a County ought to be a Juror for the Trial of an Issue, whether the County be bound to such Repairs or not; but it is said that he may be a good Witness.

*2 Inst. 701. Carib. 195. 6 Mod. 307.* No Man can be compelled to build or contribute to the Charges of building of any new Bridge, without an Act of Parliament; nor can the Inhabitants of the whole County, by their own Authority, change a Bridge or Highway from one Place to another.

*Charta, cap.* no Town or Freeman shall be distrained to make Bridges *nisi ab antiquo & de jure facere consueverunt*, which *vide* explained, *2 Inst. 29.*

*2 Inst. 701. 1 Rol. Abr. 368.* If a Man makes a Bridge for the common Good of the King's Subjects, he is not bound to repair it.

But if it becomes a publick Conveniency, the Inhabitants of the County are bound to repair it. *1 Salk. 359. 6 Mod. 307.*

“ By the 22 *H. 8. c. 5.* the Justices of Peace in every Shire, Franchise or Borough, or (a) four of them, whereof one to be of the Justices of Peace of a County or Town, &c. be four in Number, and one of them of the *Quorum*, they have no Manner of Jurisdiction by Virtue of this Statute. *2 Inst. 701, 702.* But it is said that the Justices of the Peace of the County in which such Town, being not a County of itself, and wanting such a Number of Justices,

(a) Unless the Justices of Peace of a County or Town, &c. be four in Number, and one of them of the *Quorum*, they have no Manner of Jurisdiction by Virtue of this Statute. *2 Inst. 701, 702.* But it is said that the Justices of the Peace of the County in which such Town, being not a County of itself, and wanting such a Number of Justices,

“ Anoyances of Bridges broken in the (a) Highways, and make such  
 “ Proceſs and Pains on every Preſentment, againſt the Perſons charged,  
 “ &c. as the King’s Bench is uſed to do, or as it ſhall ſeem by their  
 “ Diſcretions to be neceſſary and convenient.

ees, ſhall lie,  
 may by Vir-  
 tue of this  
 Clause of  
 the Statute,  
 determine

all Annoyances of Bridges within ſuch Town, &c. if it be known what Perſons in certain are bound to repair the ſame; but if it be not known, it ſeems that ſuch Annoyances are left to the Remedy of the Common Law; becauſe the Clause, which in ſuch Caſe authoriſes the Juſtices of the Peace to tax all the Inhabitants, ſeems expreſly to confine the Power of taxing the Inhabitants of ſuch Towns to their own Juſtices. 2 Inſt. 704. 1 Hawk. P. C. 224. (a) This Statute extends to Bridges in the Highways only. 6 Mod. 255, 256. 1 Salk. 259. But Juſtices of Peace are ſaid to have Jurisdiction over Nuſances to other common Bridges, by Virtue of 1 Eliz. 5. and the general Words of the Stat. of Ed. 3. 10. Vide 2 Hawk. P. C. 39.

“ And where it cannot be known who ought to make ſuch Bridges  
 “ decayed, they ſhall be made by the Inhabitants of the Shire, City or  
 “ Town (b) Corporate wherein they ſhall be; and if Part ſhall be in  
 “ one Shire, &c. and Part in another, the Inhabitants of each ſhall re-  
 “ pair and make ſuch Part as lies within their reſpective Limits.

(b) It hath  
 been Que-  
 ſtioned, whe-  
 ther a Bo-  
 rough which  
 hath no  
 Bridge with-

in its own Limits, be not liable to contribute to the Repairs of a County-Bridge. 1 Hawk. P. C. 223. vide Skin. 254.

“ And for ſpeedy Reformation of ſuch Bridges, the Juſtices of Peace  
 “ of ſuch Shire or Town, or four of them, whereof one to be of the  
 “ Quorum, may call before them either the Conſtables, or elſe two of  
 “ the moſt honeſt Inhabitants of every Town and Pariſh, and with the  
 “ Aſſent of the ſaid Conſtable or Inhabitants, may (c) Tax every In-  
 “ habitant within their Limits, in ſuch Sums as may be thought conven-  
 “ nient; and ſhall cauſe the Names and Sums of each Perſon to be  
 “ written in a Roll indented, and ſhall have Power to make two Col-  
 “ lectors of every Hundred for the Collection of ſuch Tax, which Col-  
 “ lectors receiving one Part of the Roll indented, under the Seals of the  
 “ Juſtices, ſhall have Power to collect all the Sums therein contained,  
 “ and to diſtrain thoſe who ſhall reſuſe to pay; and the ſame Juſtices,  
 “ or four of them; may alſo name two Surveyors, who ſhall ſee every  
 “ ſuch decayed Bridge repaired from Time to Time, to whom the ſaid  
 “ Collectors ſhall pay the ſaid Sums by them received; and the Collec-  
 “ tors and Surveyors, and their Executors, ſhall from Time to Time  
 “ make a true Account to the Juſtices, or four of them, whereof one of  
 “ the Quorum, of their Receipts, Payments and Expences; and if any of  
 “ them ſhall reſuſe that to do, the ſame Juſtices, or four of them, may  
 “ make Proceſſes againſt them by Attachment, under their Seals, re-  
 “ turnable at the General ſeſſions; and if they appear, may compel  
 “ them to Account, or elſe, on their Reſuſal, may commit them *quo-  
 “ uſque*.

(c) Viz. ſhall  
 make a di-  
 ſtin& Tax  
 on each  
 Houſholder  
 living in  
 the County,  
 and each  
 Occupier of  
 Land lying  
 in the Coun-  
 ty, whether  
 he dwell in  
 it or not;  
 and whether  
 ſuch Houſ-  
 holder or  
 Occupier be  
 a Body Pol-  
 itick or  
 Natural;  
 and though  
 he claim an  
 Exemption

by a prior Act of Parliament. 2 Inſt. 703, 704. 1 Keb. 91. Note; This Method of taxing and raiſing Money taxed, ſeems altered by 1 Ann. 18 quod vide.

“ And it is further enacted, That where the Bridge is in one Shire,  
 “ and the Perſon bound to amend it in another; or where the Bridge is  
 “ in a Town Corporate, and the Perſon bound to repair it, out of it, the  
 “ Juſtices of ſuch Shire or Town Corporate may enquire and deter-  
 “ mine all ſuch Anoyances within their Limits; and on a Preſentment,  
 “ may make Proceſs againſt ſuch Perſons; and do further in every Be-  
 “ half, in every ſuch Caſe, as they might do by the ſaid Act, in Caſe  
 “ that ſuch Perſons were in the ſame Shire, &c. and all Sheriffs and  
 “ Bailiffs of Liberties ſhall ſerve ſuch Proceſs, on Pain to make ſuch  
 “ Fine as ſhall be ſet by the ſaid Juſtices.

“ Provided

“ Provided that nothing in this Act shall be Prejudicial to the Li-  
 “ berties of the Five Ports ; but that the Warden, Mayors, Bailiffs and  
 “ *Jurats* of the same Ports, may enquire and determine all Anoyances  
 “ of Bridges therein, and make such Proceſs, &c. as the Juſtices of  
 “ Peace may do in other Places, by Virtue of the ſaid Act.  
 “ And it is further enacted, That the ſaid Juſtices, &c. may allow  
 “ ſuch reaſonable Coſts and Charges to the ſaid Surveyors and Col-  
 “ lectors, as by their Diſcretion ſhall be thought convenient.  
 “ And it is further enacted, That ſuch Parts of Highways as lie next  
 “ adjoining to the Ends of Bridges, by the Space of 300 Foot, ſhall be  
 “ amended as often as need ſhall require ; and that the Juſtices, or four  
 “ of them, whereof one of the *Quorum*, within their ſeveral Limits,  
 “ may enquire and determine in their General Sessions all Anoyances  
 “ therein, and do in every Thing concerning the ſame, in as ample a  
 “ Manner as they may do for making and repairing Bridges.

## Burglary.

H. P. C.  
 3 *Inf.* 63.  
 S. P. C.  
 30. a.  
*Dalt. cap.* 99.  
*Crom.* 31.  
 22 *Aff.* 95.  
 1 *Hawk.*  
 P. C. 101.

**B**URGLARY is a Felony at the Common Law, in breaking and  
 entering the Mansion-Houſe of another, or a Church, or the  
 Walls or Gates of a Walled Town, in the Night, with an In-  
 tent to commit ſome Felony, whether ſuch felonious Intention  
 be executed or not.

In this Definition it will be neceſſary to conſider

- (A) What Breaking is ſufficient to conſtitute this Of-  
fence.
- (B) What Entry.
- (C) Whether both be neceſſary.
- (D) What ſhall be accounted Night-time for that Pur-  
poſe.
- (E) In what Place this Offence may be committed.
- (F) Of the Intention to commit ſome Felony.
- (G) How this Offence is puniſhed, and the Offender ex-  
cluded his Clergy.

## (A) What Breaking is sufficient to constitute this Offence.

ONE who comes down by a Chimney, who opens a Window, or breaks the Glass thereof, unlocks a Door, or draws the Latch of a Door, is Guilty of Breaking the House, as much as if he had actually forced open the Door, or had broke a Hole in the Wall, &c.

Also if one Assault a House with an Intent to rob it, and the Owner of the House, in order to drive him away, opens the Door, and he thereupon enters, he is Guilty of Breaking the House.

H. P. C. 80.  
3 Inst. 64.  
1 Hawk. P. C.  
102.

Crom. 32.  
And. 115.  
cont.  
1 Hawk. P. C.  
102. leaves this a *Quære*.

If Persons coming to an House with an Intent to rob it, are let in under a Pretence of Business with the Owner, and then rifle the House; or if Persons, having such a felonious Intent, take Lodgings in a House, and then fall on the Landlord and rob him; or if Persons, having such Intent, raise an Hue and Cry, and prevail on the Constable to search the House, and being let in, by that Means bind the Constable and rob; in these Cases the Offenders have been adjudged Guilty of Burglary.

It is Burglary for one who entred by an open Door, or lay in a House by the Owner's Consent, to unlatch a Chamber-Door, with a felonious Intent. So if a Servant draws the Latch of the Chamber-Door in which his Master lay, with an Intent to murder him.

“ By the 12 Ann. 7. it is recited, That there had been some Doubt whether the Entering into a Mansion-House without breaking the same, with an Intent to commit some Felony, and Breaking the said House in the Night-time to get out, were Burglary; and thereupon it is declared and enacted, that if any Person shall enter into the Mansion or Dwelling-house of another by Day or by Night, without breaking the same, with an Intent to commit Felony, or being in such a House, shall commit any Felony, and shall in the Night-time break the said House to get out of the same, such Person is and shall be taken to be Guilty of Burglary, and ousted of the Benefit of the Clergy, in the same Manner as if such Person had broken and entred the said House in the Night-time, with an Intent to commit Felony there.

But if one enter into a House by a Door which he finds open, or through a Hole which was made there before, and steal Goods, &c. or draw any Thing out of a House through a Door or Window which was open before, or enter into a House by the Doors open in the Day-time, and lie there till Night, and then rob and go away, without breaking any Part of the House, he is not Guilty of Burglary; and therefore such Breaking, as is implied by Law in every unlawful Entry on the Possession of another, whether it lie open or be inclosed, though it will maintain a Common Indictment, or Action of Trespafs *Quare clausum fregit*, will not satisfy the Words *Felonice & Burglariter fregit*.

Kelynge 42,  
63.  
Crom. 32.  
Dalt. cap. 99.  
H. P. C.  
81.  
1 Hawk. P. C.  
102.

Kelynge 67.  
H. P. C.  
81, 82.  
1 Hawk. P. C.  
102.

3 Inst. 64.  
H. P. C. 80.  
1 Hawk. P. C.  
102.

## (B) What Entry.

**A**NY the least Entry, either with the whole or but with Part of the Body, or with any Instrument or Weapon, will satisfy the Word *Intravit* in an Indictment of Burglary; as if one do but put his Foot over a Threshold, or his Hand, or a Hook or Pistol within a Window, or turn the Key of a Door which is locked on the Inside, or discharge a loaded Gun into a House, &c.

Also in some Cases, an Entry in Law is sufficient, though there be no actual Entry; as where divers come to commit a Burglary, and some stand in adjacent Places, and the others enter and rob, they are Guilty; for the Act of one is the Act of all.

And upon this Ground *Hawkins* argues, that a Servant within a House, who in Confederacy with a Rogue lets him in to him, is as much Guilty of Burglary as if he had been without the House.

But *Quare*; it is only Robbery in the Servant. *H. P. C. 81.*

*Dalt. cap. 99.*  
*H. P. C. 81.*  
*1 And. 115.*  
*Crom. 31, 32.*  
*1 Hawk. P. C. 103.*  
*Crom. 32.*  
*H. P. C. 80.*  
*81.*  
*1 Hawk. P. C. 103.*  
*1 Hawk. P. C. 103.*  
 But *Quare*;  
 for *Hale* says

## (C) Whether both be necessary.

**T**HERE must be both a Breaking and an Entry; for both the Words *fregit* and *intravit* are necessary in the Indictment; and therefore if on a bare Assault upon a House, the Owner sling out his Money, it is no Burglary.

But he says there are some loose Opinions to the contrary; for which *vide* the Authorities there cited.

*H. P. C. 80.*  
*3 Inst. 80.*  
*1 Hawk. P. C. 103.*  
*S. P. accord.*  
 But he says

## (D) What shall be counted Night-time for this Purpose.

**T**HE Word *Noctanter*, being precisely necessary in every Indictment for this Offence, cannot therefore be satisfied in a legal Sense, if it appear upon the Evidence, that there were so much Day-light at the Time, that a Man's Countenance might be discerned thereby.

But in some of these Books there are Opinions that Burglary may be committed at any Time after Sun-set, and before Sun-rising.

*Dalt. cap. 99.*  
*S. P. C. 50.*  
*Crom. 33.*  
*H. P. C. 79.*  
*3 Inst. 63.*  
*7 Co. 6.* *1 Hawk. P. C. 101.*

## (E) In What Place may this Offence be committed.

ACCORDING to the constant Course of late Precedents and Opinions, it seems necessary to have the Word *Mansionalis* in the Indictment; and therefore that the Offence can be only committed in a Dwelling-house.

67. but 1 *And.* 302. and *S. P. C.* mention Precedents of Indictments of Burglary in *Domo*, without adding *Mansionali*. Also it is agreed that Burglary may be committed in breaking Churches, or the Walls or Gates of a Walled Town, in which the Word *Mansionalis* cannot be made Use of; but these are said to be distinct Burglaries; though by my Lord *Coke*, that as to a Church, it may properly enough be alledged, being the Mansion House of GOD; *Quare.* 3 *Inst.* 64. *Braff.* 144. b. *Ero. Coron.* 93. 22 *Aff.* 39, 95. *Poph.* 42. 27 *Aff.* 38. *Dalt.* cap 99.

A House which a Man dwells in but for Part of the Year, or which he has hired to live in, and brought Part of his Goods into, but has not yet lodged in, or which his Wife has hired, though without his Privity, and lives in without him, will satisfy the Words *Domus Mansionalis* in an Indictment of Burglary, though no Person were in at the Time of the Offence.

*Kelynge* 54. *Poph.* 42, 52. 3 *Inst.* 64. so agreed by all these Books. 1 *Hawk. P. C.* 103.

Also all Out-Buildings, as Barns, Stables, Dairy-houses, &c. adjoining to a House, are looked upon as Part thereof, and consequently Burglary may be committed in them; but if they be removed at any Distance from the House, it seems that it has not been usual of late to proceed against Offences therein, as Burglaries.

Also a Chamber in one of the Inns of Court, wherein a Person usually lodges, or a Lodging in a Part of a House, actually divided from the Rest of the House, and having a Door of its own to the Street, are agreed to be called properly Mansion-houses.

for a certain Time, and not divided from the Rest of the House, by having a different Door, &c. can be called his Mansion-House. *Kelynge* 83. holds that it cannot, but 1 *Hawk. P. C.* 104. seems *cont.*

If several Persons dwell in one House, as Servants, Guests or Tenants at Will, and a Burglary be committed in any of their Apartments, it seems clear that the Indictment ought to lay it in the Mansion-house of the Proprietor.

Burglary cannot be committed in a Shop or Work-house which is leased to one for his Use in the Day-time only, nor in a Ground inclosed, nor in a Booth or Tent.

*Dalt.* cap. 99. *Crom.* 31. 1 *Hawk. P. C.* 104.

## (F) Of the Intention to commit some Felony.

*Dyer* 99.  
*Pl.* 58.  
*Dalif.* 22.  
*3 Inst.* 65.  
*Kely.* 30  
*H. P. C.* 83,  
 84.  
*Crom.* 32.  
*cont.*  
*Dalt. cap.* 99.  
*Hawk. P. C.*  
 105.

THE Indictment must alledge, and the Verdict find an Intention to commit some Felony, tho' it be not necessary that a Felony be actually committed; for if it appear that there was only an Intention to commit a Trespass, there can be no Burglary; but it seems that an Intention to commit a Rape, or such other Crime, which was a Trespass only at Law, and is made Felony by Statute, will make a Man Guilty of Burglary, as much as if such Offence were a Felony at Common Law; because where-ever a Statute makes any Offence Felony, it incidently gives it all the Properties of a Felony at Common Law.

## (G) How this Offence is punished, and the Offender excluded his Clergy.

THIS Offence has been punished like all other Felonies, by Hanging, since the following Statutes, which oust the Offenders of the Benefit of their Clergy. For,

*Vide 2 Hawk.*  
*P. C.* 355,  
 356. and  
 the Au-  
 thorities  
 there cited.

By 1 *Ed.* 6. 12. *Par.* 10. the Principal is excluded in all Cases except that of challenging more than Twenty, if any Body be in the House at the Time of Breaking, and thereby put in Fear, &c.

Also the Principal in every Burglary, whether any Person were in the House at the Time or not, is excluded from his Clergy, by 18 *Eliz.* upon a Conviction by Verdict, Outlawry or Confession.

Also by 3 & 4 *W. & M.* every Person who shall counsel, hire or command any Person to commit any Burglary, being thereof convicted or attainted, or being indicted, and standing Mute, or challenging peremptorily above Twenty, shall not have his Clergy; and by this Statute Principals in Burglary standing Mute, or challenging peremptorily more than Twenty, are ousted of their Clergy.

## By-Laws.

**A** By-Law is a private Law made by those who are (a) duly (b) *Moor* 583, authorised thereunto, by Charter, Prescription or (c) Custom, 584. for the (d) Conservation of Order and good Government (a) A 5 Co. 62. within some particular Place or Jurisdiction. Power of making By-

Laws is included in the very Act of Incorporating, and incident to every Corporation Aggregate, without express Words in the Charter; all By-Laws must ever be subject and squared to the Rule of the General Law of the Realm, as subordinate to it. *Hob.* 211. (b) By the 19 *H. 7. cap. 7.* it is enacted that no Ordinance shall be made in Diminution, or to the Disinheritance of the Prerogative of the King, nor against the common Profit of the People, unless they are examined and approved by the Chancellor, Treasurer of *England*, Chief Justices of either Bench, or three of them, or both Justices of Assize in their Circuit, where the Ordinance is, &c. nor shall restrain any to sue to the King against such Ordinances. *Vide* 1 *Rol. Abr.* 363. 5 *Co.* 63. *Comb.* 222. (c) Where a By Law founded on a particular Custom before allowed, and become Part of the Common Law, shall be Operative by the Custom, though otherwise it would be void. *Vide* *Head of Customs*, and *Raym.* 294. *Carter* 68, 114. *Bridg.* 140. *Brown* 177, 178. *Skin.* 375. (d) The Inhabitants of a Town, without any Custom may make By-Laws for the Repair of their Church, Highways or such other Thing which is for the publick Good; and in such Case the greater Part, without any Custom, shall bind all. 5 *Co.* 63. *Mo.* 579. *Brownl.* 288. *Hob.* 212. 1 *Mod.* 194. Of By-Laws for the better Regulation of Commons, *vide* *Head Commons*, and 1 *Rol. Abr.* 365. 1 *Leon.* 190. *And.* 234. 3 *Leon.* 38, 264. *Dals.* 95. *Palm.* 396.

As every By-Law must be reasonable in itself, and agreeable to the general Laws of the Realm, and be framed so as to advance the Benefit of that Place where it is made to operate, I shall therefore consider

- (A) Such By-Laws as relate to the appointing and electing Members of a Corporation.
- (B) Such as are made in Restraint of Trade.
- (C) Such as are made to prevent Nusances.
- (D) Such as affect Strangers.
- (E) Such as in the frame and Make of them are void; by ordaining a Method of enforcing Obedience to them contrary to Law.

### (A) Such By-Laws as relate to the appointing and electing Members of a Corporation.

**I**F there be a Corporation made and incorporated by the Name of *Vide* *Head of Mayor and Commonalty*, and by the Charter the Mayor is appointed *Corporations.* to be chosen by the Commonalty, and in the said Charter there is a 4 *Co.* 78. Power given to them to make By-Laws, for the better Order and Go- *Fenk. Rep.* 273. *S. C.* vernment of the said Corporation, (e) they may make a By-Law that (e) But a select Number of the Commonalty shall be chose, by whom the where Mem- Mayor shall be chosen, for Avoidance of popular Confusion. bers of PAR- liament are

to be chose by all the Commonalty, the Election cannot by a By-Law be given to a select Number; for free Elections for Members of Parliament are *pro bono publico*; and this is not to be compared to the Case of Elections of Mayors, &c. 4 *Inst.* 48, 49.

*Raym.* 446. *Taverner's Case.*  
*Comb.* 221. A By-Law by the Company of Barber-Surgeons, that every one chosen Steward shall forfeit 20*l.* on Refusal of his Taking upon him the Office, held good. 2 *Lev.* 252. *vide* 1 *Lutw.* 402.

1 *Salk.* 142. A By-Law made in *London*, that no Freeman chosen Sheriff; &c. shall be excused, unless he voluntarily swear he is not worth 10000*l.* and bring six other Citizens to vouch in like Manner, on their Oaths, that they believe it to be true; and if he openly refuse to take the Office, then to forfeit the Sum of 500*l.* *viz.* 400*l.* to the City, and 100*l.* to the next Man that shall hold the Office; held (a) a good By-Law.  
*S. C.* (a) That every Common Councilman who resigns his Office, shall forfeit 10*l.* a good By-Law. 1 *Lutw.* 402, 405.

## (B) Such as are made in Restraint of Trade.

1 *Rol. Abr.* 364. *Hob.* 211, 212. *Norris and Staples.* *Hutton* 5, 6. A NEW Corporation, not having any (b) Prescription to appropriate to themselves, and exclude others, cannot make a By-Law to exclude all Persons from using an Art or Trade in their Town to which they were not Apprentices in the same Town, though they have served as Apprentices to it in another Place.

*S. C.* *Moor* 869. (b) But a By-Law founded upon Prescription or Custom, may restrain a Man from the Exercise of his lawful Trade, in a particular Place. 1 *Lutw.* 564. *Carter* 86, 114. But a By-Law shall not be carried farther than the Prescription warrants. *Vide Raym.* 294. 2 *Brownl.* 178, 182. *Bridg.* 140. A By-Law founded on the Custom of *London*, that no Person not being Free of the City of *London*, shall keep any Shop, or use any Trade within the City, resolved good in *Waggoner's Case.* 8 *Co.* 129. And so the Practice has been to this Day.—So where the Corporation of Weavers claim by Custom, that none shall intermeddle with their Art within *London* and *Southwark*, but those of their Guild or Fraternity; held good. *Cro. Eliz.* 803.

*Hob.* 211. *Norris vers. Staples, or the Weaver of Newberry's Case.* *Hut.* 6. *S. C.* *Moor* 869. *S. C.* 1 *Brownl.* 49. Therefore if a Corporation make a By-Law, that none shall use the Art of Weaving within the Corporation, who has not served Seven Years as an Apprentice there, or who has not exercised that Trade there for Five Years before the making of the By-Law, (c) nor unless he be allowed and approved of by the Wardens of the Company, this is a void By-Law; for any Person may lawfully follow what Trade he pleases, and where he pleases, unless prohibited by the general Law of the Land.

(c) If the King creates a Corporation, and by the same Charter grants to the Members that none shall use a Trade within the said Corporation, but such as shall be approved by them, or any two of them, this Grant is void, being against the Liberty of the Subject, and tending to a Monopoly, and what the King cannot immediately do, cannot be done by any derivative Authority from him. *Godb.* 252. 1 *Lutw.* 564.

11 *Co.* 53, 54. *The Taylors of Ipswich Case,* adjudged. 1 *Rol. Rep.* 4, 5. *S. C.* adjudged, *Godb.* 252. *S. C.* adjudged, 1 *Rol. Abr.* 364, 365. *S. C.* adjudged. (d) That if a Servant makes Clothes for his Master, Mistress, or their Children,

*rit allocatus per legale warrantum vel auctoritatem datam* by the said Corporation, or three of the Masters and Wardens; nor should set up any Shop for this Art, nor exercise it until they presented themselves to the Master, &c. or three of them, or proved that they had served in this Trade as Apprentices for Seven Years.

11 Co. 54. Hob. 211. Godb. 253. Bridg. 141. 8 Co. 129. and *vide* Statute 5 Eliz. and 28 H. 8. cap. 5 That no Apprentice or Journeyman shall, by Oath or Bond, be compelled not to keep any Shop, &c. without licence of the Master.

So where the Town of *Bedford* made a By-Law, that none, except Freemen, should exercise any Art, Trade or Mystry, within the Corporation, which not being founded on any Custom they had of excluding Foreigners, was held void.

If the Merchant-Taylors of *London*, by Virtue of their Charter, make a By-Law, that no Merchant shall put his Cloath to be dressed, but at a Cloth-workers of their Company, this is a void By-Law; for it is against Reason and the general Liberty of the Subject, to be restrained from putting his Work to whom he pleases.

between *Davenant* and *Hardis*. 2 Inf. 47. S. C. 11 Co. 36. S. C. cited. *Cart*. 116. S. C.

So a By-Law in *London*, that none shall bring any Sand, nor sell nor use any within the City or Suburbs, but only that which is taken out of the River of *Thames*, &c. is void, because it is against Reason that a Freeman should be restrained from Merchandizing and Selling; and this may concern the Inheritance of some who may have Sands in their Land.

If the City of *London* make a By-Law, that no Person shall follow the Profession of a Dancing-Master within the City, who is not Free of the Company of Musicians, this is a void By-Law; for if he be Free of any other Company it is sufficient; and the obliging a Man to be Free of a particular Company, when he has no Remedy to compel that Company to admit him, is creating a Kind of (a) Monopoly in such Company, and putting a certain Number of Men under the final Jurisdiction and Power of others.

by the Merchant-Adventurers, that no Man should buy or sell at four Fairs within such a Prince's Dominions, without first compounding with them, and paying a Fine, was made void by the Statute 12 H. 7. cap. 6. because it was an Infringement of the Liberties of all others, not being Free of that Company. 1 Rol. Abr. 363.

But if an Ordinance be made in *London*, by the Common-Council, (who have Power by Custom, which is among other Customs confirmed by Act of Parliament, by general Words) that if any Freeman, Citizen or Stranger, within the City, shall put any Broad-Cloth to Sale, within the City of *London*, before it be brought to *Blackwell-Hall* to be viewed and searched, so that it may appear to be Saleable, and that Hallage be paid for it, *scilicet* one Penny for every Cloth, that he shall forfeit for every Cloth 6s. 8d. this is a good Ordinance, as well to bind Strangers as Freemen, because it is made to prevent Fraud and Falsity in Cloth, and for the better Execution of the Statutes without Deceit; and the one Penny for Hallage is but a reasonable Recompence of Charge, for the Benefit which the Subject hath by it.

If in *London* there is an Act of Common Council made that the Bricklayers shall not Plaister with Lime and Hair, but with Lime and Sand only, and that Plaistering with Lime and Hair shall belong to the Plaisterers, under the Penalty of, &c. (admitting this before to have been Part of the Trade of a Bricklayer) the By-Law is void; for though they have *regimen Personarum* in their Manufactures, yet this Power extends

dren, this is no exercising the Trade of, &c. but for this, *vide*

1 Rol. Rep. 4.

28 H. 8. cap. 5

1 Lutw. 562.

Mayer of

Bedford v.

Fix, ad-

judged.

1 Rol. Abr.

364.

Moor 576,

577, &c.

591.

Pl. 766.

adjudged

Godb. 106,

107.

adjudged.

Raym. 293.

S. C. cited.

5 Mod. 104.

The Cham-

berlain of

*London* ver.

*Gros*court,

adjudged.

Comb. 373.

S. C.

(a) A By-

Law made

5 Co. 62.

Chamb. of

*London*'s

Cafe.

1 Rol. Abr.

365. S. C.

3 Leon. 264.

S. C. ill re-

ported.

*Palm*. 395.

*Per Cur*'.

tends only to their Demeanor in their Trade, and not to annex that to one Trade which before belonged to another.

*1 Lev. 229. adjudged.* But if a By-Law is made by the Corporation of *Throwsters* in *London*, that none shall have above such a Number of Spindles in one Week, this is a good By-Law, for it is not in Restraint of Trade, but to make a more equal Distribution of it.

### (C) Such as are made to prevent Nufances.

*Raym. 288, &c. 328. adjudged between Player and Vere. 1 Sid. 284. S. C. adjudged. 1 Keb. 463, 496. 1 Vent. 21. 2 Keb. 27. S. P. adjudged between Player and Fenkins.* IT seems clearly agreed, that where-ever any Trade by its Excrefcence tends to a Nufance, and thereby proves of publick Inconvenience, it may be restrained by a By-Law; therefore, if the Mayor, &c. of *London*, having Time out of Mind had the Right to order and dispose of Cars, &c. to the End the Streets may not be pestered with Cars, &c. make a By-Law, that but 420, &c. shall be permitted to work for Hire within the City and the Liberties thereof, and that the President, &c. of *Christ's Hospital* shall have the Regulation thereof, and that 20 s. Admittance, and 17 s. and 4 d. yearly, shall be paid, &c. to the Use of the Poor of the said Hospital, this *quoad (a)* the Fine and Rent is void, but in all Things else a good By-Law; because a Multitude of Cars, by the Stoppage of the Streets, may prove a publick Nufance.

*Vide 1 Vent. 195, 196.* Like Point between *Player, Broadnox*, admitted, such By-Law being founded on the Custom; and *vide Skin. 371 to 384. 4 Mod. 228.* A By-Law to restrain the Number of Hackney-Coaches, and that they should not exceed 400, and objected, That Coaches being of a new Invention, a By-Law founded on the Custom was void; but there is no Resolution; and now *vide* the Statutes *5 W. & M. cap. 22. 9 Ann. cap. 23. 1 Georg. 1. cap. 57.* (a) A By-Law, that no Carman within the City of *London*, should go with his Cart without a Licensee from the Guardians of such an Hospital, &c. is void; for this only tends to the private Benefit of the Guardians of the Hospital, and is in Nature of a Monopoly. *1 Rol. Abr. 364. Vide 1 Bulst. 11, 12.*—And all By-Laws ought to be for the common Benefit of, &c. and not for the private Benefit of a particuar Man. *Goldsb. 79. Moor 580. Carth. 480.*

*1 Sid. 284. per Cur'.* So if the Number of Taverns, Alehouses, &c. increases to so great a Number as to become Nufances, they may be restrained by a By-Law.

*Skin. 380. (b) 1 Sid. 284. per Cur'. March 15. S. P. March 15. per Cur'. (c) So of a Brewhouse.* So if a Trade becomes a Nufance by its Situation, it may be restrained by a By-Law, and therefore a By-Law to restrain (b) Butchers and Chandlers, and such (c) others from setting up in *Cheapside*, or such other eminent Parts of the City, is good; because such Trades are offensive, and may be apt to create Diseases; and therefore for fear of Infection, and for the Sake of Publick *Decorum* and Conveniency, such kind of offensive Trades may be removed to Places of more Retirement.

*March 15. per Cur'.*—A Man restrained from setting up a Tavern in *Birchin-Lane. March 15.*

*1 Rol. Abr. 365. adjudged.* So if a By-Law be made in *London*, that none shall make a Hot-press, nor use it within the City, under the Penalty of 10 l. for the making thereof, and 5 l. for the Use thereof, this is a good By-Law; because the Use of those Presses is dangerous, with regard to Fire, and also deceitful, in as much as those Presses make Cloths and Stuffs look better to the Eye than in Truth they are.

## (D) Such as affect Strangers.

IF the Corporation of *Butchers* in *London*, having Power to make By-Laws, make one, That no *Butcher* or Person, being a Stranger, shall sell any Veal within the City of *London*, unless they dress the Kidnies of their Veal in such Manner as the Kidnies of Sheep are dressed, under the Penalty of, &c. a Stranger selling Veal in *London*, is not (a) bound to take Notice of this By-Law.

where Strangers shall be bound by By Laws, or not, *vide Moor* 579. *Dalf.* 103. *Sauil* 74. *Godb.* 180. *Carter* 179. 1 *Salk.* 142.

But if such By-Law is made to suppress Fraud, or any general Inconvenience used by a Foreigner, as Corruption, &c. in the Sale of Meat, this is a good By-Law, and such of which he (b) must take Notice, coming into a Corporation, must at their Peril take Notice of the By-Laws of such Corporation.

If the Master, Warden and Assistants of the *Trinity-House* in *Debtford-Strand*, being Incorporated by Letters Patent of *Car.* 2. and having thereby Power to make By-Laws, do make one, That every Mariner within twenty-four Hours after Anchorage in the River of *Thames*, shall send his Gun-powder on Shore, if the Weather will permit, under the Penalty of, &c. though *quoad* the Matter, this is a good By-Law, because for the Publick Good, and Prevention of the Danger which might otherwise accrue to the City of *London*; yet because the By-Law extended beyond the Jurisdiction of the Makers, *Dubitatur*.

Where the University of *Oxford* made a By-Law, That whoever *Privilegiatus sive non Privilegiatus* should be taken walking in the Streets after Nine at Night, and having no reasonable Excuse, to be allowed by the *Proctor*, should forfeit 40 s. And whether this could affect or extend to a *Townsmen*, *Dubitatur*, and a Prohibition granted, to the End the Merits may be determined.

If the Company of *Horners* of *London*, being Incorporated by Letters Patent, and impowered to make By-Laws for the better Government of their Corporation, make a By-Law, That two Men by them appointed shall buy rough Horns for the said Company, and bring them to the Hall, there to be distributed every Month by the Master, &c. for the Use of the Company; and that no Member of the Company shall buy rough Horns within twenty-four Miles of *London*, but only of those two Men appointed, under the Penalty of, &c. this is no good By-Law; for they being a Company Incorporated in the City of *London*, have no Jurisdiction elsewhere, and may as well extend their Power all over *England*, as for twenty-four Miles.

A By-Law, That all Strangers coming into the Port of *London*, should employ City Porters to carry their Goods, &c. is naught; but they may (c) make a By-Law, That none but Freemen shall be Porters, but to confine Strangers to none but such as are City Porters is unreasonable; for if the City will appoint no Porters, they have no Remedy against the City; also Strangers cannot know who are City Porters, nor compel them to serve them.

(E) Such as in the Frame and Make of them are void, by ordaining a Method of enforcing Obedience to them contrary to Law.

5 Co. 64. BY-Laws are usually made with certain Penalties, which regularly are  
 (a) A By-Law by the Distress. to be recovered by (a) Action of Debt, or may be (b) levied by  
 City of London, and that the Penalty shall be recovered by the Chamberlain, is good. 5 Co. 63.— But if the Mayor and Commonalty limit the Penalty of a By-Law to themselves, it cannot be recovered in the Mayor's Court unless he be severed. 1 Salk. 397, 398. Where upon a By-Law made in London, the Penalty was limited to be recovered by Action of Debt, wherein no Effoin, Protection, or Wager of Law should be allowed; the Justices said, They were very presumptuous in making By-Laws in so Legislative a Strain, and said, they might be sued in B. R. for their Presumption and Insolence. Godb. 107. 3 Mod. 193.— The Action cannot be restrained to the Court of the Corporation in which the By-Law is made, but Debt, notwithstanding, will lie thereupon in the Superior Courts. 2 Sid. 105, 178.— Where under the Penalty of such a Sum (not exceeding 40 s.) as by the Makers of the By-Law should be assessed. Bridg. 139, 142.— How the Penalty must be ascertained. 2 Lutw. 1324. (b) A Penal Sum to be forfeited for Non-performance of a By-Law, cannot be levied by Distress without a Prescription to do it, or Limitation by the By-Law so to do. 5 Co. 46.

5 Co. 64. But a By-Law with a Penalty of (c) Imprisonment, or Forfeiture of  
 3 Co. 127. Goods and Chattels, is void; for by the General Law of the Kingdom,  
 S. P. Resolved. no Man is to be imprisoned, or dispossessed of his Goods and Chattels,  
 2 Inst. 54. nisi per Legale Judicium Parium suorum vel per Legem terre; and were By-  
 Moor 411. Laws with such Penalties allowed, it would be enabling Corporations to  
 S. P. set up private particular Laws in Contradiction to the Laws of the  
 (c) And there the By-Law Land; which would be against the very Nature and Essence of a By-  
 was, That if Law, which though it may be præter the General Law of the Realm,  
 any gave op- it cannot be contra.  
 probrious  
 Words to the Mayor, he should be imprisoned, &c. Per Cur', Such a By-Law is not lawful; but a  
 By-Law to Disfranchise the Offender had been good.— The City of London cannot set a Fine, &c.  
 for Non-performance of a By-Law. Comb. 10.

1 Vent. 182. If the Company of Taylors in the City of Exeter, being Incorporated  
 adjudged be- rated by Letters Patents of Edw. 4. and having thereby Power given  
 tween Clerk them to make By-Laws, make a By-Law under a certain Penalty, to be  
 and Tucker. (d) levied by Distress and Sale of the Offender's Goods, this is no good  
 (d) So a By-Law cannot By-Law, for the Forfeiture cannot be levied by Sale of the Offender's  
 be made up- Goods.  
 on Pain of  
 Forfeiture of the Goods, &c. 8 Co. 127. b. 2 Vent. 183. Vide 1 Keb. 733.

Moor 411. If in London a By-Law is made, That if any Freeman takes the Son  
 of an Alien to be his Apprentice, the Bonds and Covenant shall be void,  
 this is no good By-Law; for though the Common-Council might have  
 inflicted a Fine or other Punishment upon such Master, yet they cannot  
 make the Bonds and Covenants void.

## Carriers.

- (A) What Persons come under the Denomination of Carriers.
- (B) In what Cases chargeable for a Failure in his Duty.
- (C) Of his Interest in the Things delivered to his Charge.
- (D) Of the Regulations Carriers are under by Acts of Parliament, with respect to their Carriages, and the Prices they are to take.

### (A) What Persons come under the Denomination of Carriers.

**A**LL Persons carrying Goods for Hire, as (a) Masters and Owners of Ships, Lightermen, Stage-coach-Men, &c. come under the Denomination of Common Carriers, and are chargeable on the (b) general Custom of the Realm for their Faults and Miscarriages.

and *Servant*. (b) And though a Declaration against a Carrier may be good without reciting the general Custom, yet the best and most usual Way is to bring a Special Action on the Case, and declare *quod secundum Legem & consuetudinem Angliæ, &c.* 1 Sid. 245. Hard. 485, 486. This Custom is not confined to a particular Place, but extends to all the King's People. 3 Mod. 227. And therefore in Truth it is the Common Law. Hob. 18.— Are liable in respect of the Reward, and not of the Hundred's being answerable over to them. 1 Salk. 143.

Also if a Person, who is no common Carrier, takes upon himself to carry my Goods, though I promise him no (c) Reward, yet if my Goods are lost or damaged by his Default, I shall have an Action against him.

Agreement or Promise of Payment, he shall recover his Hire on a *Quantum Meruit*, and therefore liable. 2 Show. Rep. 8. Also a private Person undertaking without any Reward to carry my Goods, shall answer for his own Neglect; for by taking the Trust on himself, he is obliged to execute it; but if the Goods are misused by another he is not liable. *Per Holt*, Ch. Just. in *Coggs and Bernard's Case*. 1 Salk. 26. *Vide* his Argument at large, Head of *Bailment*.

But the Master of a Stage-Coach who (d) only carries Passengers for Hire, shall not be liable for the Goods of his Passengers that are lost; and therefore (e) where A. delivered a Trunk to the Driver or Servant, who lost it out of his Possession, it was held, That the Master was not liable in an Action upon the Case on the Custom of the Realm; for though the Servant received Money for it, yet that was but a Gratuity;

and shall be liable. 2 Show. Rep. 128. 1 Salk. 282. S. P. *per Holt*. (e) Ruled by *Holt* on Evidence, and the Plaintiff Nonsuit. 1 Salk. 282.

and the Master shall not be chargeable with the Acts of his Servant, otherwise than he acts in Execution of the Authority given him.

### (B) In what Cases chargeable for a Failure in his Duty.

**I**F a Man delivers Goods to a (a) common Carrier, to carry them to a certain Place, if he (b) loses them an Action upon the Case lies against him; for by the common Custom of the Realm he ought to carry (a) Though they safely. *1 Rol. Abr. 2. Hob. 17. Cro. Jac. 262.* no common Carrier, yet if he takes Hire he may be charged upon his Special Assumpsit. *Cro. Jac. 262. 1 Sid. 245. 1 Keb. 852.* (b) So if damaged, and the Declaration shall be good, though not particularly alledged how they were damaged. *Palm. 523. Hern's Plead. 76, 77.*

Also if a (c) common Carrier, who is offered his Hire, and who has (d) Convenience, refuses to carry Goods, he is liable to an Action in the same Manner as an Inn-keeper who refuses to entertain a Guest, or a Smith who refuses to Shoe a Horse. *2 Show. Rep. 327.* (c) That an Action will lie against a common

Ferry-man, who refuses to carry Passengers. *Hard. 163.* Said *arguendo.* *Vide Rob. Ent. 103.* A Special Declaration against a Letter Carrier, for the Non-delivery of a Letter delivered out to him at the General Post Office. (d) But if the Porter puts up the Box of a Passenger behind a Stage-Coach, and the Master, as soon as he knows of it, says, That he is already full, and refuses to take the Charge of it, the Master shall not be liable; Ruled upon Evidenec. *2 Show. Rep. 128.* For this is the same Case with an Host who refuses his Guest, his House being full, and yet the Party says he will Shift, &c. if he be robbed the Host is discharged; for this *vide* Head of *Inn-keepers.*

If a Man delivers Goods to a common (e) Hoyman, who is a common Carrier of Goods, to carry them to a certain Place, and pays him according to the Custom for the Carriage of them, and after for Default of good keeping they are lost; an Action upon the Case lies against him; for by the common Custom of the Realm he ought to have put into a kept and carried them safely. *Cro. Jac. 330. Hob. 17. S. C. adjudged.* (e) When Goods of Value are put into a Lighter to be

conveyed from the Ship to the Key, it is usual for the Master to send a competent Number of his Men to look to the Merchandise, so that if any of the Goods are lost or imbezilled, the Master is answerable, and not the Wharfinger; but if such Goods are sent aboard a Ship, the Wharfinger at his Peril must take Care to preserve them. *Molloy 212.* Said to be ruled at *Guildhall, per Hales Ch. Just.* So if he does not pay him, or make any Agreement, for the Carrier may have his *Quantum Meruit.* *Cro. Jac. 263. 1 Sid. 36. Bro. Action on the Case 78. 2 Show. 81, 129.*

If a Man delivers Goods to such common Hoy-man, to carry to a Place, and after delivers them (being of good Value) to another to keep safely in the Boat, and does not discharge the Hoy-man, and after they are lost through Negligence, an Action on the Case lies against him. *1 Rol. Abr. 2. Hob. 17. Cro. Jac. 330. S. C.*

If A. delivers Goods at York, to B. (who is a Water-Carrier between Hull and London) to carry them from Hull to London; though the Agreement is to carry the Goods from Hull to London, and no Mention is made of the Carriage to Hull, yet if the Goods are lost B. shall answer for them, for upon his general Receipt of them at York, he is liable. *1 Sid. 36. Vide 1 Rol. Abr. 338. 2 Show. 129.*

If a Merchant lades Goods aboard a Ship, to be transported at a reasonable Reward of Freight to be paid to the Owners, and in the Night-time while the Ship rides in the River Thames, notwithstanding a competent *2*

per totam Curiam. *Raym. 220. S. C. 3 Keb. 72, 112, 135. S. C. 1 Mod. 85. S. C. ill Reported. 2 Lev. 69. S. C. 3 Lev. 259. S. C. cited, and Holt, Ch. Just. said, The Master is chargeable in respect of his Wages, and the Proprietors in respect of the Freight. Molloy 209, 210. S. C. For he must see all*

petent Number of Men are left aboard for the Guard of the Ship and Goods, yet several Persons, under the Pretence of Dressing Seamen, seize on the Men aboard, and take away the Goods; an Action will lie against the Master, for in Effect he is paid by the Merchant, for the Merchant pays the Owners, and the Owners pay the Master; so that the Money of the Merchant is but handed over by them to the Master; adjudged and said, That though by the Admiral Law, the Master is not chargeable *pro Damno fatali*, as in Case of Pirates, Storm, &c. where there is no Negligence in him; yet because this Ship was *infra Corpus Comitatus*, (a) this Case must not be measured by the Rules of that Law.

all Things  
forth coming  
which are  
delivered to  
him, let  
what will  
happen, the  
Act of God  
or an Enc-  
my, Perils  
and Dangers  
of the Sea  
only except-  
ed; but for

Fire, Thieves, &c. he must answer. (a) In an Action against a common Hoyman from *Walton* to *London*; the Defendant pleads, that the Boat and Goods *super Tham sim* were sunk and lost, *absque hoc*, that they were lost *pro defectu bonæ Custodiæ*; and Issue thereupon joined.

If *A.* and several others take their Passage in a Ferry-Boat, and being upon the Water a Tempest arises, so that they are in much Danger of being drowned; upon which, to preserve their Lives, several of the Goods were cast over-board, among which, a Pack of Goods of *A.*'s of great Value is thrown over; (b) *A.* shall have no (c) Action against the Bargeman.

2 Bullf. 280.  
(b) But when  
and how, by  
the Marine

Law he shall have Average, &c. *Vide Molloy* 246. and Head of *Merchants*. (c) So if any Passenger, *ex necessitate* for the Safeguard of his Life, throws it over-board, no Action lies against the Bargeman. 12 Co. 62. But it seems settled, notwithstanding these Cases, that a Ferryman who carries Goods for Hire, shall answer for the Goods, though robbed of them, or though he throws them over-board to save the Lives of the Men in the Boat, because for his Hire he runs the Venture of the Voyage. *Vide Allen* 93.

It is clearly resolved, that if a Carrier be robbed he shall answer the Value of the Goods, for he hath his (d) Hire, which implies an Undertaking for the safe Custody and Delivery of them, which charges him at all Events; and this Political Institution was introduced the better to secure People in their Dealings, and to prevent Carriers, who are often intrusted with Things of the greatest Value, from confederating with Robbers, &c.

Co. Lit. 89.  
4 Co. 84.  
Owen 57.  
8 Co. 84.  
1 Rol. Abr. 2,  
124.  
2 Rel. Abr.  
367.  
1 Rol. Rep.

79. *Hob.* 17, 18. *Cro. Jac.* 162, 330, 331. 1 Bullf. 280. 1 Sid. 36. 1 Mod. 85. 2 Sand. 380. *Palm.* 532. *Moor* 462. (d) He is liable in respect of his Reward, and not of the Hundred's being answerable over to him; for the Hundred is liable by the Statute of *Winchester*, but he was so at Common Law, *per Holt*, Ch. Just. 1 Salk. 143.

So if *A.* delivers a Box to a Carrier to carry, and he asks, What is in it, and *A.* tells him, a Book and Tobacco, and in Truth there is 100 *l.* besides, yet if the Carrier is robbed, he shall answer for the Money; for *A.* was not bound to tell him all the Particulars in the Box, and it was the Business of the Carrier to have made (e) a Special Acceptance: Ruled by *Roll*, at the *Nisi Prius* at *Guild-hall*; but in regard of the intended Cheat to the Carrier, he told the Jury, they might consider of it in Damages; but yet the Jury gave the Plaintiff 97 *l.* Damages, abating 3 *l.* only for Carriage *quod durum videbatur Circumstantibus*.

Allen 93.  
Kenrig and  
Eccleston.  
(e) It seems  
now settled,  
that without  
a Special Ac-  
ceptance the  
Carrier shall  
be liable.

1 Vent. 238. 1 Keb. 135. *Vide Dr. and Stud.* 130. and Head of *Inn-keepers*.

But if *A.* being a common Carrier, receives by his Book-keeper, from the Servant of *B.* two Bags of Money sealed up, containing, as was told him, 200 *l.* and the Book-keeper gives a Receipt for his Master to this Effect, *Received of, &c. two Bags of Money sealed up, said to contain 200 l. which I promise to deliver on such a Day at Exeter, unto — he to pay 10 s. per Cent. for Carriage and Risque*; though the Bags contain 450 *l.* and

Carth. 485.  
Sir Joseph  
Tyly and  
Morrice.  
And the like  
Point said to  
have been so  
ruled be-

tween others and the same Plaintiff.  
the

the Carrier is robbed, he shall be answerable only for 200 l. for this is a particular Undertaking; and as it is by reason of the Reward that the Carrier is liable, which when the Plaintiff endeavours to defraud him of, it is but reasonable he should be barred of that Remedy which is only founded on the Reward.

### (C) Of his Interest in the Things delivered to his Charge.

Co. Lit. 89.  
4 Co. 83.  
7 H. 6. 60.  
2 Bulst 311.  
1 Sid. 438.  
1 Mod. 30.  
2 Sand 47.  
Yelv. 44.  
Dyer 98.

2 Hawk. P. C. 167.

13 E. 4. 10.  
S. P. C. 25.  
Dal. cap. 102.  
Kelynge 35.  
1 Rol. Abr. 73.  
1 Hawk. P. C. 90.

H. P. C. 62.  
3 Inst. 107.  
Bro. Coron. 160.  
S. P. C. 25.  
Hawk. 90.

7 H. 6. 43.  
5 H. 7. 18. b.  
Bro. Coron. 45, 160.  
Cro. Eliz. 536.  
S. P. C. 26. a.  
3 Inst. 310.  
Mo. Pl. 981.  
H. P. C. 67.

A Carrier who hath Goods delivered to him, undertakes for his Hire to deliver them safely, and he hath the Possession of them for no other Purpose; yet he hath such a Special limited Property, that he may bring Trover and Conversion against a Stranger that takes them away, or he may sue the Hundred when robbed of them, because he is answerable over in Damages to the absolute Owner.

So a Carrier by reason of his Possession, and this special kind of Property, may have an Appeal of Larceny against one who robs him of the Goods committed to his Charge.

Also a Carrier by not delivering the Goods, or by imbeziling of them, cannot be guilty of Felony; but if he opens a Pack and takes out Part of the Goods, with an Intent to steal that Part, he is guilty of Felony; for a Possession of Part distinct from the Whole was gained by Wrong, and not delivered by the Owner; also it was obtained basely, fraudulently, and clandestinely, in hopes to prevent its being discovered at all, or fixed upon any one when discovered.

So if a Carrier, after he has brought the Goods to the Place appointed, take them away again secretly *animo furandi*, he is guilty of Felony, because the Possession which he received from the Owner being determined, his second Taking is in all respects the same as if he were a meer Stranger.

Also if a Stranger steals the Goods delivered to a Carrier, he may be indicted generally, as having stolen his Goods; so by reason of this special Property, if the Owner, with an Intent to make the Carrier answer for them, fraudulently and secretly takes them away, he is guilty of Felony, and may be indicted generally, as having stolen his Goods; for the Injury is altogether as great, and the Fraud as base, where they are taken away by the Owner, as by a Stranger.

Kelov. 70. 1 Hawk. P. C. 94

(D) Of the Regulations Carriers are under by Acts of Parliament, With respect to their Carriages, and the Prices they are to take.

BY the 5 Geo. 1. cap. 12. it is enacted, " That no Waggon travelling  
 " for Hire shall go, or be drawn with more than six Horses, either  
 " at Length or in Pairs, or Sideways; and that no Cart travelling for  
 " Hire shall go or be drawn with more than three Horses, under the  
 " following Penalties, *i. e.* That if any travelling Waggon for Hire  
 " shall go or be drawn with more than six Horses, that the Owner or  
 " Driver of such Waggon shall forfeit and lose all the Horses above six  
 " in the Waggon, with all Geers, Bridles, Halters and Accoutrements,  
 " to the sole Use and Benefit of any Person or Persons who shall seize or  
 " distrain the same; and if any Cart travelling or carrying for Hire  
 " shall go, travel, or be drawn with more than three Horses, that the  
 " Owner or Driver of such Cart so travelling for Hire shall forfeit and  
 " lose all the Horses above three, with all Geers, Bridles, Halters and  
 " Accoutrements, to the sole Use and Benefit of any Person or Persons  
 " who shall seize or distrain the same.

Sec 22 Car.  
 cap. 12.  
 7 W. 3.  
 cap. 29.  
 6 Ann. c. 29.  
 9 Ann. c. 18.  
 and 1 Geo. 1.  
 cap. 11. Statutes to this Purpose;  
 and 1 Hawk.  
 P. C. 214.  
 and 1 Geo. 1.  
 cap. 57. That Carmen riding in Carts, not having some Person on

Foot to guide them, forfeit 10 s. Vide Title London, for the Regulation of Carts, Coaches, &c. there.

" Provided, That the Persons making any Seizure or Distress for any  
 " of the Penalties hereby incurred, such Person or Persons shall deliver  
 " the Horse or Horses, or other Things so seized or distrained, into  
 " the Custody of the Constable, or some other Parish Officer of the  
 " same, next, or adjacent Town or Parish, where such Distress or  
 " Seizure is made (who are hereby required to receive into their Custody,  
 " and safely to keep the same) till the Person or Persons who made  
 " such Distress or Seizure, shall make Proof upon Oath before some Ju-  
 " stice of the Peace, of the Offence committed; and the said Justice or  
 " Justices before whom such Proof is made, are hereby required to issue  
 " their Precept to such Constable or Parish Officer, immediately to de-  
 " liver the Horse or Horses, or other Things so forfeited, to the Party  
 " or Parties who seized or distrained the same, to and for their sole Use  
 " and Benefit, paying such reasonable Charge for keeping and securing  
 " such other Thing, as the said Justice shall direct.

Also it is enacted by the said Statute, " That no such travelling Wag-  
 " gon for Hire, having the Wheels bound with Streaks or Tire of a less  
 " Breadth than two Inches and a Half when worn, or being set or  
 " fastened on with Rose-headed Nails, shall go, or be drawn with more  
 " than three Horses, every such Owner or Driver of any such Waggon,  
 " being so bound with Tire or Streaks of a less Breadth than two  
 " Inches and a Half when worn, or if of a greater Breadth, such Tire or  
 " Streak shall be fastened on with Rose-headed Nails, shall forfeit and  
 " lose all such Horses above the Number of Three, with all Geers,  
 " Bridles, Halters, and Accoutrements, to be seized and disposed of as  
 " aforesaid.

" And that if any Person or Persons shall, or do hinder, or with  
 " Force or otherwise attempt, or endeavour to hinder or obstruct the  
 " Seizing, Distraining, Taking, or Carrying away of any Seizure or  
 " Distress, or Matter or Thing seized or distrained for any the Pe-  
 " nalties or Forfeitures incurred, or to be incurred or forfeited by Vir-  
 " tue of this Act, or shall rescue the same, or shall use any Violence to  
 " the Person or Persons concerned in making such Seizure or Distress,  
 " each and every such Person or Persons, shall upon due Proof made  
 " upon

“ upon Oath, by one or more credible Witnesses or Witnesses, before one  
 “ or more Justice or Justices of the Peace for the County wherein such  
 “ Offence is done, be committed by the Justice or Justices to the com-  
 “ mon Gaol for the said County, for three Months, there to remain  
 “ without Bail or Mainprize, and shall also lose and forfeit for every  
 “ such Offence, the Sum of 10 *l.* to be levied and recovered by Distress  
 “ and Sale of the Offenders Goods and Chattels, by Virtue of a War-  
 “ rant under the Hand and Seal of such Justice or Justices (who is and  
 “ are hereby authorized and required to grant the same); and in Case the  
 “ said Penalty be not paid within three Days after such Distress made,  
 “ then it shall and may be lawful to and for the Person or Persons so  
 “ distraining as aforesaid, to sell the Goods and Chattels so distrained,  
 “ rendering the Overplus to the Owner or Owners, the Charge of such  
 “ distraining and selling being first deducted.

“ *Provided*, That nothing in this Act shall extend, or be construed to  
 “ extend to such Waggon, Wains, Carts or Carriages, as are or shall  
 “ be employed in or about Husbandry, or manuring of Land, and in  
 “ the carrying of Cheefe, Butter, Hay, Straw, Corn unthrashed, Coals,  
 “ Chalk, or any one Tree or Piece of Timber, or any one Stone or  
 “ Block of Marble, Carravans, and the covered Carriages of Noblemen  
 “ and Gentlemen, for their own private Use, or such Timber, Ammu-  
 “ nition or Artillery, as shall be for the Service of his Majesty, his Heirs  
 “ and Successors.

*Note*; In the Statutes 6 & 9 *Ann.* which prohibit the Drawing with  
 more than five Horses, there is this *Proviso*, Except only where such  
 five Horses shall not be sufficient to draw such Cart or Waggon up any  
 steep Hill, or out of any foul Place; in which Case it shall be lawful  
 to join any Horses from another Cart or Waggon then travelling that  
 Road, with the Consent of the Owner or Driver of such Cart or Wag-  
 gon, to help such insufficient Horses up such steep Hill, or out of such  
 foul Place.

As to the Regulation of the Prices of Carriage of Goods, by the  
 3 & 4 *W. 3. cap. 12.* it is enacted, “ That the Justices of the Peace of  
 “ every County, and other Place within the Realm of *England*, or Do-  
 “ minion of *Wales*, shall have Power and Authority, and are hereby en-  
 “ joined and required at their next respective Quarter or General Ses-  
 “ sions after *Easter-Day*, yearly to assess and rate the Prices of all Land-  
 “ Carriage of Goods whatsoever, to be brought into any Place or Places  
 “ within their respective Limits and Jurisdictions, by any common Car-  
 “ rier or Waggoner; and the Rates and Assessments so made to certify  
 “ to the several Mayors, and other chief Officers of each respective  
 “ Market-Town, to which all Persons may resort for their Information;  
 “ and that no such common Waggoner or Carrier shall take for Car-  
 “ riage of such Goods and Merchandizes, above the Rates and Prices  
 “ set, upon Pain to forfeit for every such Offence, the Sum of five  
 “ Pounds, to be levied by Distress and Sale of his and their Goods, by  
 “ Warrant of any two Justices of the Peace where such Waggoner or  
 “ Carrier shall reside, in Manner aforesaid, to the Use of the Party  
 “ grieved.

## Certiorari.

- (A) Out of what Court it issues, and therein of the Discretionary Power of the Court of King's Bench, in granting, denying, and filing it.
- (B) To what Courts it lies.
- (C) Where it is necessary, or the Record may be removed without it.
- (D) What the Party, who applies for it, must do before it is granted.
- (E) Where by Acts of Parliament the Court of King's Bench is restrained from granting.
- (F) To whom it ought to be directed.
- (G) How far it is a Superfedeas to the Court below.
- (H) In what Manner it is to be returned.
- (I) Where the Record shall be said to be removed.
- (K) Of the Proceedings of the Superior or Inferior Court, after the Issuing out of the Certiorari.

(A) Out of what Court it issues, and therein of the Discretionary Power of the Court of King's Bench, in granting, denying, and filing it.

**A** *Certiorari* is an original Writ issuing out of Chancery, or the King's Bench, directed in the King's Name, to the Judges or Officers of (a) Inferior Courts, commanding them to return the Records of a Cause depending before them; to the End the Party may have the more sure and speedy Justice before him, or such other Justices as he shall assign to determine the Cause.

*F. N. B.* 542.  
(a) The Court of Chancery may issue a *Certiorari* to the King's Bench; as if

in an Action of Debt brought in the Common Pleas, upon a Judgment in *B. R.* the Defendant pleads *Nul tiel Record*, the Plaintiff may have a *Certiorari* out of Chancery to send the Record thither; and the same may be sent after by *Mittimus* into the Common Pleas, notwithstanding the general Rule, that Records in *B. R.* shall not be moved out of that Court into any other Court. *Cro. Car.* 297. *Dyer* 187. 4 *Inst.* 73. So if in an Action of Debt brought in an Inferior Court upon a Bond, the Defendant pleads, that the Plaintiff had Recovered in *B. R.* upon the same Bond; and the Plaintiff replies *Nul tiel Record*, and thereupon Issue is joined *quod Habetur tale Recordum*, the Record in *B. R.* may be certified into Chancery, and from thence sent by *Mittimus* to the Inferior Court. 1 *Sand.* 97, 99. 1 *Sid.* 329, 330, 223. 2 *Kebl.* 205, 249, 278.

The Court of King's Bench has a Superintendency over all Courts of an Inferior Criminal Jurisdiction, and may by the Plenitude of its Power award a *Certiorari*, to have any Indictment removed and brought

1 *Vent.* 63.  
1 *Mod.* 4.  
2 *Hawk. P.*  
C. 257.

before it self; and where such *Certiorari* is allowable, ought of Right to award it at the Instance of the King, because every Indictment is the Suit of the King, and he has a Prerogative of Suing in what Court he pleases.

2 *Hawk. P.*  
C. 287.  
1 *Salk.* 144,  
149, 150,  
151.  
1 *Keb.* 4.

But though the Court is to grant it at the Suit of the King, yet it has a Discretionary Power in granting or refusing it at the Suit of the Defendant, and agreeably here to it is laid down as a general Rule, that the Court will never grant it for the Removal of an Indictment before Justices of Gaol-Delivery, without some Special Cause; as where there is just Reason to apprehend that the Court below may be unreasonably prejudiced against the Defendant; or where there is so much Difficulty in the Case, that the Judge below desires that it may be determined in the King's Bench; or where the King himself gives Special Direction that the Cause shall be removed; or where the Prosecution appears to be for a Cause not properly Criminal.

1 *Sid.* 54.  
2 *Hawk. P.*  
C. 287.

Neither will the Court of King's Bench ordinarily, at the Prayer of the Defendant, grant a *Certiorari* for the Removal of an Indictment of Perjury, or Forgery, or other heinous Misdemeanor; for such Crimes deserve all possible Discountenance, and the *Certiorari* might delay, if not wholly discourage, their Prosecution.

2 *Hawk. P.*  
C. 287, 288.  
1 *Salk.* 145.  
S. P. and  
that it was

Nor will the Court of King's Bench grant it for a Conviction of Recusancy on a Default at the Sessions, because by the Statute such Convictions are to be removed into the Exchequer, and Proccs on them is to go from thence.

never done but in the Duke of York's Case. *Vide* Head of *Popish Recusants*.

2 *Hawk. P.*  
C. 288.  
16 *E.* 4. 5.  
1 *Salk.* 149.  
3 *Mod.* 17.

Also it is said to be a good Objection against granting a *Certiorari*, that Issue is joined, and a *Venire* awarded for the Trial in the Court below.

A *Certiorari* shall not be granted to remove an Indictment or Appeal after a Conviction, unless for some Special Cause; as where the Judge below is in doubt what Judgment to give.

1 *Sid.* 296.  
2 *Keb.* 81.  
2 *Hawk. P.*  
C. 288.

But it hath been adjudged, that a *Certiorari* for the Removal of a Presentment before Justices in *Eyre*, of a Matter which is inquirable and punishable by the Forest Law only, shall not be granted before, but only after Conviction; for if it should be granted before, the Offence would be dispunished; but it may be granted after Conviction, in order to give the Party, the Right of whose Freehold is concerned in it, an Opportunity so far to traverse it.

2 *Hawk. P.*  
C. 288.

The Court has refused to grant a *Certiorari* to remove a Recognizance of Appearance before Justices of Oyer and *Terminer*, &c. because the Court below is most proper to Judge upon the whole Circumstances of the Case, which are equitably to be considered, whether it ought to be estreated or not.

2 *Hawk. P.*  
C. 288.

By a Rule of the King's Bench, no Order of Commissioners of Sewers is to be filed without Notice to the Parties concerned; neither will the Court suffer the Return of a *Certiorari* for such Order to be filed, without hearing Affidavits of the Facts; whereon if the Matter appear doubtful, it is usual to order a Trial of feigned Issues, and after such Trial, either to file the Return, or supersede the *Certiorari*, and grant a *Procedendo*, and give (a) Costs, &c. as shall appear to be most reasonable.

(a) *Vide*  
2 *Keb.* 500.

(B) To What Courts it lies.

THE Courts of Chancery and King's Bench may award a *Certiorari* to remove the Proceeding from any Inferior Courts, whether they be of an antient or newly created Jurisdiction, (a) unless the Statute or Charter, which creates them, exempts them from such Jurisdiction.

1 Lev. 312. Cro. Car. 265. 3 Mod. 93. (a) As the Statutes concerning the Commissioners of Cambridge-shire Fens, &c. as said by some to have done. 1 Sid. 296. cont', 1 Keb. 43. 2 Keb. 722.

S. P. C. 70.  
1 Salk. 144.  
Pl. 3. 146,  
148.  
2 Lev. 86.

And therefore it is agreed, That the King's Bench may award such *Certiorari* to Justices in (b) *Eyre*, or of (c) Gaol-Delivery, or of (d) County Palatine, and to the (e) College of Physicians, having a Special Power by Statute to impose Fines, &c. and to Justices of the Peace, &c. even in such (f) Cafes, which they are impowered by Statute finally to hear and determine; and to (g) Commissioners of Sewers, for the Clause in 13 *Eliz. cap. 9. That such Commissioners shall not be compelled to make any Return of their Ordinances*, (b) has been construed to intend only to exempt them from returning their Orders into Chancery, as by the Statute of *H. 8.* they were obliged to do.

(b) 1 Sid. 226.  
2 Keb. 81.  
4 Inst. 294.  
(c) 1 Salk. 144.  
(d) 3 Mod. 229.  
2 Lev. 223.  
1 Salk. 146.  
1 Rol. Abr. 395.  
Allen 49.

(e) 1 Salk. 144. (f) 3 Mod. 93. (g) 1 Salk. 145. 1 Keb. 129. March 196. Raym. 186. (h) 1 Mod. 44, 45. 1 Lev. 288. 1 Vent. 66.

Also it seems settled at present, that a *Certiorari* lies to the Courts of *Cinque Ports*, to remove an Indictment from those Courts, and that the Privilege of the *Cinque Ports*, which they have enjoyed Time out of Mind, that the King's Writs do not run there, is to be intended only of Civil (i) Causes between Party and Party.

(i) Cro. Eliz. 910. Palm. 54. Cro. Jac. 531. 1 Sid. 452. Hard. 475.

Also a *Certiorari* lies from the King's Bench to the Courts of Grand Sessions, and to other Courts in *Wales*, whether in the old *Welch Counties*, or in the Lordships Marches; and whether such Indictments be for inferior Crimes or for Felony.

2 Hawk. P. C. 287.  
Vide Courts and their Jurisdiction.

Also it lies to remove an Indictment from any Court of Criminal Jurisdiction in *London* or *Middlesex*; but by the City Charter only the Tenor of the Indictment shall be removed.

2 Hawk. P. C. Vide Title London.

(C) Where

## (C) Where it is necessary, or the Record may be removed without it.

Vide 2 Hawk.  
P. C. 290.  
and several  
Authorities  
there cited.

IF a Justice of Peace or other Judge of Record, having taken a Recognizance or Inquisition, or recorded a Riot, or done any other Executory Matter, still continue in the Commission without Interruption; the King's Bench may, without any *Certiorari*, receive the Record from his Hands; also the Clerk of the Assises may, without *Certiorari*, bring in the Records of *Nisi Prius* on the Death of the Justices; but the Executor of the Judge cannot do it without Writ; neither can a Record executed, as by Acquittal, &c. be brought into a higher Court without Writ; neither can a Justice who is out of the Commission at the Time, nor one who has been out, and is restored, certify any Record without Writ.

## (D) What the Party, who applies for it, must do before it is granted.

BY the 2 Jac. 1. cap. 8. " All *Certiorari*'s for Indictments of Riots, " Forcible Entry, or Assault and Battery at any Quarter-Sessions of " the Peace, or otherwise, shall be delivered in open Court, and the De- " fendant shall, before the Allowance, become bound to the Prosecutor " in 10 l. with such Sureties as the Justices at their Quarter-Sessions shall " think fit, to pay to such Prosecutor such Costs and Damages as the " Justices of the County, &c. shall think fit; and in Default thereof it " shall be lawful to proceed, such *Certiorari* notwithstanding.

And the like Recognizance in the Sum of 40 l. is required by 13 & 14 Car. 2. cap. 6. on *Certiorari*'s for Indictments on that Statute concerning the Highways.

1 Keb. 225.  
6 Mod. 226.  
2 Salk. 526.  
2 Show. Rep.  
336.  
2 Hawk. P.  
C. 291.

These Statutes do not extend to all Indictments at Sessions in General, but only to those particular ones therein mentioned; but this Defect was in a great Measure supplied by the Rules of the Court of King's Bench, which, upon the Removal of an Indictment from *London* to *Middlesex*, required a Recognizance from the Defendant, to carry down the Record to Trial the same Term on which the *Certiorari* was returnable, or the Sittings after, and, on the Removal of an Indictment from other Counties, required such Recognizance for a Trial at the next Assises.

And agreeably hereto it is enacted by 5 & 6 W. & M. cap. 11. and 8 & 9 W. cap. 3. 33. " That all Parties indicted at a General or Quarter- " Sessions of the Peace, prosecuting a *Certiorari* before the Allowance " thereof, shall first find two sufficient Manucaptors, who shall enter into " a Recognizance in the Sum of 20 l. before one or more Justices of the " Peace of the County or Place (or else before one of the Judges of the " King's Bench, in which Case such Judge shall make mention of it " under his Hand on the Back of the Writ) and the Recognizance shall " be with Condition, at the Return of such Writ, to appear and plead to " the Indictment or Presentment in the Court of King's Bench, and at " his own Costs to procure the Issue that shall be joined upon the said " Indictment or Presentment, or any Plea relating thereto, to be tried " at the next Assises for the County wherein the Indictment was found,

" after

“ after such *Certiorari* shall be returnable, if not in *London, Westminster,*  
 “ or *Middlesex*; and if there, then to cause it to be tried the next Term  
 “ after, wherein such *Certiorari* shall be granted, or at the Sitting after  
 “ the said Term, if the Court of King’s Bench shall not appoint any  
 “ other Time for the Trial thereof; and if any other Time shall be ap-  
 “ pointed by the Court, then at such other Time; and to give due  
 “ Notice to the Prosecutor, or his Clerk in Court; and also that the  
 “ Party or Parties prosecuting such *Certiorari*, shall appear from Day to  
 “ Day in the said Court of King’s Bench, and not depart until he or  
 “ they shall be discharged by the said Court; and such Recognizances,  
 “ *Certiorari*’s, and Indictments, shall be filed in the King’s Bench, and  
 “ the Name of the Prosecutor, (if he be the Party grieved or injured)  
 “ or some publick Officer, endorsed on the Back of the Indictment; and  
 “ if the Person prosecuting such *Certiorari*, being the Defendant, shall  
 “ not before Allowance thereof procure such Manucaptors to be found as  
 “ aforesaid, the Justices of the Peace shall and may proceed to Trial of  
 “ the Indictment notwithstanding such *Certiorari*.

And it is further enacted by the said Statute of 5 & 6 W. & M. c. 11.  
 “ That if the Defendant prosecuting such *Certiorari* be convicted, the  
 “ King’s Bench shall give reasonable Costs to the Prosecutor, if he be the  
 “ Party grieved or injured, or be a Civil Officer, who shall prosecute on  
 “ Account of any Fact that concerned him as Officer to prosecute or pre-  
 “ sent; which Costs shall be taxed according to the Course of the said  
 “ Court; and the Prosecutor, for the Recovery of such Costs, shall  
 “ within ten Days after Demand made of the Defendant, and Refusal of  
 “ Payment on Oath, have an Attachment granted against the Defen-  
 “ dant by the said Court, for such his Contempr, and the said Recog-  
 “ nizance shall not be discharged till the Costs so taxed shall be paid.

And the like in Effect is enacted by the said Statute of 5 & 6 W. & M.  
*cap. 11.* concerning the Removal of Indictments by *Certiorari*, within the  
 Counties Palatine of *Chester, Lancaster, and Durham*.

In the Construction of these Statutes, the following Points seem most  
 remarkable.

That notwithstanding the express Words are, That Justices may pro-  
 ceed to Trial, &c. if a proper Recognizance be not given, notwithstanding  
 such *Certiorari*, yet they will be in Contempt if they make no Re-  
 turn to it, for all Writs must be obeyed, unless good Cause shewn to the  
 contrary.

1 *Keb.* 225,  
 1 *Sid.* 70.  
 2 *Hawk. P.*  
 C. 292.

That these Statutes extend only to *Certiorari*’s procured by Defendants,  
 and therefore those procured by Prosecutors remain as they were at  
 Common Law.

6 *Msd.* 246.

That these Statutes being in the Affirmative, as to the taking Recog-  
 nizances, do not take away the Power which the Justices of the King’s  
 Bench had before; and therefore if such a Justice take a Recognizance  
 variant from the Form prescribed by the Statute, it will be as effectual as  
 before; but it is said, That in such Case the *Certiorari*, if procured by  
 the Defendant, will be no *Superfedeas*, because the Statutes seem to be  
 express, that the Sessions may proceed notwithstanding any *Certiorari* pro-  
 cured by a Defendant, whereon such Recognizance is not given as is pre-  
 scribed.

2 *Hawk. P.*  
 C. 292.  
 1 *Salk.* 564.

That if the Persons offering to be Sureties appear to be worth twenty  
 Pounds, the Justices cannot refuse them.

*March* 27.  
 2 *Hawk. P.*  
 C. 292.

That if there be several Defendants, and some find Sureties, and others  
 not, the Indictment shall be removed as to those at least, who find Sure-  
 ties, because they shall not be prejudiced by the Fault of others; and as  
 (a) some say, it shall be removed as to all.

2 *Hawk. P.*  
 C. 292.  
*March* 27.  
 (a) 1 *Keb.*

That in taxing the Costs, those only are to be considered that were  
 subsequent to the *Certiorari*.

231.  
 1 *Salk.* 55.

- <sup>2</sup> *Hawk. P. C.* 292.  
<sup>1</sup> *Salk.* 55. That the Prosecutor, by accepting the Costs so taxed, is not restrained from aggravating the Fine, because he has a Right to them by the express Words of the Statute; but in other Cases, if a Prosecutor accept Costs from a Defendant, he cannot afterwards aggravate the Fine, because having no Right to the Costs, if he take them at all, he must take them in Satisfaction of the Wrong; after which it is unreasonable for him to harass the Defendant.
- <sup>1</sup> *Salk.* 370. That notwithstanding the Condition of the Recognizance be, That the Defendant shall procure a new Trial at the next Assizes, yet the Recognizance shall not be forfeited unless the Prosecutor give Rules, &c.
- <sup>1</sup> *Salk.* 380.  
<sup>2</sup> *Hawk. P. C.* 293. That after the Recognizance is forfeited for not procuring a Trial, &c. no Motion shall be made to quash the Indictment.
- And the like <sup>1</sup> *Salk.* 380.  
in Effect is <sup>2</sup> *Hawk. P. C.* 293.  
enacted by <sup>4</sup> & <sup>5</sup> *W. & M. cap.* 10.  
<sup>4</sup> & <sup>5</sup> *W. & M. cap.* 23.  
and <sup>5</sup> *Ann.*  
in relation to Convictions in those Acts of Offences concerning the Game. *Vide* Head of Game.
- It is enacted by 3 & 4 *W. & M. cap.* 10. against Deer-stealers, " That no *Certiorari* shall be allowed to remove any Proceedings on that Act, unless the Party convict shall become bound with good Sureties in 5 *l.* to pay full Costs and Damages within one Month after the Conviction shall be confirmed, or a *Procedendo* granted.

### (E) Where by Acts of Parliament the Court of King's Bench is restrained from granting it.

**B**Y the 1 & 2 *Ph. & Ma. cap.* 13. it is enacted, " That no Writs of *Habeas Corpus*, or *Certiorari*, shall be granted to remove any Prisoner out of any Gaol, or to remove any Recognizance, except the same Writs be \* signed with the proper Hands of the Chief Justice, or in his Absence, of one of the Justices of the Court out of which the same Writ shall be awarded or made, upon Pain, that he that writeth any such Writs, not being signed, as is aforesaid, to forfeit for every such Writ five Pounds.

\* If a *Certiorari* be taken out in Vacation, and Tested of the precedent Term, the *Fiat* for it must be signed by some Judge of the Court some Time before the Essoin-Day of the subsequent Term; otherwise it is irregular; and the Court, upon Motion, will order a *Procedendo*; but it is said, that there is no need for any Judge to sign the Writ of *Certiorari* it self, but only in such Cases wherein it is required by Statute. <sup>1</sup> *Salk.* 150.

And by 5 & 6 *W. & M. cap.* 11. " No *Certiorari* in Term-time, at the Prosecution of the Defendant, shall be granted out of the King's Bench, to remove any Indictment or Presentment from any General or Quarter-Sessions before Trial, but on Motion and Rule in open Court; but in Vacation such Writ may be granted by any Judge of the said Court, whose Name shall be indorsed thereon; and also the Party's Name at whose Instance it is granted.

It is enacted by 22 *Car. 2. cap.* 12. " That all Defects of Repairs of Causeways, Pavements, Highways or Bridges, shall be Presented in the County only where such Causeways, &c. lie, and not elsewhere; and that no Indictment or Presentment shall be removed by *Certiorari* or otherwise out of the said County, till such Indictment or Presentment shall be traversed, and Judgment thereupon given: " And it is farther enacted by 3 & 4 *W. & M. cap.* 11. " That all Matters concerning Highways, &c. shall be determined in the County where they lie, and not elsewhere; and no Presentment, Indictment, or Order made by Virtue of that Act, shall be removed by *Certiorari*: " But it is enacted

*Vide* Head of Highways.

enacted by 5 & 6 W. & M. cap. 11. " That if the Right or Title to re-  
 pair such Causeys, &c. may come in Question, upon Suggestion and  
 Affidavit of the Truth thereof, a *Certiorari* may be (a) granted to re-  
 move such Indictment or Presentment into the King's Bench. (a) Also it  
 hath been  
 adjudged,

That if the Sessions manifestly exceed their Authority in making Orders concerning Highways, such  
 Orders may be removed by *Certiorari* into the King's Bench, and quashed. 2 Hawk. P. C. 289.

By the 7 & 8 W. & M. cap. 6. made for the Recovery of small Tithes  
 before Justices of the Peace, it is enacted, " That no Proceedings, or  
 Judgment by Virtue thereof, shall be removed or superseded by any  
 Writ of *Certiorari* out of any Court whatsoever, unless the (b) Title  
 of the Tithes, &c. shall come in Question. (b) If the  
 Party insists  
 on any Mat-

ter 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. P. C. 289.

**(F) To Whom it ought to be directed.**

**R**egularly a *Certiorari* ought to be directed to the Judge of the In-  
 ferior Court ; but in some Cases it may be directed to the Officer  
 known to have the Custody of the Record ; and in some other Cases to  
 others, as shall be most agreeable to the Course of approved Precedents,  
 which seems to be the best Guide in this Matter. 2 Hawk. P.  
 C. 289.

If the Person who ought to certify a Record, as a Justice of (c) Peace,  
 who hath taken a Recognizance ; or (d) a Judge of *Nisi Prius*, who has  
 taken a Verdict ; or a (e) Coroner, who hath taken an Inquest, die  
 with the Record in his Custody, the *Certiorari* may go to his Execu-  
 tor, &c. (c) 2 Keb. 750.  
 (d) 3 H. 4. 3.  
 Cro. Jac. 669.  
 (e) Dyer 163.  
 Raft. Ent.  
 439.  
 2 Inst. 424.

2 Rol. Abr. 629. (e) Bro. *Certiorari* 9. Indictment 23.

Also it hath been adjudged, that it may be directed to a Justice of Af-  
 fise, to certify a Record of Assise taken before his Companion in his Ab-  
 sence. 11 H. 7. 5.  
 Bro. Receipt  
 81.

*Certiorari*'s for the Removal of Indictments, &c. from Sessions of the  
 Peace, are commonly directed either to the Justices of the Peace of the  
 District generally, or to some of them in particular by Name, and not  
 to the *Custos Rotulorum* ; yet it hath been holden, That after a Recogni-  
 zance is brought in to him he shall (f) certify it. Register Ori-  
 gin. 90.  
 F. N. B. 81.  
 Hob. 135.  
 (f) Vide

2 Hawk. P. C. 290. Leaves it a Doubt whether it can be certified by him, unless he does it as Ju-  
 stice of Peace.

**(G) How**

## (G) How far it is a Superfedeas to the Court below.

*Cro. Car.* 261. *1 Salk* 148. *Cro. Eliz.* 915. *Lyer* 98. *M.* 677. **I**T is clearly settled, that after a *Certiorari* is allowed by the Court below, all subsequent Proceedings on the Record are Erroneous. Also before 21 *Jac.* 1. (which requires that all *Certiorari's* for Indictments, Forcible Entries, at Sessions, shall be delivered in Court) the Delivery of such *Certiorari* to any one Justice of the Peace of the same Place, made all subsequent Proceedings erroneous; and if any Process had been before awarded on the Indictment, the Justice to whom the *Certiorari* was delivered, ought immediately to have awarded a *Superfedeas* to the Sheriff, in order to have stopped the Execution of it; and it seems that the Delivery of such a *Superfedeas* to the Sheriff before he has begun to put a Process in Execution, makes his subsequent Execution of it wholly void; because it is but a ministerial Act; but if it be not delivered till after the Execution is begun, he may afterwards go through with it, by

(a) But Virtue of a (a) Writ of *Venditioni exponas*.  
 2 *Hawk. P.C.* 293, questions whether without such Writ he can proceed.

*Vide 2 Hawk. P.C.* 293, 294. and the Authorities there cited. It is said that the bare Delivery of a *Certiorari* makes all subsequent Proceedings on the Record, whether before or after the Return of the *Certiorari*, erroneous, by Force of the Words *coram nobis terminari volumus & non alibi*; in which Respect a *Certiorari* is of greater Force than a Writ of *Error*; for that becomes of no Effect if the Record be not satisfied in a reasonable Time; also it hath been held that the very Issuing of a *Certiorari* is of itself a *Superfedeas*, though it be never delivered, in the same Manner as an Appearance in the Court above; and a *Superfedeas* purchased there, though not delivered to the Sheriff till after the *Quinto exactus*, will avoid an Outlawry pronounced after; but it seems the better Opinion, that if a *Certiorari* be not delivered before Issue is joined, or at least before the Return of it is expired, it is of no Effect; however it is of no Force at this Day, as to Indictments at Sessions, as appears *supra*, Letter (D).

*Cro. Jac.* 282. *Yelv.* 207. *Skin.* 244. *2 Hawk. P.C.* 294. *2 Rol. Abr.* 492. *cont.* and *Dalt. cap.* 75. *cont.* A *Certiorari* for the Removal of a Recognisance for the Good Behaviour, or for an Appearance at the Sessions, will not supersede its Obligation, because it would be highly inconvenient that the Party, against whom there may be very just Matter of Complaint, should be let loose upon the bare bringing a Writ.

## (H) In what Manner it is to be returned.

(a) *Cro. Eliz.* 821. **T**HE Return of a *Certiorari* ought to be under the Seal of the (a) inferior Court, or of the Justice or Justices to whom it is directed; and if such Court have no proper Seal, it may be under any (b) other Seal. Also it must be made by the Person, to whom the *Certiorari* is directed, to the Justices of Peace of such a Place, and the (c) Clerk of the Peace only return it, or to the Constable, or to the Recorder of B. and the (d) Deputy Constable or Deputy Recorder return, (without shewing in the Return, that the Principal had Power to make a Deputy)

2 *Keb.* 385.

or to the Steward of St. Paul's, and the Steward of the Church of (a) *2 Keb. 385. cited.*  
 St. Peter and St. Paul return it, nothing is removed.

But if it be directed to the Justice of Chester, it may be (b) returned by A. B. Chief Justice; for the same Officer is known to be meant in the Writ and Return, and his Description in both is in Substance the same. *1 Sid. 64. 1 Lev. 50. 1 Keb. 165. 2 Salk. 452. (b) But if a Certiorari directed to several Justices, be returned by one of them only, Quare what shall be done. Vide 2 Hawk. P. C. 294, 295.*

A Recognizance taken by a Justice of Peace, ought to be certified by such Justice only till it be made Record of the Sessions, after which it shall be certified in the same Manner as the other Records of the Sessions. *Cro. Jac. 669.*

The Return to a *Certiorari*, directed to Justices of the Peace, for the Removal of an Indictment, ought to have the Clause *nec non ad diversas felonias, &c.* in the Description of the Justices who make the Return, where such Clause is necessary in the Caption of an Indictment. *2 Hawk. P. C. 295.*

A *Certiorari* issued to remove an Indictment upon the Statute 5 Eliz. for exercising a Trade in a Borough, to which the Mayor made this Return, viz. *Humillime Certifico quod ad Sessionem pacis, &c. per juratores presentatum existit quod billa sequens est vera, viz. quod predictus S. J. did exercise, omitting the Clause juratores pro Domino Rege presentant quod, &c.* and though the Court held that without these Words no Indictment was returned, yet they would not quash it, but ordered the Mayor to amend his Return; also the Court held that *Humillime Certifico* was not a good Return. *Carth. 223. The King vers. Perry. See the Form of Returns to Certiorari's. Lamb. B. 2. cap. 2, 107. Dalt. cap. 73. and 134.*

The Person to whom a *Certiorari* is directed, may make what Return to it he pleases, and the Court will not stop the filing of it, on Affidavit of its (c) Falsity, except only where the publick Good requires it; as in the Case of the (d) Commissioners of Sewers, or for some other special Reason. *6 Mod. 90. (c) 2 Hawk. P. C. 295. (d) But an Action on*

the Case lies for a false Return, at the Suit of the injured Party, or there may be an Information at the Suit of the King. *6 Mod. 90. 2 Hawk. P. C. 295.*

Whatsoever is put into the Return to a *Certiorari*, by Way of Explanation or otherwise, besides what is ordered to be returned, is put in without Warrant, and not to be regarded. *2 Salk. 492. 2 Hawk. P. C. 295.*

Generally the Record itself, or the Tenor of it, or the Tenor of the Writ requires; for, if, on a *Certiorari* to return an Order of Justices of the Peace, the Tenor of it be only certified, the Return is naught; but the Return of a Tenor of an Indictment from London is good, by the City Charter; also it is said to be sufficient to certify the Tenor only in all Cases where the Purport of the *Certiorari* is not to proceed on the Record removed, but only to try the Issue of *Nul tiel Record*. However it seems clear, that if the Court, which awards a *Certiorari*, have no Jurisdiction to proceed on the Record ordered to be removed, as where the Court of Common Pleas award a *Certiorari* for an Indictment, the Tenor only shall be removed, lest there should be a Failure of Justice. *2 Hawk. P. C. 295. and vide several Authorities there cited.*

## (1) Where the Record shall be said to be removed.

For which *vide supra* (F) (G) and (H).  
 1 *Salk.* 148. It will remove an Indictment, though there were a Discontinuance below, in the same Manner as a *Recordare* will remove a Pleint that was discontinued below. 2 *Hawk. P. C.* 296.

WHERE the Writ of *Certiorari* is improperly directed or returned, nothing can be removed by it.  
 A *Certiorari* may remove a Record coming within its Description, before the Time of its Return, though there were no such Record at the Time of its Teste, or at the Time of its Delivery to the Court below.

*Vide 2 Hawk. P. C.* 296, 297. and the several Authorities there cited, most of which were on the Returns to Writs of Error, for which *vide Head of Error.*

But it removes no Record which materially varies from the Record described in it; as where the Writ describes a Record taken before *A. B. Jusficiario nostro*, and eight others, and the Record certified was taken before *A. B.* and seven others only, or before him and others, besides the eight, or before *C. D.* and the other eight, or before Justices of a former Reign, or where the Writ describes an Indictment for stealing two Horses, or an Order concerning foreign Salt, or the Manor of *Ansley*, and the Record certified mention one Horse only, or Salt in general, or relate only to the Manor of *Ansley*, without shewing in the Return, that *Ansley* and *Aesley* are the same, &c. or where the Writ mentions Orders or Indictments against *A. B.* and *C.* and those certified are against *A.* only, or against *A.* and *B.* only.

1 *Salk.* 146.  
 2 *Hawk. P. C.* 296.  
 (b) But per 2 *Hawk. P. C.* 296. it is not agreed whether in such a Case the Indictment shall be removed, so far as it concerns the other twenty.

But a Writ for the Removal of all Indictments against *A.* may remove an Indictment against *A.* and twenty others, so far at least as it (*b*) concerns him; because in Judgment of Law it is a several Indictment against each Defendant.

*Vide 2 Hawk. P. C.* 297. and the Authorities there cited.

A Variance between the *Certiorari* and the Record certified in the Spelling only, where the Words are of the same sound, as *Bird* and *Burd*, seems not to be material, because it appears not by any Record of the Court, but that the Name in the *Certiorari* may be the true one, and that in the Record, being in the Same sound, shall be intended to mean the same Person; neither does it seem to be a material Variance that the *Certiorari* omits an Addition which the Record gives the Party; but if the *Certiorari* give the Party an Addition which the Record does not, the Variance is fatal; and so *a fortiori* is a Variance in giving the Party Names of a different Sound, or Additions of a different Kind in the *Certiorari* and Record certified; as where the one calls him *William Giggure*, and the other *William Giggeer*; or the one calls him *Henry Coachman*, *quocunque nomine censeatur*, and the other *Henry Murton Coachman*; or the one calls him *John of S.* and the other *John S.* or the one calls him Knight and Baronet, and the other Baronet only; or the one call him *Garret* and the other *Gerrard*; or the one *J. S. nuper de B.* the other *J. S. nuper de C.* or the one *J. S. de B. Sadler*, the other *J. S. de B. Salter*.

*Vide Head of Misnomer.*

(K) Of the Proceedings of the Superior or inferior Court, after the issuing out of the Certiorari.

AFTER the *Certiorari* delivered, if the inferior Court proceeds, where by Law it ought not, it is a Contempt, for which the Court will grant an Attachment. *Raym.* 186. *1 Vent.* 66. *1 Salk.* 144.

But if an Indictment be removed after Issue joined and remanded, the inferior Court (a) shall proceed as if no *Certiorari* had been granted. *2 Hawk. P. C.* 294.

(a) But by the Common Law, if a *Certiorari* be once filed, the Proceedings below can never be revived by any *Procedendo.* *2 Hawk. P. C.* 294.

Also if a *Certiorari* issues, and the Record is not thereby removed, the Court (b) above cannot proceed upon it, but will (c) quash the Writ, and award (d) a new one, or suffer the Court below to proceed, and take such (e) Order in Relation to the Defendant's Appearance, either in the one Court or the other, to answer the further Prosecution of the Cause against him, as shall in Discretion appear to be most proper. *(b)* *12 H. 7.* 25. *(c)* *1 Sid.* 193. *2 Keb.* 142. *(d)* *1 Keb.* 101. *1 Salk.* 147. *(e)* *2 Hawk.*

*P. C.* 297. *(e)* *12 H. 7.* 25. *3 Aff. Pl.* 3. *2 R. 2.* 9. *2 Keb.* 14. *Carth.* 223.

If the Defendant, against whom a Record is removed into the King's Bench, do not appear, the like Process shall go from thence as if the Cause had been commenced there; but since the Record is put without Day, by the Removal, there is no Way to Nonfuit the Plaintiff before he has appeared there, but by taking out a *Scire facias* to warn him to prosecute, whereon if the Sheriff (f) return a *Scire feci*, he may be Nonfuit. *(f)* But if two *Nihil* are returned,

*Quere* what is to be done. *2 Hawk. P. C.* 297.

Champerty.

## Champerty.

1 Hawk. P. C. 256.  
2 Inst. 208.  
Co. Lit. 368.b.

**C**hamperty is the unlawful Maintenance of a Suit, in Consideration of some Bargain to have Part of the Thing in Dispute, or some Profit out of it.

As there is little said in our modern Books on this Head, I shall only set down the Acts of Parliament relating to it, and those Resolutions which are to be met with in the old Ones.

By *Westm. 1. or 3 E. 1. cap. 25. it is enacted*, That no Officers of the King, by themselves or by other, shall maintain Pleas, Suits, or Matters hanging in the King's (a) Courts, for Lands, Tenements, or (b) other Things, for to have Part or (c) Profit thereof by (d) Covenant made between them; and he that doth shall be punished at the King's Pleasure.

(a) Courts of Record only are intended.

2 Inst. 208.

1 Hawk. P. C. 257. (b) Maintenance in an Action Personal, to have Part of the Debt or Damages, is within the Statute 47 Aff. Pl. 5 1 Hawk. P. C. 257. (c) A Grant of Rent out of the Lands in Question, is within the Statute; but not a Grant of a Rent out of other Lands. F.N.B. 172. 1 Hawk. P. C. 257. (d) Any Contract, whether by Writing or Parol, is within the Statute. 2 Inst. 209, 563. F. N. B. 172.

1 Hawk. P. C. 257.

The Maintenance of the Tenant or Defendant, is as much within the Meaning of the Statute, as the Maintenance of a Demandant or Plaintiff.

2 Rol. Abr.

113. Pl. 3.

15 H. 7. 2. a.

Bro. Tit. Champerty 6.

A Grant of Part of a Thing in Suit, made in Consideration of a precedent Debt, is not within the Meaning of the Statute, but such only as is made in Consideration of Maintenance.

In a Prosecution on this Statute, it doth not seem material, whether the Plea, wherein the Maintenance is alledged, be determined or not, or whether the Party did suffer any Prejudice by it.

1 Hawk. P. C. 257.

and

vide the Au-

thorities there cited.

By the Statute *Westm. 2. cap. 49. it is enacted*, That the Chancellor, Treasurer, Justices, nor any of the King's Counsel, nor Clerk of the Chancery, nor of the Exchequer, nor any Justice, or (e) other Officer, nor any of the King's House, Clerk nor Lay, shall not receive any Church, nor Advowson of a Church, Land, nor Tenement in Fee, by Gift or by Purchase, or to Farm, nor by Champerty nor otherwise, so long as the Thing is in Plea before the King, or before any of his Officers, nor shall take no Reward thereof; and that he that doth contrary to this Act, either himself or by another, or make any Bargain, shall be punished at the King's Pleasure, as well he that purchaseth as he that doth sell.

(e) This Sta-

ture extend-

eth only to

the Officers

therein na-

med. 2 Inst.

484. It

has been

held that it

so strictly

restrains all

such Officers

from purchasing any Land, hanging a Plea, that they cannot be excused by any Consideration of Kindred or Affinity, and that they are within the Meaning of the Statute, by barely making such a Purchase, whether they maintain the Party in his Suit or not; whereas such a Purchase for good Consideration, made by any other Person, or any Tenant, is no Offence, unless it appear that he did it to maintain the Party. 1 Hawk. P. C. 257. and the Authorities there cited.

And it is further enacted by 28 E. 1. cap. 11. in the following Words,  
Because the King hath heretofore ordained by Statute, that none of his Ministers shall take no Plea for Maintenance, by which Statute

“ other Officers were not bounden before this Time, the King will that  
 “ no Officer, nor any other, (for to have Part of the Thing in Plea)  
 “ shall not take upon him the Busines that is in Suit, nor none upon  
 “ any such Covenant, shall give up his Right to another; and if any  
 “ do, and be attainted thereof, the Taker shall forfeit unto the King  
 “ so much of his Lands and Goods as doth amount to the Value of the  
 “ Part that he hath purchas'd for such Maintenance; and to obtain  
 “ this, whosoever will shall be received to sue for the King, before the  
 “ Justices before whom the Plea hangeth, and the Judgment shall be  
 “ given by them; but it may not be understood hereby that any Per-  
 “ son shall be prohibited to have Counsel of Pleaders, or of learned Men  
 “ in Law, for his Fee, or of his Parents or next Friends.

Champerty in any Action at Law, seems to be agreed to be within <sup>1 Hawk. P. C.</sup>  
 this Statute, and a Purchase of Land, pending a Suit in Equity <sup>258.</sup> con-  
 cerning it, hath also been holden to be within it; also a Lease for Life  
 or Years, or a voluntary Gift of Land, hanging a Plea, is as much with-  
 in the Statute as a Purchase for Money.

But neither a Conveyance executed, hanging a Plea, in pursuance of <sup>1 Hawk. P. C.</sup>  
 a precedent Bargain, nor any Surrender by a Lessee to his Lessor, nor <sup>258.</sup>  
 any Conveyance or Promise thereof made by a Father to his Son, or  
 by any Ancestor to his Heir apparent, nor a Gift of Land in Suit, af-  
 ter the End of it, to a Councillor for his Fee or Wages, without any  
 Kind of precedent Bargain relating to such Gift, are within the Meaning  
 of the Statute.

## Charitable Uses and Mort- main.

- (A) Of the several Statutes prohibiting to purchase in Mortmain.
- (B) Of Things exempt from, or out of the Statutes of Mortmain.
- (C) What is a good charitable Use within the Statute 43 Eliz.
- (D) What is a superstitious Use to which the King is intitled.
- (E) How charitable Dispositions have been construed.
- (F) Of the Commissioners of charitable Uses, pursuant to the Statute 43 Eliz.

## (A) Of the several Statutes prohibiting to purchase in Mortmain.

**T**HE Clergy in former Days had so great an Ascendant over the People, by instilling in them the Notions of Purgatory, and had so wrought on them by their Art and Management, that they prevailed on them to be very Liberal of their Possessions, and especially at their Deaths, to dispose of them to those only who could promise them Happiness in another World; this proving very Prejudicial to the Lords, who thereby lost the Advantages of Wardships, Marriage, Relief, Escheat, &c. (Lands in the Hands of a Religious House or Person being considered as in a *dead Hand*, yielding no Fruits to the Lord) occasioned the Clause in the Statute of *Magna Charta*, by which it is enacted, *That it shall not be lawful for any to give his Lands to any Religious House, and to take the same Lands again to hold of the same House, &c.*

9 H. 3. cap. 36.

But Religious Men found Means to avoid this Statute, by purchasing Lands held of themselves, and by taking long Leases; also all Ecclesiastical Persons regular, as Abbots, &c. thought themselves out of this Statute; to meet therefore with these Evasions, the 7 Ed. 1. called the Statute of *Mortmain*, was made.

Co. Lit. 2.

By which it is provided, *That no Corporation, Civil or Religious, shall purchase Lands in Mortmain; and that if they do, the immediate Lord may enter within a Year after such Purchase made, and the superior Lords, up to the King, in Half a Year afterwards; and if all such Lords, immediate and mediate, being of full Age, within the four Seas, and out of Prison, are Negligent, the King may enter and enfeoff a Tenant by Services to the King, saving the Wardship and Escheat to the Lord of the Fee, &c.*

2 Inst. 75.

Comp. Incumb. 374.

The Clergy, when they found themselves prohibited by *Magna Charta* from purchasing Lands, and perceived that their Evasion of that Law was provided against by 7 E. 1. which prohibited them not only from purchasing, but also *ulla arte vel ingenio terris sibi ipsis appropriare sub pœna forisfacturæ earundem*, began to apply the Judgments of the Courts, against the Intention of the Law, to their own Advantage; for they brought their *Præcipe* against the Tenant, who had agreed either to give or sell them the Lands in Demand, and prosecuted the Suit, as if it had been really an adversary one, till the Tenant, according to the precedent Agreement, made Default, which was always look'd upon as sufficient Ground for a Judgment in Favour of the Demandant; and the Judges presuming all Recoveries just and lawful, which were prosecuted in the usual Course of Law, would not bring those covinous Ones within the Statute, tho' they were apparently *in fraudem legis*, and attended with all those Inconveniencies which those Statutes were made to prevent; but the Clergy were quickly stopped in this Course, for (a) 32 Westm. 2. made these Recoveries by Default to be Mortmain; and the Exposition of this Statute by the Judges has been carried as far beyond the Letter, as their Exposition on 7 E. 1. seems to have fallen Short of the Meaning and Intention of that Law; for though the Letter of this Act extends only to Recoveries by Default, yet they, and with good Reason too, have extended it to all other Recoveries, whether by Demurrer or Verdict, or otherwise; for if these should not be within the Meaning of the Act, an Issue might be taken so much in Favour of the Clergy, and the Evidence offered might be so weak, that the whole Intention of the Statute would be eluded.

(a) 13 E. 1. cap. 32.

2 Inst. 429, 430.

Afterwards they found out the Method of conveying to Uses, which was first introduced to evade the Statutes of Mortmain; and this served them effectually; for they generally sitting in Chancery, where Uses were solely cognizable, obliged the Feoffee to execute the Use according to the Trust and Confidence reposed in him; but this Mischief was provided against by the Statutes of 15 Rich. 2. cap. 5. and 23 H. 8. cap. 10.

15 Rich. 2.  
cap. 5.  
23 H. 8.  
cap. 10.

## (B) What Things are exempt from, or out of the Statutes of Mortmain.

WHERE the (a) King (b) licences any Corporation, Civil or Religious, they may Purchase notwithstanding the above mentioned Statutes of Mortmain. This Power the Kings seem always to have had; but the dispensing Power having been carried too high, and greatly abused in a late Reign, it was thought proper to restrain it by 1 W. & M. but now the Lords, mediate and immediate; but now by 7 & 8 W. 3. it may be granted by the King alone, of whomsoever the Lands are holden. (b) And it hath been holden, that such Licence is good without any Clause of *Non obstante*. Co. Lit. 99. Plow. 502. Dyer 269.—Also if the King dies before Execution thereof, it may be executed afterwards. Co. Lit. 52. b.

Co. Lit. 99.  
(a) formerly  
this Licence  
or Dispensa-  
tion was to  
have been  
made by the  
King and all

By the 7 & 8 W. & M. cap. 37. it is enacted, “ That it shall and may be lawful to and for the King, his Heirs and Successors, when and as often, and in such Cases as his Majesty, his Heirs or Successors shall think fit, to grant to any Person or Persons, Bodies Politick or Corporate, their Heirs and Successors, Licence to alien in Mortmain, and also to purchase, acquire, take and hold in Mortmain, in Perpetuity, or otherwise, any Lands, Tenements, Rents or Hereditaments whatsoever, of whomsoever the same shall be holden; and it is hereby declared that Lands, Tenements, Rents or Hereditaments so aliened or acquired, and licenced, shall not be subject to any Forfeiture, for or by Reason of such Alienation or Acquisition.

By the 17 Car. 2. cap. 3. for the Augmentation of poor Benefices with Cure, it is enacted, “ That every Owner or Proprietor of any Impropriation, Tithes, or Portion of Tithes, shall be enabled and empowered to give or bestow, unite or annex the same, or any Part thereof, unto the Parsonage or Vicarage of the Parish or Chapel where the same do lie or arise, or settle the same in Trust, for the Benefit of the said Parsonage or Vicarage or of the Curate or Curates there successively, where the Parsonage is impropriate, and no Vicar endowed, according to his or their respective Estates, without any Licence of Mortmain. And it is further enacted, That if the settled Maintenance of such Parsonage, Vicarage, Churches or Chapels so united, or of any other Parsonage or Vicarage, with Cure, shall not amount to the full Sum of 100*l.* per Ann. clear and above all Charges and Reprizes; that then it shall be lawful for the Parson, Vicar and Incumbent of the same, and his Successors, to take, receive and purchase to him and his Successors, Lands, Tenements, Rents, Tithes or other Hereditaments, without any Licence of Mortmain.

“ By the 2 & 3 Ann. A Corporation is erected for the Disposing of the First-fruits to the Clergy, with Power to take Lands and Tenements for the Use of the Clergy, having no settled competent Provision, by Bargain and Sale inrolled, according to the Statute H. 8. as by Last Will and Testament in Writing, duly executed according to

“ Law,

“ Law, without any Licence or Writ *Ad quod damnum*, notwithstanding the Statute of *Mortmain*.

DoH. & Stud. cap. 10. Also by the Custom of *London*, any Citizen being a Freeman of *London*, and being resident there, and taxable to Scot and Lot, may by Will, in Writing, devise his Lands lying in the said City in Mortmain, notwithstanding the above Statutes.  
Bridg. 103.  
Bro. Customs 7.  
38 Aff. Pl. 18. 45 Ed 3. 26. 1 Rel. Abr. 556.

Hob. 136. Also since the (a) Statute of Charitable Uses, it has been held, that  
Flood's Case. a Devise to the Principal, Fellows and Scholars of *Jesus College* in *Oxford*, and their Successors, for Maintenance of a Scholar, is good, tho' such Devise had been Mortmain by the Statute 23 H. 8.  
1 Lev. 284.  
S. P.  
(a) 43 Eliz.  
which vide infra.

### (C) What is a good Charitable Use within the 43 Eliz.

Vide 35 Eliz. cap. 7. “ THE Statute 43 Eliz. cap. 4. enacts, That the Commissioners im-  
39 Eliz. c. 5. “ powered by the Lord Chancellor shall inquire, &c. as to the Lands,  
1 Co. 24. “ &c. given by well-disposed People, for Relief of aged, impotent and  
11 Co. 70. “ poor People; for Maintenance of sick and maimed Soldiers and Ma-  
That a Dis- “ riners, Schools of Learning, Free-Schools, and Scholars of Univer-  
position to “ sities; for Repair of Bridges, Ports, Havens, Causeways, Churches,  
any of those “ Sea-Banks and Highways; for Education and Preferment of Orphans;  
Uses will be “ for or towards the Relief, Stock or Maintenance of Houses of Cor-  
good at this “ rection; for Marriages of poor Maids; for Supportation, Aid and  
Day, with- “ Help of young Tradesmen, Handcraftsmen and Persons decayed,  
out any Li- “ and others; for Relief or Redemption of Prisoners or Captives, and  
cence, not- “ for Aid or Ease of any poor Inhabitants; concerning Payment of Fif-  
withstanding “ teens, setting out of Soldiers, and other Taxes.  
the Statutes “  
of *Mortmain*. “

Duke's Char. 109. In the Construction of this Statute, it has been held That Lands, &c. given for the Building of an Hospital, for the Relief of poor People, is a Charitable Use within the Equity of the Statute.

Duke's Char. 109. So for the Building of a Sessions-House for a City or County; the making of a new or repairing of an old Pulpit in a Church, or the Buying of a Pulpit Cushion or Pulpit-Cloth, or the setting up of new Bells, where none are, or the amending them where they are out of Order.

Poph. 139. It seems settled, that Money given for the Maintenance of a Preach-  
decreed. ing Minister, though not a Charitable Use (b) mentioned in the Statute,  
Duke's Char. yet comes within the Equity of it; for *summa est ratio quæ pro Religione*  
109. S. C. *facit*.

(b) A Gift of Lands, &c. to a Chaplain or Minister to celebrate Divine Service, is neither within the Letter or Meaning of this Statute; for it was on Purpose omitted in the Penning of the Act, lest the Gifts intended to be employed on Purposes grounded on Charity, might in Change of Time, contrary to the Mind of the Giver, be confiscate into the King's Treasury; for Religion being variable according to the Pleasure of succeeding Princes, that which at one Time is held for Orthodox, may at another be accounted Superstitious, and then such Lands are forfeited, as appears by the Statute of 1 Ed. 6. cap. 14. Sir Francis Moor's Reading on the Statute 43 Eliz. cap. 4.

2 Vern. 387. But if a School-House is erected by the voluntary Contributions of the Inhabitants of *A.* on the Waste of the Lord of the Manor, and the Lord enfeoffs Trustees in Trust, that the Inhabitants of *A.* may for ever have a School, as of the Gift of the Lord of the Manor, this is not a Free-School, and so not a Charity within the Statute of 43 Eliz. for which

which the Inhabitants have a Right to sue in the Attorney General's Name.

So if the Lord of a Manor should erect a Mill, and convey it to Trustees, to the Intent that the Inhabitants might have the Convenience of Grinding there, this would not be a Charity within the Statute. 2 Vern. 387

### (D) What is a Superstitious Use to which the King is intitled.

A Superstitious Use is described to be where Lands, Tenements, Rents, Goods or Chattels are given, secured or appointed, for and towards the Maintenance of Priest or Chaplain to say Mass; for the Maintenance of a Priest, or other Man, to pray for the Soul of any dead Man, in such a Church, or elsewhere; to have or maintain perpetual Obits, Lamps, Torches, &c. to be used at certain Times, to help to save the Souls of Men out of Purgatory; these, and such like Uses are declared Superstitious, to which the King, by Force of several (a) Statutes, and as Head of the Church and State, and intrusted by the Common Law, to see that nothing is done in Maintenance or Propagation of a false Religion, is intitled to, so as to direct and appoint all such Uses to such as are truly charitable. 4 Co. 104. Bridge. 105. Cro. Jac. 51. 1 Salk. 162. (a) Vide 1 E. 6. cap. 14. 15 Rich. 2. cap. 5. 23 H. 3. cap. 10. 37 H. 8. cap. 4.

And all Limitations of Lands, &c. in Fee-tail, for Life or Years, to any of the above-mentioned Uses, are said to be Superstitious, and to belong to the King, who is to direct and appoint them *in eodem genere*; so that they cannot revert to the Donor, his Heirs or Representatives, during the Time that they were to continue to the Purposes aforesaid. Duke's Char. 107.

So if Lands be given on Condition to find a Priest, &c. though no Priest be found, yet this is a superstitious Use, to which the King is intitled. 4 Co. 104. Duke's Char. 106.

But if there be a charitable Use intermixed with the superstitious Use, so that they may be distinguished, the King shall have only so much as is limited to the superstitious Use. 4 Co. 104. Duke's Char. 107.

It was found by Inquest, that *A.* devised to *J. S.* and his Heirs, absolutely, without a Trust, that he did it for the Good of his Soul, and that the Devisee owned that this Estate was not his, but belonged to GOD and his Saints, the Court of King's Bench held that this could not be averred to be a superstitious Use, by Reason of the Statute of Frauds and Perjuries; and said that a *Monk* might take now by Purchase, and seemed to think so of a *Nun*; but an Information being exhibited in the Exchequer, for a Discovery, and that an Application might be made of the Devise to a Use truly Charitable, it was held there that the Statute of Frauds did not bind the King, that he, as Head of the Commonwealth, is intrusted and empowered to see that nothing is done to the Dishonour of the Crown, or the Propagation of a false Religion, and to that End intitled to pray a Discovery of a Trust to a superstitious Use; and that this being a superstitious Use, the King shall order it to be applied to a proper Use. 1 Salk. 162. The King and Lady Portington.

*A.* having devised 100*l.* to be applied to such charitable Uses, as he had, by Writing under his Hand, formerly directed, and no such Writing being to be found, it was held that the King should appoint, who gave it to the Mathematical Boys in *Christ's-Hospital*, which was decreed accordingly; and that the Parties should be indemnified against the Writing referred to. 1 Vern. 224. Attorney General and Siderfin. Vide 2 Vern. 105. where a Charity for Maintaining

of Independent Lectures, is said to be changed into Catechistical Lectures.

- 1 Vern. 248. *A.* being a Beneficed Clergyman, devised 600*l.* to Mr. *Baxter*, to be distributed by him to sixty *Pious ejected Ministers*, and adds, that he did not give it to them for the Sake of their Nonconformity, but because he knew many of them to be pious and good Men, and in great Want; he also gave Mr. *Baxter* 20*l.* and 20*l.* to be laid out in a Book of his, intituled, *Baxter's Call to the Unconverted*; and this was held a Superstitious Use, which though void, yet the Charity is good, and shall be applied *in eodem genere*; and it was decreed for the Maintenance of a Chaplain in *Chelsea* College.
- Attorney General v. *Baxter*.  
Decreed by North, Lord Keeper; but this Decree was reversed 1 *W. & M.* Commissioners. 2 Vern. 105.
- 2 Vern. 266. *A.* by Will charged his Estate with an annual Sum for the Maintenance of *Scotchmen* in the University of *Oxon*, to be sent into *Scotland*, to propagat the Doctrine of the Church of *England* there; and *Presbyters* being settled in *Scotland* by Act of Parliament, the Question was, Whether this Devise should be void, and so fall into the Estate and go to the Heir, or should be applied *Cy pres?* But the Matter does not appear by the Report to have been determined.
- Pasch.* 1692. Attorney General and *Guise*.

### (E) How Charitable Gifts and Dispositions have been construed.

- Duke's Char.* 109, 110. OUR Chancellors have been very liberal in their Constructions as to Charitable Dispositions, so as to make them answer the Intention of the Donors, and for that Purpose have dispensed with several Ceremonies required in other Grants; and therefore it has been held, that an Appointment to a Charity without Livery or Seisin, or Attornment, is good.
- Preced. Chan.* 391. So a Deed of Bargain and Sale to a Charitable Use, though not good by 27 *H. 8.* for want of Inrolment, yet shall be good as an Appointment within the Statute 43 *Eliz.*
- Duke's Char.* 110. So if Copyhold Lands are devised to a Charity, they shall pass without any Surrender, and shall bind the Heir, but the Lord shall not lose his Fine.
- Duke's Char.* 110. Tenant in Tail, without levying a Fine or suffering a Recovery, may devise to a Charity, and such Disposition shall be good, by way of Appointment within the Statute 43 *Eliz.* which being subsequent in Time, hath so far repealed and abrogated the Statute *de donis*.
- 2 Vern. 453. S. P. *Preced. Chan.* 390. S. P. But if *A.* devises Lands by Will not duly executed within the Statute of *Frauds and Perjuries*, such Disposition is void, and cannot operate as an Appointment; for the Statute of *Frauds* is subsequent to the 43 *Eliz.* and requires, That all Devises of Lands, &c. should be in Writing duly attested, &c. without making any Exceptions as to charitable Dispositions.
- 2 Vern. 597. 1 *Salk.* 163. S. P. *Preced. Chan.* 270, 390. Also if an Infant Lunatick, or Feme Covert, by Will or Deed, give any Thing to a Charitable Use, it shall be void, in the same Manner as all other Acts of theirs are.
- Duke's Char.* 110. *Moor* 822. But *Choses in Action*, as Statutes, Bonds, &c. though not assignable at Law, yet a Gift of them is good; as an Appointment to a Charity.
- Duke's Char.* 82. Said to be decreed. Also if Lands are given to Church-wardens of a Parish, to a Charitable Use, although the Devise be void in Law, they not being a Corporation capable of taking Lands in Succession; yet they shall be capable for this Purpose.
- A Devise to the Principal, Fellows and Scholars of *Jesus College* in *Oxford*, and their Successors, for Maintenance of a Scholar, is good, and they shall be in Nature of Trustees for this Purpose, though before 43 *Eliz.* such Disposition would have been *Mortmain*, by 23 *H. 8. Hob.* 136. 1 *Lee.* 294. S. P.

So where an Impropiator devised to one who served the Cure, and to all that should serve the Cure after him, all the Tithes and other Profits, &c. though the Curate was incapable of Taking by this Devise, in such Manner, for want of being Incorporate and having Succession; yet it was held, That the Heir of the Devisee should be seised in Trust for the Curate for the Time being. <sup>2 Vern. 349.</sup>

Where there has been an Uncertainty in the Description of the Persons to Take, the Courts have been very liberal in their Expositions; as where a Devise of Lands to a Charity was to a Corporation by a wrong Name; as to the Mayor and Chamberlain, instead of the Mayor and Commonalty. <sup>Duke's Char. 82. Mayor of London's Case. So where Money was given gene-</sup>

rally to a Parish, it was held, That it must be intended to the Poor of the Parish. <sup>1 Chan. Ca. 134</sup> So where Lands were devised to A. for Life, Remainder to the Church of St. Andrew's Holborn, it was held, That the Parson of the Church should have this Remainder. <sup>Duke's Char. 113.</sup>

If one disposes of Lands worth 10 l. a Year, to maintain a Preacher, School-master, and poor People in Deal, and the Land after comes to be worth 100 l. a Year, it must be all employed to increase the several Charities. <sup>8 Co. 130. School of Thetford's Case, That the Price of</sup>

Lands increasing, the Rents shall be raised, and laid out in Augmentation of the Charity. <sup>Vide Duke's Charitable Uses 71, 112. 2 Vern. 414. Preced. Chan. 225.</sup>

If in the Constitutions for founding an Hospital, it be ordained, That no Lease should be made for above twenty Years, and the Rent not to be raised, nor above three Years Rent taken for a Fine, though the Tenant of the Hospital Lands is intitled to a Beneficial Lease upon Removal, yet this Constitution is not to be followed according to the Letter; but as Times alter, and the Price of Provisions increases, so the Rent ought to be raised in Proportion. <sup>2 Vern. 596, 746. S. P.</sup>

If A. seised of a Manor of the yearly Value of 240 l. devises several Legacies, and particularly to his Heir at Law 40 l. and then adds, *that being determined to settle for the Future, after the Death of me and my Wife, the Minor of F. with all Lands, Woods and Appurtenances, to charitable Uses, I devise to M. and N. upon Trust, that they shall pay yearly and forever, several particular Sums to charitable Uses, amounting in the Whole to 120 l. per Ann. and gives the Trustees something for their Pains; and there being an Overplus, it was decreed to go in Augmentation of the Charities, it appearing to be the Testator's Intent to settle the whole Manor, and that the Heir should have no more than 40 s.* <sup>Show. P. C. 22.</sup>

Neither will the Courts suffer a Charity to be diverted to other Uses than the Donor intended it; and therefore where Money was given for the Relief of the Poor, and the Trustees laid it out in the Building a Conduit, this was held a Misemployment. <sup>Duke's Char. 94.</sup>

So where several distinct Charities were given to a Parish, viz. 12 l. per Ann. for repairing the Church, 6 l. per Ann. for mending the Highways, and so much to the Poor, in all 40 l. per Annum; and the Trustees having paid 10 s. for every Day's Lecture to a Lecturer, and laid out other Parts of it for the Service of the Parish, but not according to the Directions of the Donor; it was held by my Lord Chancellor, That if it should be admitted that Parishioners might change and apply Parochial Charities as they thought fit, it would destroy all Charities; and therefore ordered, That for what was paid the Parson, they should not be allowed a Farthing, but that for the other Payments they should be allowed the Money, being promiscuously paid for several Years before; but for the Future, that it should be paid according to the Terms of the Charity. <sup>1 Vern. 42. Man and Ballet.</sup>

1 Vern. 55.

Nor will the Courts be easily prevailed on to change the Terms of a Charity, though by the Consent of all the Parties Interested; as where *A.* devised 50 *l. per Annum* for a Lecturer in Polemical or Casuistical Divinity, so as he was a Bachelor or Doctor in Divinity, and fifty Years of Age, and would read five Lectures every Term, and at the End of the Term deliver fair Copies of the same, to be kept in the University; and in Default of such Lecturer he gave the 50 *l. per Annum* to ——— College in Oxon. with Consent of the Heir; Application was made to mitigate the Rigour of the Qualifications, *viz.* That a Man of forty might be capable, that three Lectures may be sufficient every Term, and that if fair Copies were delivered in every Year, it may suffice; but my Lord Chancellor refused to intermeddle, though no Opposition was made, and said, that it was not in the Power of the Heir to alter the Disposition of his Ancestor.

### (F) Of the Commissioners of Charitable Uses, pursuant to the Statute 43 Eliz.

(a) Vide the Uses before mentioned, Letter (C). Note, The same Power is given to the Chancellor of the Duchy of Lancaster, for Lands lying within the Duchy. Vide 2 Inst. 710.

BY the 43 *Eliz. cap. 4.* it is enacted, “ That where Lands, &c. are  
 “ given to any (a) Charitable Use, the Lord Chancellor or Keeper  
 “ of the Great Seal, may award Commissions under the Great Seal, un-  
 “ to any Parts of the Realm, directed to the Bishop and his Chan-  
 “ cellor, in Case there shall be any Bishop of the Diocese at the Time,  
 “ and to other Persons of good Behaviour; authorizing them, or any  
 “ four or more of them, to inquire, as well by the Oaths of twelve  
 “ Men or more, of the County, as by all other good and lawful Ways  
 “ and Means, of all and singular such Gifts, Limitations, &c. of Lands,  
 “ Tenements, &c. and of all Abuses, Breaches of Trust, Negligences, Mis-  
 “ employments, not imploying, concealing, defrauding, misconverting,  
 “ or misgoverning any Lands, &c. heretofore or hereafter to be given to  
 “ any charitable Use; and after calling before them the Parties Interest-  
 “ ed in any such Lands, &c. shall make Inquiry by the Oaths of twelve  
 “ Men or more of the County (to which the Parties Interested may  
 “ make their Challenges) and upon such Inquiry, Hearing and Exami-  
 “ nation, set down such Orders, Judgments and Decrees, as the said  
 “ Lands, &c. may be faithfully employed to the Intent for which they  
 “ were given; which Orders, Decrees or Judgments, being agreeable to  
 “ the Intention of the Donors or Founders, shall stand good and be af-  
 “ firmed until the same be undone or altered by the Lord Chancellor,  
 “ upon the Complaint of any Party grieved; which said Orders, Judg-  
 “ ments and Decrees of the said Commissioners, shall be certified under  
 “ the Seal of the said Commissioners, or any four of them, within the  
 “ Time limited in the Commission to the Lord Chancellor, who shall  
 “ take such Order for the due Execution of all or any the said Judg-  
 “ ments, Orders, Decrees, as shall be fit and convenient; and may upon  
 “ the Hearing thereof, at the Application of any Party grieved, annul,  
 “ diminish, alter, or enlarge the said Orders, Judgments and Decrees of  
 “ the Commissioners, and may tax and award good Costs against Per-  
 “ sons complaining without Cause.

Vide the Statute and the Exceptions thereout as to Lands given to Colleges, where Trustees are appointed by the Founder, &c.

Duke's Char. 124.

By Virtue of this Act, the Commissioners may appoint Trustees, and enable a certain Number of them to demise Lands, &c. for the best Ad-  
 vantage

vantage of the Charity; and that when such a Number of them die, the Survivors may elect others, and so continue the Number appointed.

They may likewise turn out Trustees who misbehave themselves, as <sup>2</sup> *Inst.* 710. by making of Leases at low Fines and small Rents, &c. and may de- *Duke's Char.* cree such Leases void. 124.

If one who hath a Lease of Lands charged with a Charity, commits *Duke's Char.* Waste, this is such a Misemployment for which the Commissioners may 116. decree the Lease void.

If a Rent-charge is granted to a charitable Use out of Lands in fe- *Duke's Char.* veral Counties, the Commissioners are to charge this Rent by their De- 65. cree, upon all the Lands in every County, according to an equal Distribution, having a Regard to the yearly Value of all the Lands charged; and (a) cannot by their Decree charge one or two Manors with all the <sup>(a)</sup> The Rent, and discharge the Residue in other Counties or Places, for that *Town of A.* would be decreeing contrary to the Intent of the Donors. was, upon a *Commission*

of Charitable Uses, decreed liable to a Charity, and the Grantees distrained for the Whole, on one who held only Part of the Lands chargeable; and it was held, That the whole Town being made chargeable, they might sue for the Whole on any Part; but a Commission was awarded to apportion each Man's Share. 1 *Chan. Rep.* 91. It has been held, That all the Tertenants of Lands liable to a Charity, need not be made Parties to the Suit, for this would put the Charity to too great Difficulty; but yet those who are sued may make the other Parties to the Information, and compel them to a Contribution.

The Commissioners of Charitable Uses cannot decree Costs on this Sta- <sup>1</sup> *Salk.* 163. tute; but if there be an Appeal from their Decree, my Lord Chancellor may decree the Costs, not only of the Appeal, but likewise of the Com- *Abr. Eq.* 126. mission; and though they decree Costs, yet that shall not upon an Appeal be sufficient to reverse the Decree, for my Lord Chancellor may either increase or lessen the Costs, or exempt the Party from them entirely.

# Church-wardens.

(a) Of their first Institution, *vide Kennet's Par. Antiq.* 649. Of Sidelmen or Synodsmen, *vide Degg's Parson* 183.

**C**Hurch-wardens are Officers instituted for the Benefit and Advancement of Religion, whose chief Duty it is to suppress all Prophaneness and Immorality, and to see that the Publick Worship be performed with due Decency and Reverence.

But though they deal chiefly in Matters relating to the Church, yet are they every where treated of in our Law Books, as (b) Temporal Persons, and are undoubtedly to be considered as a (c) Lay Corporation vested with a Temporal Right in their Offices, and a special Property in the Goods belonging to the Church, which farther appears by the Duties enjoined them by several Statutes and Acts of Parliament, as will be more fully explained under the following Heads.

(b) *Vide Hard.* 379.  
 (c) And may take Goods for the Benefit of the Church.  
 1 *Roll. Abr.* 393.  
*March* 66. but not Lands; and therefore if a Feoffment be made to the Use of the Church-wardens of D. the Use is void. 12 *H.* 7. 27. *Kelw.* 32. a. *Co. Lit.* 3. a. S. P. - *March* 66. S. P. *per Cur.* 1 *Salk.* 167. S. P. *per Cur.*, and *vide Duke's Char. Uses* 82. Where it is said, That Lands given them for a charitable Use, shall be a good Appointment within the 43 *Eliz.* *Vide Title Charitable Uses.*— But in *London* the Parson and Church-wardens are a Corporation, and may purchase and demise Lands, &c. *Cro. Jac.* 532. *March* 66, 67. *Lane* 21. 5 *Mod.* 395. And *Q.* Whether they may not have Land by Prescription for the Reparation of the Church; but admitting they may, yet they cannot Prescribe generally *in non decimando*, for they are not Spiritual Persons, though their Office be a kind of an Ecclesiastical Office. 1 *Roll. Abr.* 653. 2 *Roll. Rep.* 107. *Comp. Incumb.* 507, 508.

- (A) Of the Manner and Right of choosing Church-wardens.
- (B) Of their Interest in, and Power over the Things belonging to the Church.
- (C) Of their Power and Duty in making Rates in Matters relating to the Church.
- (D) Of their Power and Duty in making Presentments and hindring Irreverence in the Church.
- (E) Of their Accounts, and herein of Actions brought by, or against them, and the Remedies they have when their Time is expired.

Of their Duty and Power in taking care and providing for the Poor. *Vide Tit. Poor.*

## (A) Of the Manner and Right of chusing Church-Wardens.

BY the Common Law, the Right of chusing Church-wardens belongs to the Parishioners, who are to be at the Charge of repairing the Church, &c. and (a) therefore it is but fitting that they should have it in their Power to determine what Persons are proper to be intrusted in these Concerns; nor (b) does any Canon deprive them of this Right; for though by Custom the Parishioners in some Places chuse one, and the Parson another; yet this is by Virtue of the Custom; the Validity of which, as of all other Customs, must be determined in the King's Temporal Courts; (c) nor can the Archdeacon, or any others, who by Virtue of their Offices are to swear and admit them, controul any such Election, for herein their Offices are purely Ministerial.

*Cro. Jac. 532, 670.* *Cro. Car. 552.* *Nov 31, 139.* *2 Rel. Abr. 234 pl. 1.* *Hard. 379.* *Raym. 439.* That they may be chosen by a select Vestry. *Vide 1 Fones 439.*  
*Cro. Car. 551.* They are to be chosen every Easter Week. *Degg 1, 183.* What Persons are exempted from serving, *vide Head of Privileges, and 1 W. & M. cap. 18.* By which Statute, if any Dissenting from the Church be chosen Church-warden, he may execute the Office by a sufficient Deputy, by him to be provided, who shall comply with the Laws in that Behalf. (a) And hence also it is, That in London, where the Parson and Church-wardens are a Corporation, and may purchase and demise Lands, and dispose of Goods; the Church-wardens are always chosen by the Parishioners. *Cro. Jac. 532. Mar h 66. Lane 22.* (b) For the Canon, *viz. Can. 89. Anno 1603.* is not regarded by the Common Law. *Hard 378. per Hale. Carth. 118. S. P. per Holt, C. J. But vide 2 Vent. 41.* (c) For if the Archdeacon refuses them, a *Mandamus* lies; of which there are numberless Instances. *Vide 6 Mod. 89.* And where for a false Return an Action on the Case lies. *2 Lutw. 1012.* And that in such Action both the Church wardens may join. *3 Lev. 362.* And for an ill and evasive Return, *vide 1 Vent. 267. 2 Salk. 433.* And that before he is sworn he may officiate. *1 Vent. 267.* And that there is no Fee due for swearing them, except by Custom. *1 Salk. 330.*

And though by Custom the Rector or Vicar may name one, yet where the Vicar of *St. Giles in Northampton* was under a Deprivation for not taking the Oaths to King *William* and Queen *Mary*, and the Church being vacant, the Parishioners proceeded to the Election of two Church-wardens, and presented them to be sworn; but the Register of the Consistory Court being a Friend to the Vicar, refusing to swear them unless that Person, whom the late Vicar approved, were nominated one, a *Mandamus* was granted. *Carth. 118.*

The Parishioners are also Judges of the Fitness and Qualifications of the Persons they chuse for that Office; and therefore where to a *Mandamus* to swear a Church-warden chosen according to Custom, the Archdeacon returned, that the Person presented was a poor Dairy-man, who had no Estate, and was *Persona minus habilis & idonea* for that Office; the Court granted a peremptory *Mandamus*. *Carth. 393.* *Hill. 8 W. & M. the King and Rees. Comb. 417.* *S. C.* *1 Salk. 166.* *S. C.*

But where a Prohibition was granted *Nisi* to the Ecclesiastical Court, where *J. S.* sued as Church-warden of, &c. in *Colchester*, on a Suggest on, that in *Colchester* there is a Custom for the Inhabitants to elect the Church-wardens, and that *A.* and *B.* were duly elected, which Matter the Defendant had pleaded in the Spiritual Court, but the Plea was refused; but it appearing that *J. S.* was Church-warden *de facto*, chosen by the Parson, and that he all the Year acted as such, and that he, with the Inhabitants and another Church-warden made the Tax, for which the Defendant was sued in the Ecclesiastical Court, the Rule for a Prohibition was discharged; for *per Cur'*, where the Question is only, Who is Church-warden, if such Custom is alledged, a Prohibition shall be granted; but the Matter here is for a Tax for the Repair of the Church, and it is not material now whether he was duly elected or not; it is sufficient that he was Guardian *de facto*; and it may be as well put in Issue, whether the Minister was a rightful Minister; besides, this Tax is not rated by the Church-wardens, for they have no such Power, but it is a common

common Charge, imposed by the major Part of the Parishioners, and the Church-wardens do no more in assessing them, than the other Parishioners, and the Tax will be well assessed by the major Part of the Inhabitants, though the Church-wardens are against it; their chief Business is in collecting of it, and the Matter is a Matter of Ecclesiastical Cognizance, for the Spiritual Judge may inquire touching the Want of Reparations of the Church. And *Note*, That upon the Rule for discharging the Prohibition, all this Matter was ordered to be entred, for fear it should be afterwards thought, that a Prohibition was decreed where a Custom was in Question.

### (B) Of their Interest and Power over the Things belonging to the Church.

**T**HE Church-wardens, when chosen, are a Corporation intrusted with the Care and Management of the Goods belonging to the Church, which they are to order for the best Advantage of the Parishioners; they are likewise enabled to take Goods for the Benefit of the Church, but cannot dispose of them without the Consent of the Parishioners.

1 *Rol. Abr.* 593.  
2 *Inst.* 492.  
1 *Rol. Rep.* 67.  
*Yelv.* 173.  
2 *Brownl.* 215. *Comp. Incumb.* 390.

(a) 1 *Rol. Abr.* 393. They have such a Special Property in the (a) Organ, (b) Bells, (c) Parish-Books, (d) Bible, Chalice, Surplice, &c. belonging to the Church, that for the taking away, or for any Damage done any of these, they may (e) bring an Action at Law, and therefore (f) the Parson cannot sue for them in the Spiritual Court.

(b) *Cro. Eliz.* 145, 179.  
(c) 5 *Mod.* 395, 396.  
(d) 1 *Rol. Rep.* 67. (e) That the Action must be for *bona Parochianorum*, and not *bona Ecclesiæ*. 1 *Mod.* 65. *per Cur.*  
2 *Keb.* 675. S. C. and S. P. *per Cur.* 1 *Vent.* 89. S. C. and S. P. and the Court inclined accordingly; but said, the Precedents were both Ways.—Where they may sue at Common Law for Damages, and in the Spiritual Court for the Things in *Specie*. 1 *Sid.* 281. 2 *Keb.* 6. 22. (f) 1 *Rol. Abr.* 393. 2 *Inst.* 492.

*Cro. Fac.* 235. If two Church-wardens sue in the Spiritual Court for a Levy towards the Reparation of their Church, and have Sentence to Recover, and Costs assessed, and after one of them releases, yet the other may proceed for the Costs, &c. for Church-wardens have nothing but to the Use of the Parish, and the Corporation consists of both; and one only cannot release or give away the Goods of the Church.

*Yelv.* 175.  
2 *Brownl.* 215. S. C.

Also they have such a Special Property in the Goods of the Church, that when they are stolen they may bring an Appeal of Robbery for them; (g) they may also sue the Offender in the Spiritual Court *pro Salute Animæ*, but not to recover Damages.

2 *Harwk. P.* C. 167.  
(g) 2 *Keb.* 25.  
1 *Sid.* 281.  
2 *Inst.* 492. 1 *Keb.* 743. *Regist.* 57.

But the Church-wardens have no Right to, or Interest in the Freehold and Inheritance of the Church, which (b) alone belongs to the Parson or Incumbent.

*Comp. Incumb.* 381. Church-wardens cannot grant a Licence for burying in the Church, being the Freehold of the Parson. *Cro. Fac.* 366. *Noy* 104. Yet the Church-wardens, by Custom, may have a Fee for burying in the Church, because the Parish is at the Charge of repairing the Floor. 1 *Vent.* 274. 3 *Keb.* 504, 523, 527. But the Church-yard is a common Burial Place for all the Parishioners. *Comp. Incumb.* 381. (b) If the Walls, Windows, or Doors of the Church be broken by any Person, or the Trees in the Church-yard cut down, or the Grass thereon eaten by a Stranger, the Incumbent shall have his Action. 27 *H.* 7. 21. *Bro. Trespas* 210. 38 *H.* 6. 19. 11 *H.* 4. 12. And so may his Lessee, if the Church-yard be let. 2 *Rol. Abr.* 337.

Also the Seats in the Church being fixed to the Freehold, the Church-wardens (a) cannot dispose of them alone, nor can the Church-wardens and Rector jointly dispose of them without the Consent of the Ordinary; and though such Dispositions have been made, yet it has been always presumed that it was so done with the Consent and Approbation of the Ordinary.

*Vide 12 Co. 105. Hettl. 94. Godb. 200. 2 Enflf. 150. Hob. 69. Moor 878. Comp. Incumb.*

382. 1 Salk. 167. (a) But by the Custom of London, the Church-wardens have the ordering the Seats there, for the Parishioners are obliged to repair the Chancel, as well as the Body of the Church. *Comp. Incumb. 387, 388. 2 Rol. Abr. 288. Poph. 140. 2 Rol. Rep. 24.* And there may be the like Custom elsewhere, for the Church-wardens to dispose of Seats. *Raym. 246. admitted per Cur'.* But the Church wardens must shew some particular Reason why they are to order the Seats, exclusive of the Ordinary, for a general Allegation, that they used to Repair, which is no more than what they are obliged to by common Right, is not sufficient. 2 Lev. 241.

But as Seats are erected for the more convenient attending of Divine Service, and as the Parishioners are at the Expence of erecting them and keeping them in repair, if any of them be taken away, though they are fixed to the Freehold, yet the Church-wardens, and not the Parson, shall bring the Action against the Wrong-doer.

*Comp. Incumb. 382. 8 H. 7. 12. Whether Church-wardens may remove Seats*

erected by a Stranger in the Church. *Vide Noy 108. Comp. Incumb. 387.*

It is said to have been holden, That at Common Law a Church-warden may maintain an Action upon the Case for defacing a Monument in the Church.

*Godb. 279. That Church-wardens them-*

selves, nor any others, cannot take down Arms in Windows, or deface Grave-stones or Monuments erected in the Church or Church-yard; and if they do, an Action lies by the Heir or Executors of the Parties for whom they were erected. 1 Rol. Abr. 625. *Noy 104. Godb. 200. Cro Jac. 367. 2 Enflf. 151.* But the Ordinary may deface any Superstitious Picture. *Noy 104.*

(C) Of their Power and Duty in making Rates in Matters relating to the Church.

THE Church-wardens have no Power to make any Rate themselves, exclusive of the Parishioners, their Duty being only to summon the Parishioners, who are to meet for that Purpose, and when they are assembled, a Rate made by the Majority present shall bind the whole Parish, although the Church-wardens voted against it.

*Vide Cont. Incumb. 389.*

But if the Church-wardens give the Parishioners due Notice, that they intend to meet for that Purpose, and the Parishioners refuse to come, or being assembled refuse to make any Rate, they may make one without their Concurrence; for as they are liable to be punished in the Ecclesiastical Courts for (b) not repairing the Church, it would be unreasonable that they should suffer by the Wilfulness and Obstinacy of others.

*1 Vent. 367. 1 Mod. 79. 194. (b) By the Civil and Canon Law,*

the Parson is obliged to repair the whole Church, and it is so in all Christian Kingdoms but in England; for it is by the peculiar Law of this Nation, that the Parishioners are charged with the Repairs of the Body of the Church. *Cartb. 360. Fer Helt, Ch. Just.—The Bishop cannot appoint Commissioners to tax the Parishioners, or make Rates for repairing the Church. 2 Mod. 8.* But the Spiritual Court may compel the Parishioners to do it, and may excommunicate every one of them till it be repaired; but if any are willing to contribute, they are to be absolved till the greater Part agree to make a Tax. *Comp. Incumb. 388, 389* Of the Manner it is to be made, *vide 5 Co. 67. 1 Vent. 308. 2 Mod. 222, 254. Lit. Rep. 263. Poph. 137. 1 Mod. 236.*

The Church-wardens in summoning the Parishioners need not do it from House to House, but a general publick Summons at the Church is sufficient,

*1 Vent. 367. Comp. Incumb. 389.*

sufficient, and the major Part of them that appear upon such Summons, will bind the whole Parish.

*Carth.* 360. On a Motion for a Prohibition, it appeared, that the Libel recited that *Hewkins* and *J. S. Dean* of, &c. had presented that the Church and Chancel of *D.* was out of Repair, &c. and that the Church-wardens of the said Parish did make, or cause to be made, a certain Rate upon the Inhabitants thereof, towards the Charge of repairing the said Church and Chancel; and that the Church-wardens had accordingly repaired the Church and Chancel, and beautified the same with Ornaments, and that *H.* was a Parishioner of the said Parish, and refused to pay his Proportion of the said Rate; and it being objected, 1st, That the Church-wardens only could not make a Rate; 2dly, That the Parson alone ought to repair the Chancel; a Prohibition was granted generally to the whole Suit, though it was strongly insisted on that the Prohibition ought to go *quoad* the Rate for Repairs of the Chancel only.

*Rous*  
1 *Salk.* 165.  
*Comb.* 344.  
5 *Mod.* 384.  
S. C.

### (D) Of their Power and Duty in making Presentments, and hindring Irreverence in the Church.

*Cro. Car.* 291. **P**resentments made by Church-wardens relate to the Church, the Parson, and Parishioners, in which they are to be guided by the Articles delivered them; but these Articles must be agreeable to the Laws of the Church, and particularly to the Canons made and agreed on in the Year 1603. they need not take a particular Oath upon all the Presentments they make, but may do it by Virtue of their (a) general Oath of Church-wardens.

1 *Vent.* 114.  
2 *Vent.* 42.

(a) That such Promisfory Oath does not seem to be punishable as Perjury. 1 *Kebl.* 522.

*Hard.* 364. The Oath is to be general, *viz.* To do all Things which appertain to their Office; and therefore if the Oath tendred requires them to present (b) Matters not Presentable by Law, they are not obliged to take it, (c) nor are they to be required to present or accuse themselves.

(b) Where the Articles enjoined the Church-warden to present filthy Talkers, Revilers, and common Sowers of Sedition amongst Neighbours; the Court held, That these general Terms comprehended Matters out of their Jurisdiction, and that if the Church-warden had pleaded there *quod non tenetur respondere* as to those Matters, and the Plea had been refused, a Prohibition ought to have been granted. 1 *Vent.* 114. The S. P. as to sowing Sedition among Neighbours. 1 *Vent.* 127. But whether any Person within his Parish hath incroached upon the Church-yard, is lawful, though Matter of Freehold. 1 *Vent.* 127. Also if the Oath tendred has these general Words, *viz.* To make Presentations according to the King's Ecclesiastical Law; the particular Articles by way of Direction will not be sufficient Grounds for a Prohibition. 1 *Vent.* 127. (b) But to Present every Person in their Parish, does not include themselves. 1 *Vent.* 127.

*Hard.* 364. Also if the Ecclesiastical Court proceeds against the Church-wardens in Matters not within their Jurisdiction, an Action on the Case lies against them.

*per Cur.*

*Cro. Car.* 285. And if the Church-wardens maliciously present an innocent Person for any Crime, by which he is put to Expence, or suffers in his good Name or Reputation, an Action on the Case lies.

1 *Sid.* 463.  
1 *Vent.* 86.

In Assault and Battery against a Church-warden, he justified that the Plaintiff was at Church in Time of Prayers, with his Hat on, and that he demanded of him to pull it off, and because he did not do it, the Church-warden took off his Hat and laid it by him; and the Court held this a good Justification; and that Church-wardens may justify to wake a Man, to switch Boys that are at Play, and turn an excommunicated Person out of the Church.

*1 Lev. 196. adjudged between Hall and Tinner, for though they may present it in*

the Ecclesiastical Court, yet they are not bound in the mean Time to permit such Irreverence and Indecency in the Church. *1 Sand. 13, 14. S. C. adjudged; and there said by the Reporter, That the Court taking it to be a great Misdemeanor in the Plaintiff, gave Judgment against him, without regard to the Exceptions to the Defendant's Plea. 1 Sid. 301. S. C. and S. P. adjudged; Twifflen only doubting upon the Words of the Canon, against wearing a Hat, &c. viz. What Hat intended, and said, they might appease a Disturbance in the Church, but laying Hands on a Man to pull off his Hat, tends to the Raising a Disturbance and Breach of the Peace. 2 Keb. 124, 125. S. C. adjudged.*

Church-wardens may restrain and hinder any Stranger not licensed, from Preaching in their Church or Chapel.

*Comp. Incumb. 335. Vide 2 Bull. 49.*

**(E) Of their Accounts, and herein of Actions brought by, or against them, and the Remedies they have when their Time is expired.**

THE Church-wardens, at the Expiration of their Year, are to give up their Accounts to their Parishioners, and on Refusal, may be proceeded against in the Ecclesiastical Court, or the succeeding Church-wardens may bring an Action of Account against them at Common Law.

*(a) Or to a select Committee appointed by the Parishioners, according to*

the Custom of some Parishes, who may allow their Accounts, and such Allowance shall discharge them from being called in Question in the Spiritual Court. *2 Lutw. 1027. (b) By the succeeding Church-wardens, either in the Spiritual Court, or by Writ of Account at Common Law. Godb. 279. 1 Rol. Rep. 71, 106, 107. 2 Keb. 6, 22. 1 Sid. 281. (c) But the Parishioners cannot bring an Action of Account against them at Common Law, but must make new, &c. Bro. Account 71. 8 E. 4. 6. Bro. Corporations 55. 4 E. 4. 6. Bro. Garden. 7. And though a Parish prescribe to chuse two Church wardens, and that the Persons so chosen shall continue in that Office for two Years; yet the Parish may, notwithstanding the Prescription, remove such Wardens at their Pleasure, and chuse new ones. 26 H. 8. 5. b. 13 Co. 70. Comp. Incumb. 390. Vide 27 H. 8. cap. 25. in Rastal. That no Church-warden shall continue in his Office above one whole Year. (d) Vide 1 Sid. 307. Where a Church-warden of St. Martin's in the Fields was indicted for taking a Silver Cup of one, for the Place of Gallery-keeper, colore Officii, &c.*

If the Church-wardens, by the Consent and Agreement of the Parishioners, take a ruinous Bell and deliver it to a Bell-Founder, and that he by their Agreement shall have for the Casting thereof 4 l. and shall retain it till the 4 l. be paid; this Agreement of the Parishioners shall excuse the Church-wardens, in a Writ of Account brought against them by their Successors.

*1 Rol. Abr. 121. pl. 9, 393. S. C.*

*(e) But whether they can plead it*

in Bar to the Account, or must set it forth in Discharge before Auditors, *vide 1 Mod. 65. 1 Vent 88 2 Keb. 675.*

*Vide Preced. in Chan.* 42. 2 *Ven.* 262. where Bills have been exhibited for Relief against the new Church-wardens and Parishioners, for Money expended by Order of the Vestry. If the Church-wardens and Parishioners make an Assessment, and the Church-wardens lay out the whole Money, but before the Whole is collected their Time is expired, and new Church-wardens are chosen, the former Church-wardens, by having presented such Parishioners as refused to pay before the Determination of their Time, may still proceed against them; otherwise the new Church-wardens must collect such Arrears, and reimburse their Predecessors.

*Cro. Eliz.* 145, 179. 1 *Leon.* 177. *Vide Dalf.* 105. 2 *Brownl.* 215. *Kelw.* 32. If Goods belonging to the Church are taken away, and the Church-wardens for the Time being neglect to bring an Action, the succeeding Church-wardens may, by Virtue of their Office, bring an Action against the Wrong-doer, but they must declare *ad Damnum Parochianorum*, and not *ipforum*; though the old Church-wardens, in whose Time the Fact was done, may lay it either way.

2 *Jones* 132. *Gray and Day.* *Raym.* 418. *S.C.* adjudged, though the Sentence was given by a Judge; but for this *vide Harl.* 194, 195, &c. If *A.* was Church-warden of *B.* and at the End of the Year gave up his Accounts to his Successor, and yet *A.* is falsely and maliciously cited by *D.* into the Ecclesiastical Court, to render an Account, and at the Request of *D.* he is excommunicated for not rendering up his Account; an Action lies against *D.*

By the 3 & 4 *W. & M. cap. 11.* " In all Actions to be brought in the Courts of *Westminster*, or at the Assises, for Money mispent by Church-wardens, the Evidence of the Parishioners, other than such as receive Alms, shall be taken and admitted.

Church-wardens are comprehended within the Purview of the Statutes 7 *Jac. I. cap. 5.* and 21 *Jac. I. cap. 12.* as to pleading the General Issue to Actions brought against them, (a) and as to double Costs when they have Judgment.

(a) But in Action on the Case

against a Church warden for a false and malicious Presentment, though there be Judgment for him, yet he shall not have double Costs; for the Statute does not extend to Spiritual Affairs. *Cro. Car.* 285, 286. 1 *Jones* 305. *S. C.*

## Commitments.

- (A) What kinds of Offenders are to be committed.  
 (B) By whom.  
 (C) To what Prison.  
 (D) What is to be done previous to their Commitment.  
 (E) What ought to be the form of the Commitment.  
 (F) At whose Charges they are to be sent to Prison.  
 (G) To what Court the Commitment is to be certified.  
 (H) By what Means the Party may be discharged from such Commitment.

### (A) What kinds of Offenders are to be committed.

**A**LL Persons who are apprehended for Offences notailable, as <sup>2 Hawk. P.</sup> also Persons who neglect to offer Bail for Offences which are <sup>C. 116.</sup>ailable, must be committed.

Also where-ever a Justice of Peace is impowered to bind a <sup>2 Hawk. P.</sup> Person over, or to cause him to do a certain Thing, he may commit him <sup>C. 116.</sup> *quousque*, &c. if in his Presence he shall refuse to be so bound, or to do such Thing.

### (B) By whom.

**I**T is laid down by Serjeant *Hawkins*, as a Matter which seems agreed <sup>2 Hawk. P.</sup> by all the old (a) Books, That wheresoever a Constable or private <sup>C. 116, 117.</sup> Person may justify the Arresting another for a Felony or Treason, he <sup>(a) 10 H. 4.</sup> may also justify the sending or bringing him to the common Gaol; and <sup>7. a.</sup> that every private Person has as much Authority in Cases of this Kind, <sup>7 E. 4. 20. a.</sup> as the Sheriff, or any other Officer, and may justify such Imprisonment <sup>3 E. 4. 26. b.</sup> by his (b) own Authority, but not by the Command of another. <sup>27. a.</sup> <sup>20 Ed. 4. 6. b.</sup> <sup>10 E. 4. 17. b.</sup>

18 a. 5 H. 7. 4. b. 5. a. 2 H. 7. 3. b. 11 Ed. 4. 4. b. (b) 5 H. 7. 4. b. 5 a. *Fitz. False Imprisonment* 8.

But in as much as it is certain, that a Person lawfully making such an <sup>2 Hawk. P.</sup> Arrest, (c) may justify bringing the Party to the Constable, in order to <sup>C. 117.</sup> be carried by him before a Justice of Peace; and in as much as the Sta- <sup>(b) 9 E. 4.</sup> tutes of 1 & 2 Ph. & M. cap. 13. and 2 & 3 Ph. & M. cap. 10. which di- <sup>26. b. 27. a.</sup> rect in what Manner Persons brought before a Justice of the Peace for <sup>10 E. 4. 17. b.</sup> Felony, shall be examined by him, in order to their being committed or <sup>H. P. C. 91,</sup> <sup>112.</sup>

bailed, seem clearly to suppose, that all such Persons are to be brought before such Justice for such Purpose; and in as much as the Statute of 31 Car. 2. commonly called the *Habeas Corpus* Act, seems to suppose that all Persons, who are committed to Prison, are there detained by Virtue of some Warrant in Writing, which seems to be intended of a Commitment by some Magistrate, and the constant Tenor of the late Books, Practice and Opinions, are agreeable hereto; it is certainly most advisable at this Day, for any private Person who arrests another for Felony, to cause him to be brought, as soon as conveniently he may, before some Justice of Peace, that he may be committed or bailed by him.

H. P. C. 91,  
112.  
Dalt. c. 118.

2 Hawk. P.  
C. 117.  
(a) 1 And.  
298.

Palm. 558.

It is certain, that the (a) Privy Council, or any one or two of them, or (b) a Secretary of State, may lawfully commit Persons for Treason, and for other Offences against the State, as in all Ages they have done.

1 Sid. 78. 1 Leon. 70. Sir William Windham's Case, 2 Geo. 1. (b) That a Secretary of State may commit, Carth. 291. Resolved in Yaxley's Case, 5 W. & M. Skin. 596. S. P. Resolved between the King and Kendal, Salk. 347. S. C. and S. P. resolved. Vide 5 Mod. 80. S. C. and S. P. resolved.

### (C) To what Prison.

BY the 31 Car. 2. cap. 2. it is enacted, " That no Subject of this " Realm, being an Inhabitant or Resident of this Kingdom of Eng- " land, Dominion of Wales, or Town of Berwick upon Tweed, shall or " may be sent Prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, " or into Parts, Garrisons, Islands, or Places beyond the Seas, which " then were, or at any Time hereafter should be within or without the " Dominions of his Majesty, his Heirs or Successors; and that every " such Imprisonment is by the said Statute enacted and adjudged to be " illegal; and that every Subject so imprisoned shall have an Action of " False Imprisonment, and recover treble Costs, and no less Damages " than Five hundred Pounds against the Person making such Warrant, " who shall also incur a *Præmunire*.

By the 14 E. 3. cap. 10. it is enacted as followeth, " In the Right of " the Gaols which were wont to be in Ward of the Sheriffs, and an- " nexed to their Bailiwicks, it is assented and accorded, that they shall " be rejoined to the Sheriffs, and the Sheriffs shall have the Custody of " the same Gaols as before this Time they were wont to have, and they " shall put in such Under-keepers for whom they will answer. " And this is confirmed by 19 H. 7. cap. 10. Also it is recited by 5 H. 4. c. 10. " That divers Constables of Castles within the Realm, being assigned " Justices of the Peace by the King's Commission, had, by Colour of " such Commission, used to take People, to whom they bore evil Will, " and imprison them within the said Castles, till they had made Fine and " Ransom with the said Constables for their Deliverance: " And there- upon it is enacted, " That none be imprisoned by any Justice of the

(c) But none " Peace, but only in the common Gaol, (c) saving to Lords, and others can claim a " which have Gaols, their Franchise in this Case. Prison as a

Franchise, unless he have also a Gaol-Delivery; nor can the King grant to private Persons to have the Custody of Prisoners committed by Justices of the Peace. 1 And. 345. Cro. Eliz. 829. 9 Co. 119. b. Salk. 343. 2 Hawk. P. C. 118.

Since this Statute it has been held, That regularly no one can justify the Detaining a Prisoner in Custody out of the common Gaol, unless there be some particular Reason for so doing; as if the Party be so dangerously (a) sick, that it would apparently hazard his Life to send him to the Gaol; (b) or there be evident Danger of a Rescous from Rebels, &c. (c) Yet constant Practice seems to authorize a Commitment to a Messenger, and it is (d) said, That it shall be intended to have been made in order for the carrying of the Party to Gaol.

(c) 2 Hawk. P. C. 118. (d) 1 Salk. 347. Skin. 599. S. P.

And it is said, That if a Constable bring a Felon to Gaol, and the Gaoler refuse to receive him, the Town where he is Constable ought to keep him till the next Gaol-Delivery.

Dalt. cap. 118. Bro. Faux Imprisonment 25. 2 Hawk. P. C. 118.

If a Person arrested in one County for a Crime done in it, fly into another County, and be retaken there, he may be committed by a Justice of the first County to the Gaol of such County.

But by the better Opinion, If he had before any Arrest fled into such County, he must be committed to the Gaol thereof by a Justice of such County.

5. a. 13 E. 4. S. Plow. 37. Keilw. 45. 2 Hawk. P. C. 118.

Also it seems to be laid down as a Rule by some Books, That any Offender may be committed to the Gaol next to the Place where he was taken, whether it lie in the same County or not.

Also it seems that the Court of King's Bench is not restrained by the said Statute, but may commit to such Gaol as they shall think most convenient.

As Prisoners ought to be committed at first to the proper Prison, so ought they not to be removed thence, except in some special Cases; and to this Purpose it is enacted by 31 Car. 2. cap. 2. "That if any Subject of this Realm shall be committed to any Prison, or in Custody of any Officer or Officers whatsoever, for any Criminal, or supposed Criminal Matter, that the said Person shall not be removed from the said Prison and Custody, into the Custody of any other Officer or Officers, unless it be by *Habeas Corpus*, or some other legal Writ, or where the Prisoner is delivered to the Constable or other inferior Officer, to carry such Prisoner to some common Gaol, or where any Person is sent by Order of any Judge of Assize, or Justice of the Peace, to any common Work-house, or House of Correction; or where the Prisoner is removed from one Prison or Place to another within the same County, in order to a Trial or Discharge by due Course of Law; or in Case of sudden Fire or Infection, or other Necessity; upon Pain that he who makes out, signs, or counter-signs, or obeys or executes such Warrant, shall forfeit to the Party grieved One hundred Pounds for the first Offence, Two hundred Pounds for the second, &c.

## (D) What is to be done previous to their Commitment.

BY the 2 & 3 Ph. & M. cap. 10. it is enacted, " That every Justice  
 " or Justices, before whom any Person shall be brought for Man-  
 " slaughter or Felony, or for Suspicion thereof, before he or they shall  
 " commit or send such Prisoner to Ward, shall take the Examination of  
 " such Prisoner, and Information of those that bring him, of the Fact  
 " and Circumstances thereof, and the same, or as much thereof as shall be  
 " material to prove the Felony, shall put in Writing, within two Days  
 " after the said Examination; and the same shall certify in such Man-  
 " ner and Form, and at such Time as they should and ought to do;  
 " if such Prisoner so committed or sent to Ward had been bailed, or let  
 " to Mainprize, upon such Pain as in 1 & 2 Ph. & M. 13. is limited  
 " and appointed, for not taking or not certifying such Examinations,  
 " &c. And it is further enacted, That the said Justices shall have Au-  
 " thority to bind all such by Recognizance or Obligation, as do declare  
 " any Thing material to prove the said Manslaughter or Felony, to ap-  
 " pear at the next General Gaol-Delivery, to be holden within the  
 " County, City or Town Corporate where the Trial of the said Man-  
 " slaughter or Felony shall be, then and there to be given in Evidence  
 " against the Party; and that the said Justices shall certify the said  
 " Bonds taken before them, in like Manner as they ought to certify  
 " Bonds mentioned in said former Act, &c.

2 Hawk. P. C.  
 119.  
 (a) Cro. Eliz.  
 829, 830.

A Justice of the Peace may detain a Prisoner a reasonable Time, in order to examine him; and it is (a) said that three Days is a reasonable Time for this Purpose.

## (E) What ought to be the Form of the Commitment.

2 Inst. 52,  
 591.  
 Dalt. cap. 125.  
 H. P. C. 94.  
 2 Hawk. P. C.  
 119.

EVERY Commitment must be in Writing, and under the Hand and Seal, and shew the Authority of him that (b) made it, and the Time and Place, and must be directed to the Keeper of the Prison.

(b) It may be made either in the King's Name, and only tested by the Justice, or in the Justice's Name. Dalt. cap. 125. 2 Hawk. P. C. 119. Where a Commitment in Execution must be to the Sheriff, or not to the Gaoler, vide 5 Mod. 21.

It may command the Gaoler to keep the Party in safe and close Custody; for this being what he is obliged to do (c) by Law, it can be no Fault to command him so to do.

2 Hawk. P. C.  
 119.  
 (c) 8 Co. 100.  
 9 Co. 87. Dalt. 118.

It ought to set forth the Crime with convenient (d) Certainty, whether the Commitment be by the (e) Privy Council, or any other Authority, otherwise the Officer (f) is not punishable by Reason of such *Mittimus*, for suffering the Party to escape, and the Court, before whom he is removed by *Habeas Corpus*, ought to discharge or bail him; and this

1. cap. 10. Cro. Car. 133, 507, 579, 593. 2 And. 298. cont. 1 Rel. Rep. 134. 1 Leon. 71. (f) 2 Inst. 591. H. P. C.

this doth not only hold where (a) no Cause at all is expressed in the Commitment, but also where it is (b) so loosely set forth, that the Court cannot adjudge whether it were a reasonable Ground of Imprisonment.

H. P. C. 109.  
Palm. 550  
(a) Cro. Car.  
579.  
Palm. 558.  
2 Hawk. P. C.

119. (b) As where one was committed for manifold Contumacy to the High Commission Court. 1 Rol. Rep. 245.—Or for refusing to answer, before them, to certain Articles. 1 Rol. Rep. 220, 245. or for insolent Behaviour, and Words spoken at the Council-Table. Cro. Car. 135, 579. 2 Bulst. 139, 140.

But a Commitment for High Treason or Felony in general, without expressing the particular Species, has been held good.

2 Inst. 52.  
Cromp. 233.b.  
Dalt. cap. 125.  
2 Inst. 591. cont.

1 Sid. 78. 1 And. 298. 1 Keb. 305. Palm. 558. 2 Hawk. P. C. 119. Vide 2 Inst. 591. cont.

But now, since the *Habeas Corpus Act*, it seems that such a general Commitment is not good; and therefore where *A.* and *B.* were committed for Aiding and Abetting Sir *James Montgomery* to make his Escape, who was committed by a Warrant of a Secretary of State for High Treason, on a *Habeas Corpus*, they were admitted to Bail, because it did not appear what Species of Treason Sir *James* was Guilty of.

Skin. 596.  
The King  
vers. Kendall  
and Row.  
1 Salk. 347.  
S. C.

It is safe to set forth that the Party is charged upon Oath; but this is not necessary; for it hath been resolved, that a Commitment for Treason, or for Suspicion of it, without setting forth any particular Accusation or Ground of the Suspicion, is good.

5 M. d. 78 S. C.  
2 Hawk. P. C.  
120.  
Dalt. c. 125.  
Cromp. 233.  
2 Inst. 52, 591.

Every such *Mittimus* ought to have a lawful Conclusion, (c) viz. that the Party be safely kept till he be delivered by Law, or by Order of Law, (d) or by due Course of Law, or that he be kept till further (e) Order, (which shall be intended of the Order of Law) or to the like Effect; and if the Party be committed only for Want of Bail, it seems (f) to be a good Conclusion of the Commitment, that he be kept till he find Bail; but a Commitment (g) till the Person who makes it shall take further Order, seems not to be good; and it seems that the Party, committed by such or any other irregular *Mittimus*, may be bailed.

2 Hawk. P. C.  
120.  
(c) 2 Inst. 52,  
591.  
H. P. C. 94.  
Cromp. 233.  
Dalt. cap.  
124.  
(d) That the  
Omission of  
these Words,  
until he be de-

livered by due Course of Law, makes no Nullity in a Justice of the Peace's *Mittimus*; for they are no more than the Law says. 3 Keb. 531. (e) 1 Lev. 230. cont. Cro. Car. 558. (f) 6 Mod. 73, 74. (g) 2 Inst. 52, 591. 1 Rol. Rep. 220. 1 Lev. 230. Cro. Car. 579. cont. 3 Bulst. 48, 49. 1 Rol. Rep. 410.

Also a Commitment grounded on an Act of Parliament ought to be conformable to the Method prescribed by such Statute; as where the Church-wardens of *Northampton* were committed on the 43 *Eliz. cap. 2.* judged, and and the Warrant concluded in the common Form, viz. *until they be duly discharged according to Law*; but the Statute appointing *that the Party should there remain until he should Account*, for Want of such Conclusion they were discharged.

Carth. 152,  
153. ad-  
judged, and  
a Difference  
taken be-  
tween a  
Commit-  
ment as a  
Criminal,

and where one is committed for a Contumacy.

So where one *Bracey* was committed by the Commissioners of Bankrupts, for refusing to answer, and they concluded their Warrant, viz. *until he conform himself to our Authority, and he thence delivered by due Course of Law*; and upon the Return of a *Habeas Corpus*, he was discharged; for the Statute only impowers them to commit until he submit himself to be by them examined.

1 Salk. 348.  
Bracey's  
Case.  
5 Mod. 308.  
S. C.

So where one *Taxley* was committed by the Earl of *Nottingham*, Secretary of State, by Virtue of the 35 *Eliz.* for refusing to answer, whether he was a *Jesuit*, *Seminary* or a *Massing Priest*; and the Conclusion of the Warrant was, *there to remain until he shall be from thence discharged by due Course of Law*; whereas the Words of the Statute are Special, viz. *until he shall answer unto the Questions*; and he was discharged on

Carth. 291  
Taxley's Case.

being asked these Questions, and answering them openly and directly in the Negative.

Baxter's Case,  
Mich. 20.  
Car. 2. in  
C. B.

Mr. *Baxter* being committed, by two Justices of the Peace of *Middlesex*, to *Clerkenwell Prison*, was brought by *Habeas Corpus* to *C. B.* the Gaoler returns that he keeps him by Virtue of a Warrant from the Justices of the Peace, in these Words, *Whereas it hath been proved unto us, upon Oath, that Richard Baxter, Clerk, hath taken upon him to preach in an unlawful Assembly, Conventicle or Meeting, under Colour or Pretence of Exercise of Religion, contrary to the Laws and Statutes of this Realm, at Acton, where he now liveth, in the said County, not having subscribed the Oath by Act of Parliament in that Case appointed to be taken; and whereas we having tendred to him the Oath and Declaration appointed to be taken by such as shall offend against the said Statute, which he has refused to take; we therefore send you herewith the Body of the said Richard Baxter, strictly charging and commanding you, in his Majesty's Name, to receive him the said Richard Baxter, into his Majesty's said Prison, and him there safely to keep six Months, without Bail or Mainprize; and hereof, &c.* This Return the Court held insufficient, the Warrant being vicious throughout. First, There is nothing in the Warrant to certify to the Court on what Statute the Justices proceeded. Secondly, Admit they did proceed on the Statute 17 *Car. 2.* (which they must intend, if any) yet the Commitment is ill, for several Reasons. First, It does not appear that *Baxter* was Guilty of any Offence at all, against this Act. This Law does not forbid Conventicles, nor enjoin the Taking of any Oath, nor subscribing any Declaration, (nay, there is no such Thing as a Declaration in the Act) the Preaching at Conventicles is only one of the Descriptions that are there given of such Persons as are not to come within five Miles, &c. and the taking the Oath is only allowed them as a Remedy to secure themselves against the Penalty of the Law; the only Offence then is, of Persons so described, to come within five Miles of a Corporation, or the Place where they have taken upon them to preach, &c. Now it does not appear by the Warrant, that Mr. *Baxter* did either of these, it is only said that he took upon him to preach at *Acton*, where he now liveth, which last Words are only the Suggestion of the Justices, and not any Part of that which is proved unto them, upon Oath, as the Crime intended to be punished by the Law must be. Secondly, It does not appear that he preached, &c. since the Act of Oblivion, neither is there any other Description given of him to make him the Person intended to be restrained by the Act; the Time should have been expressed. Thirdly, It is not said who made the Oath before the Justices; so that the Prisoner can have no Remedy in Case the Oath were false. Fourthly, If his being at *Acton* were proved after, &c. yet it does not appear how long he continued there; possibly he might be sent for before the Justices, and committed immediately after his Preaching, and then he could not be Guilty of any Residence punishable within this Act; and for these Reasons he was discharged.

## (F) At whose Charges they are to be sent to Prison.

“ *By the 3 Jac. 1. cap. 10. it is enacted,* That every Person and Persons that shall be committed to the common or usual Gaol, within any County or Liberty within this Realm, by any Justice or Justices of the Peace, for any Offence or Misdemeanor, having Means or Ability thereunto, shall bear their own reasonable Charges, for so conveying or sending them to the said Gaol; and the Charges also of such as shall be appointed to guard them to such Gaol, and shall so guard them thither; and if any such Person or Persons, so to be committed, shall refuse, at the Time of their Commitment and Sending to the said Gaol, to defray the said Charges, or shall not then pay or bear the same, that then such Justice or Justices of the Peace, shall and may, by Writing under his or their Hand and Seal, or Hands and Seals, give Warrant to the Constable or Constables of the Hundred, or Constable or Tithingman of the Tithing or Township where such Person or Persons shall be dwelling and inhabit, or from whence he or they shall be committed, or where he or they shall have any Goods within the County or Liberty, to sell such and so much of the Goods and Chattels of the said Persons, as by the Discretion of the said Justice or Justices of the Peace shall satisfy and pay the Charges of such his or their conveying or sending to the said Gaol; the Appraisement to be made by four of the honest Inhabitants of the Parish or Tithing where such Goods or Chattels shall remain and be; and the Overplus of the Money which shall be made thereof, to be delivered to the Party to whom the said Goods shall belong.

“ *And it is further enacted,* That if the said Persons shall not have, or be known to have any Goods or Chattels which may be sold for the Purpose aforesaid, within the County or Liberty, an indifferent Assessment shall be made by the Constables and Church-wardens, and two or three other honest Inhabitants of the Parish or Tithing where such Offenders shall be taken or apprehended, the said Taxation being allowed under the Hand of one or more Justice or Justices of the Peace, if there be such Constables or Church-wardens there inhabiting; and in Default of them, by four of the principal Inhabitants of the said Parish, Township or Tithing, where such Offender shall be taken or apprehended; and if any so assessed shall refuse to pay their said Taxation, then the Justice or Justices of the Peace, by whom the said Offenders shall be committed to Prison, or any Justice of the Peace near adjoining, shall and may give Warrant as aforesaid, to the Constable, Tithingman, or other Officer, there to distrain the Goods of any so assessed, which shall refuse to pay the same, and to sell the same; and that such Person or Persons so authorized, shall have full Power so to distrain; and by Appraisement of four substantial Inhabitants of the said Place, to sell a sufficient Quantity of the Goods and Chattels of the Person so refusing, for the Levying of the said Taxation; and if any Overplus of the Money come by the Sale thereof, the same to be delivered to the Owner.

## (G) To What Court the Commitment is to be certified.

Vide Title  
Habeas Cor-  
pus.

BY the 3 H. 7. cap. 3. it is enacted, " That every Sheriff, Bailiff of  
" Franchise, and every other Person, having Authority or Power  
" of Keeping of Gaol, or of Prisoners for Felony, do certify the Names  
" of every such Prisoner in their keeping, and of every Prisoner to  
" them committed for any such Cause, at the next general Gaol-Deli-  
" very, in every County or Franchise where any such Gaol shall be,  
" there to be calendred before the Justices of the Deliverance of the  
" same Gaol, whereby they may, as well for the King as for the Party,  
" proceed to make Deliverance of such Prisoners, according to Law,  
" on Pain to forfeit to the King for every Default there recorded, one  
" hundred Shillings.

## (H) By What Means the Party may be discharged from such Commitment.

Keilw. 34.  
3 Inst. 209,  
210.  
H. P. C. 94.  
2 Hawk. P. C.  
121.

A Person legally committed for a Crime, certainly appearing to have  
been done by some one or other, cannot be lawfully discharged by  
any other but by the King, till he be acquitted on his Trial, or have an  
*Ignoramus* found by the Grand Jury, or none to prosecute him on a Pro-  
clamation for that Purpose, by the Justices of Gaol-Delivery.

Keilw. 34.  
H. P. C. 109,  
110, 114.  
2 Hawk. P. C.  
121.

But if a Person be committed on a bare Suspicion, without any Appeal  
or Indictment for a supposed Crime, where afterwards it appears that  
there was none; as for the Murder of a Person thought to be dead,  
who afterwards is found to be alive, it hath been holden that he may be  
safely dismissed, without any farther Proceeding; for that he who suffers  
him to escape, is properly punishable only as an Accessory, where  
there can be no Principal; and it would be hard to punish one for a  
Contempt founded on a Suspicion appearing in so uncontested a Man-  
ner to be groundless.

## Common.

**C**OMMON is a Right or Privilege which one or more Persons claim to take or use, in some Part or Portion of that which another Man's Lands, Waters, Woods, &c. do naturally produce, without having an (a) absolute Property in such Land, Waters, Wood, &c. it is called an Incorporeal Right, which lies in Grant, as if I have originally commencing on some Agreement between Lords and Tenants, for some valuable Purposes, which by Age being formed into a Prescription continues good, although there be no Deed or Instrument in Writing which proves the original Contract or Agreement.

4 Co. 37. a. 2 Inst. 65. 1 Vent. 387. (a) And therefore a Right of Common in another Man's Soil, and I grant it to A. reserving Rent, if the Rent be behind, I cannot distrain the Beasts of A. because the Right of Common, which every Man has, runs through the whole Common; and I cannot say that any particular Part of the Common is more mine than another. Co. Lit. 47. a. 142. a. 2 Rol. Abr. 446.

### (A) Of the several Kinds of Commons: And herein

1. Of Common Appendant.
2. Of Common Appurtenant.
3. Of Common in Gross.
4. Of Common *pur cause de vicinage*.

### (B) Of the Interest of him who is Owner of the Soil.

### (C) Of the Commoners Interest in the Soil: And herein of the Remedies the Law gives him.

1. Against the Lord or Owner of the Soil.
2. Against the other Commoners: And herein of Admeasurement.
3. Against Strangers.

### (D) Of Approbement and Inclosure.

### (E) Of Apportionment and Extinguishment.

### (A) Of the several Kinds of Commons.

**T**HE general Division of Common, according to some Books, is into, 1st, *Common of Pasture*, which is a Right or Liberty that one or more have to Feed or Fodder their Beasts or Cattle in another Man's Lands; 2dly, (a) *Common of Turbary*, or a Liberty of cutting Turves in another's Sand or Soil; 3dly, (b) *Common of Piscary*, or a Right and Liberty of taking Fish in another's Fish-pond, Pool or River; 4thly, (c) *Common of Estovers*, which is a Right of taking Trees or Loppings, Shrub, Underwood in another's Woods, Coppices, &c. and 5thly, (d) a Liberty, which in some Manors the Tenants have of digging and taking Sand, Gravel, Stone, &c. in the Lord's Soil.

(a) Of the Nature of this Kind of Common, and that it can only be Appendant to an House, vide 4 Co. 37. a. Of prescribing for it, vide 1 Lev. 231. Sid. 354. 2 Keb. 290. that an Assise lies of it. 8 Co. 48. That by a Grant of a House, *cum pertinentiis*, Common of Turbary passes, vide Cro. Jac. 179, 180. 3 Lev. 165. vide 1 Lev. 231. 1 Sid. 354. (b) That a Man may prescribe to have *separalem Piscariam*, and exclude the Owner of the Soil wholly from fishing; for he has still the Profit of the Soil and the Water, &c. Co. Lit. 122. 8 Co. 98. 1 Vent. 391. 1 Sand. 251. 2 Sand. 326. How it must be prescribed for, vide Hard. 407. (c) For this vide Title *Estovers*. (d) For this vide Co. Lit. 41. b.

Co. Lit. 122. But the Word *Common* is usually understood of Common of Pasture,  
 4. of which there are four (a) Kinds; first, *Common Appendant*; secondly,  
 Vaugh. 255. *Common Appurtenant*; thirdly, *Common in Gross*; fourthly, *Common pur*  
 (a) For *Shak*, in the *cause de vicinage*; and therefore  
 County of  
 Norfolk, which is a Sort of *Common pur cause de vicinage*; and the Commencement thereof, vide  
 7 Co. 5.

### 1. Of Common Appendant.

Common Appendant of Common Right belongs to arable Land for  
 Co. Lit. 122. a. Beasts that serve for Maintenance of the Plough; as Horses and Oxen  
 26 H. 8. 4. (b) But it to plow the Land, Kine and Sheep to compester it; and for such Com-  
 (b) For mon there is (b) no need to prescribe.  
 must be said  
 to have been

Time out of Mind. 4 Co. 37. 1 Rol. Abr. 401. Cro. Car. 542. must be Appendant Time out of  
 Mind. Keilw 129. b. 1 Rol. Abr. 396. Fitz. Issue 143. and cannot be created at this Day. 26 H. 8. 4.  
 5 Aff. 9. Fitz. Affise 134. 1 Rol. Abr. 396.

4 Co. 67. As the Lords of several Manors, in which there were great Wastes, used  
 2 Inst. 96. to Portion out some Parts of the arable Lands to their Tenants, which  
 they were to till and plow, and were to hold in Nature of Socage, it  
 was necessary, in Support of Tillage, which has always been greatly fa-  
 voured in the Law, that the Cattle employed in this Service should  
 have Food and Provender in some other Parts of the Manor; and this  
 was usually assigned them in such Wastes, as were least fitted for Im-  
 provement or Cultivation.

1 Rol. Abr. Hence it is, that if before the Statute of *Quia Emptores Terrarum*, the  
 396. Lord of a Manor had made a Feoffment of Parcel of the Manor, to  
 4 Co. 37. a. hold of him, the Feoffee, as incident to the Grant, should have Common  
 S. P. in the Wastes of the Lord.  
 2 Inst. 86.  
 S. P.

37 H. 6. 34. This Kind of Common is regularly Appendant (c) only to arable  
 26 H. 8. 4. Land, yet it may be claimed by that Name, as Appendant to a Manor,  
 4 Co. 37. a. Farm, a Plough-Land, or a Carve of Land, though it may contain Pa-  
 11 H. 6. 12. sture, Meadow and Wood; for it shall be presumed to have been all ori-  
 1 Rol. Abr. ginally arable Land, though afterwards converted into Meadow, Pasture,  
 396. &c.  
 2 Erownl.  
 298.

2 Inst. 85, 474. (c) It cannot be Appendant to Land which is approved within Time of Memory,  
 out of the Waste of the Lord. 5 Aff. 2. Bro. Common 16. S. C. Ero. Aff. 116. S. C. 1 Rol. Abr. 397.  
 S. C.

(d) 37 H. 6. (d) It can only be for such Cattle as are necessary in Tillage; as  
 34. Oxen and Horses to plow the Land, and Cows and Sheep to compester  
 10 E. 4. 10. b. it; (e) and therefore a Prescription to have Common Appendant for all  
 1 Rol. Abr. Manner of Cattle, is not good; because it comprehends Goats, Geese,  
 397. and such like, which is more properly Common Appurtenant.  
 Co. Lit. 122 a.  
 (e) 14 H. 6.

6. b. Bro. Common 13. S. C. 37 H. 6. 34. S. C. 1 Rol. Abr. 397. S. C.

17 E. 3. 27. Common Appendant may by Usage be limited to any certain Num-  
 34. ber of Cattle.  
 1 Rol. Abr. 399. S. C.

17 E. 3. 34. b. A Man may have Common Appendant for thirty Cattle in one Place,  
 1 Rol. Abr. and to the same Land Common Appendant also in another Place, for  
 397. S. C. Part of his said Cattle, and so may take it where he pleases.

27 E. 3. 86. Common Appendant (f) may be through all the Year, saving at a  
 1 Rol. Abr. certain Time, in which the Lord uses it.  
 396. S. C.

(f) May be  
 on Condition or Limitation; as *quandiu* he pays so much, so *tandiu* as he shall be living in such a  
 House to which the Common is Appendant. 37 H. 6. 34. Fitz. Trespass 85. S. C. Bro. Common 13. S. C.  
 1 Rol. Abr. 397. S. C.

(a) So it may be to Common in the Meadow, after the Hay carried off, till *Candlemas*. 17 E. 3. 26. 34. 1 Rol. Abr.

397. (a) So to Common in the Pasture, from the Feast of *St. Augustin* till *All Saints*. 17 E. 7. 26. 34. 1 Rol. Abr. 397. S. C.—So it may be to Common two Years after the Corn cut and carried away, till it is re-sowed, and every third Year *per totum annum*. 22 Aff. 42. 1 Rol. Abr. 397. S. C. 1 Sand. 343. S. P. *Vide post* Letter (C).

If an Inhabitant of one Parish hath Common Appendant in certain Waste Grounds, which lie in another Parish, he shall be assessed, and pay Taxes in that Parish where his Farm lies, and not in that in which he hath Common; for the Common is only incident to it, and will pass by a Grant of the Common; and is therefore to be considered as Part of the Farm, and the Farm to be taxed the higher. 1 Salk. 169.

## 2. Of Common Appurtenant.

Common Appurtenant can only be claimed by Prescription, and is a Right of Commonage for Beasts, not (b) only Commonable (c) as <sup>a</sup>(b) A Man Horses, Oxen, Cows and Sheep, but likewise for Beasts not Commonable, as Swine, Goats and Geese. <sup>a</sup>Co. Lit. 122. <sup>b</sup>may prescribe to have it for

all Manner of Cattle. 15 E. 4. 33. 1 Rol. Abr. 402. S. C. (c) These are Commonable, and called *Magna Averia*, for which *vide Cro. Jac.* 580. 2 Rol. Rep. 173. 1 Sand. 227.—If the Lord Licenses a Stranger *ad ponend' averia* into the Common, this shall be intended of Commonable Cattle only, and not of Hogs. 2 Mod. 7. *per North* Ch. Just.—But if the Licence be for a particular Time, it is otherwise. 2 Mod. 7. *per North*.

He that claims Common by Force of a Prescription, as an Inhabitant of a Town, shall have no other Cattle to Common there, but what are (d) Levant and Couchant within the same Town. 15 E. 3. 32. 1 Rol. Abr. 398.

Cattle shall be said Levant and Couchant, *vide Noy* 30. where it is said, that by *Coke* Ch. Just. so many Cattle as the Land, to which the Common is Appurtenant, may maintain in the Winter, so many shall be said Levant and Couchant. *Vide* 1 Vent. 54. And so many Beasts may be said Levant and Couchant upon a House, as may be tied there, and are usually to be maintained in the House. 2 Brownl. 101.—But *per Vaugh.* 253. Cattle cannot be Levant on a Messuage only, yet *vide* 1 Salk. 169. Prescription to have Common for all Beasts Levant and Couchant, as Appendant to a Cottage, is good, for a Cottage contains a Curtilage at least; and there is no Difference between a Messuage and Curtilage, as to this. Also a Cottage by Statute ought to have four Acres of Land. 6 Mod. 114. S. C. And *Holt*, Ch. Just. said that he remembered the Trial of an Issue, where it was ruled by *Hale*, Ch. Just. that Foddering Cattle in the Yard was sufficient Evidence of Levancy and Couchancy. 1 Salk. 169. 6 Mod. 114. S. P.

If a Man claims Common, by Prescription, for all Manner of Commonable Cattle in the Land of another, as belonging to a Tenement, this is a void Prescription; (e) because he does not say that it is for Cattle Levant and Couchant upon the Land to which he claims it to be Appurtenant; for a Man cannot have Common *sans* Number appurtenant to Land; and when he claims the Common for all Cattle Commonable, and does not say for Cattle Levant and Couchant upon the Tenement, this shall be intended Common *sans* Number, according to the Words; (f) for there is not any Thing to limit it, when it does not say for Cattle Levant and Couchant. 1 Rol. Abr. 398. <sup>e</sup>It is naught upon a general Demurrer; but is helped after Verdict. *Theadle* and *Miller*, 1 Lev. 196. 1 Sid. 313.

314. 2 Keb. 108, 120. *Mellor* and *Spateman*. 1 Sand. 346. 1 Mod. 6, 7. and *vide* 3 Mod. 162. Co. Ent. 656. *Poph.* 201. 1 Vent. 164, 165. and so 1 Sand. 227. adjudged. 1 Mod. 75. *Cro. Jac.* 44. (f) But if a Man prescribes for Common for a certain Number of Cattle, as belonging to certain Land, he need not say Levant and Couchant. 2 Mod. 185. *Vide* the Diversity adjudged, and 1 Rol. Abr. 401. 1 Vent. 163. 1 Mod. 75. *Cro. Jac.* 27.

It seems agreed, that if a Man has a Grant of Common for a certain Number of Beasts, that the Commoner may take the Beasts of a Stranger. 22 Aff. Pl. 84. 45 E. 3. 25. b. 11 H. 6. 26. b. *Vide Cro. Jac.* 15, 575. (g) *Secus* of Common *sans* Number. 1 Rol. Abr. 402. But he that claims the sole Pasture of Land, may license a Stranger to put in his Beasts. 2 Sand. 327.

a Stranger, and put them upon the Common, so that it exceed not the Number.

1 Jones 375. Also in Case of a Common appurtenant, it is said, That where the  
Cro. Car. 432. Number of the Beasts to be Commoned is certain, the Commoner may  
grant over the Commonage of Part, and reserve the Rest to himself.

22 Aff. 84. It is clear, that if a Commoner borrows Cattle to manure his Land, he  
1 Rol. Abr. may use the Common with them; for by the Borrowing he has a Special  
396, 402. Property in them.

S. P.  
Skin. 138. S.  
P. admitted.

### 3. Of Common in Gros.

Co Lit. 122. a. This is a Right of Commonage which must be claimed by Deed or Pre-  
2 Injt. 477. scription, and has no Relation to any Land belonging to the Commoner;  
What shall it may be for a certain Number of Cattle, or *sans* Number.  
be said Com-  
mon in Gros, vide 1 Rol. Abr. 402. 13 Co. 66.

11 H. 6. 22. b. He that hath Common in Gros for a (a) certain Number of Cattle,  
1 Rol. Abr. may put in the Cattle of a Stranger, and use the Common with them.

402. S. C.  
(a) So may he who hath Common *sans* Number in Gros. 11 H. 6. 22. b. 1 Rol. Abr. 402. S. C.

9 E. 4. 39. Common Appendant cannot be made Common in Gros, for this is  
26 H. 8. 3. for Cattle Levant upon the Land, to which, &c. and therefore it can-  
1 Rol. Abr. not be severed without Extinguishment.

401. S. C.  
Cro. Car. 542. S. P.

1 Rol. Abr. So Common Appurtenant for Cattle levant and couchant upon the  
402. Land, cannot be made in Gros.

Cro. Fac. 15. S. C. But though it cannot by Grant be severed from the Soil, yet Common appurtenant for a cer-  
tain Number of Beasts may be granted over, *per Cur.*

1 Rol. Abr. If *A.* and all those whose Estate he hath in the Manor of *D.* have  
402. had Time out of Mind a Fold-course, *ff.* Common of Pasture for any  
Cro. Car. 432, Number of Sheep, not exceeding 300 *l.* in a certain Field, appurtenant  
433. S. C. to the said Manor, he may grant over this Fold-course to another, and  
adjudged, and so make it in Gros; because the Common is for a certain Number, and  
stated, that by the Prescription the Sheep are not to be levant and couchant upon  
it was grant- the Manor, but it is a Common for so many Sheep appurtenant to the  
ed over with the Manor, which may be severed from the Manor as well as an Advowson,  
Parcel of the Manor.  
1 Jones 375. without any Prejudice to the Owner of the Land where the Common is  
S. C. adjudg- to be taken.  
ed.

### 4. Of Common pur cause de Vicinage.

Co Lit. 122. a. Common *pur cause de Vicinage* is but an Excuse of Trespass, and no  
Man can put his Beasts into the Land in which he has such Common,  
but they must escape thither themselves, and either of the Parties that

(b) That by such Inclo- has such Neighbouring Grounds (b) may inclose against the other.

ture the Common is gone. 4 Co. 38. 1 Rol. Abr. 399. S. P.

1 Rol. Abr. But if there be Common *pur cause de Vicinage* between two Manors,  
399. and the Lord of one Manor incloses, yet he shall not bind a Copyholder  
of the same Manor, but that he may have Common *pur cause de Vicinage*  
as he had before.

7 Co. 5. b. If there be Common *pur cause de Vicinage* between the Towns of *A.*  
Resolved *per* and *B.* and *A.* hath 50 Acres of Common, and *B.* hath 100 Acres of  
Cur. Common, the Inhabitants of *A.* cannot put more Cattle into their  
Common

Common than the 50 Acres will Depasture, without any regard to the Common of *B.* for the original Cause of this Common was not the Profit of either Town, but to prevent Suits in open Countries for reciprocal Escapes from one Field into the other.

If there are two Manors in one Vill, the Tenants of each may inter-common, and this is likewise called Common *pur cause de Vicinage*.

Every Common *pur cause de Vicinage* is Common Appendant, and therefore a Man need not prescribe in a Common *pur cause de Vicinage*; but it is sufficient to say, that he and all those whose Estate, &c. have used to intercommon *Causa Vicinagii*.

*Vide 2 Bulst.*  
87.

*Dyer 47. Pl.*  
14.

*1 Rol. Abr.*  
399. But for  
this *vide Popb.*  
201.

*Latch 161.*

*3 Keb. 388.*

## (B) Of the Interest of him who is Owner of the Soil.

THE Lord of the Soil hath such an Interest therein, that it seems agreed, That a Custom or Prescription (*a*) totally to exclude him from all manner of Profit, is void, as unreasonable and against Law.

*Co. Lit. 122. d.*

(*a*) Therefore if the Owner of the

Soil grants to another Common *sans Number* there, yet the Grantee cannot use the Common with so many Cattle, that the Grantor shall not have sufficient Common for his Cattle. *12 H. 8. 2. 1 Rol. Abr. 396, 399. Bridg. 5. 1 Rol. Rep. 365. 1 Sand. 245. S. P. admitted.*— But where the Lord shall by Prescription be restrained to a certain Number, *vide 2 Rol. Abr. 267. pl. 2.*

But one may prescribe or alledge a Custom to have *solam Vesturam terræ*, from such a Day to such a Day, and exclude the Owner of the Soil.

*Co. Lit. 122. a.*

And may prescribe to have *separa-*

*lem Pasturam*, and exclude the Owner of the Soil from Feeding there. *Co. Lit. 122. a.*

Also it seems by the better Opinion, That a Prescription for *sol. & se- paral' Pastur'* at all Times, so as to exclude the Lord from feeding there, is good; for this does not exclude the Lord of all the Profits, for he shall have the Mines, Trees, &c. and is not like a Prescription for the whole Common to exclude the Lord, for that is repugnant.

But for this *vide 1 Vent.*  
383.

*Vaugh. 251.*

*1 Sand. 350.*

*1 Lev. 263.*

*Potter and*

*North, and 2 Lev. 2. 1 Vent. 123, 163. 2 Sand. 324. 1 Mod. 74. 2 Keb. 758, 842. Hopkins and Robinson.*

The Lord without Prescription cannot agist the Cattle of a Stranger in the Common.

*30 E. 3. 27.*

*1 Rol. Abr.*

396.

But he may (*b*) license a Stranger to put in his Cattle, if he leaves sufficient Common for the Commoners.

*2 Mod. 6. 7.*

*& vide 2 Mod.*

275. (*b*) And if the Lord Licenses a Stranger *ad Ponend' averia* into the Common, this shall be intended of Commonable Cattle only, and not of Hogs; but if the Licence be for a particular Time, it is otherwise. *2 Mod. 7. Per North, That such Licence must be by Deed. 2 Lev. 2.*

If the Lord alien in Fee the Soil where the Common is taken, saving his Power of Pasture, as Lord, he shall have Common there as Lord, *aliter* without any saving; but the Alienee of the Soil may Depasture it, as the Lord had done before.

*18 Aff. 56.*

*pl. 4*

*18 E. 3. 43.*

*1 Rol. Abr.*

396.

If *A.* grants Common to *B.* in a certain Place, *A.* cannot afterwards erect a Rick there; for by the Grant the Cattle of *B.* are to range over the whole Place without Restraint, and it shall not be in the Power of *A.* to defeat his own Grant.

*Cro. Jac. 271.*

*Farmer and*

*Grant. Yelv.*

201. S. C.  
adjudged.

(C) Of the Commoner's Interest in the Soil, and herein of the Remedies the Law gives him.

(a) For the Interest and Power of a Commoner, and the general Learning thereof, **A** Commoner hath only a (a) special and limited Interest in the Soil, but yet he shall have such (b) Remedies as are commensurate to his Right, and therefore may distrain Beasts Damage-feasant, bring an Action on the Case, &c. but not being absolute Owner of the Soil, he cannot (c) bring a General Action of Trespafs for a Trespafs done upon the Common.

*vide Bridg.*

10, 11. *Godb.* 123, 124. 2 *Leon.* 201, 202. (b) Where he may maintain an Assise, and what shall be a sufficient Seisin for that Purpose. 1 *Rol. Abr.* 404. (c) 4 *Mod.* 187. *Carth.* 285. admitted.

12 *H. S.* 2. A Commoner cannot regularly do any Thing on the Soil which tends  
13 *H. S.* 15. to the Melioration or Improvement of the Common, as cutting down of  
1 *Sid.* 251. Bushes, Fern, &c.

Therefore if a Common every Year in a Flood is surrounded with  
1 *Rol. Abr.* 405. Water, yet the Commoner (d) cannot (e) make a (f) Trench in the  
2 *Bulft.* 116. Soil to avoid the Water; because he has nothing to do with the Soil, but  
S. P. only to take the Grass with the Mouth of his Cattle.

*Godb.* 52. S. P.

(d) So the Commoner cannot cut Bushes, Fern, &c. which impair the Common. *Bridg.* 10. Unless it be by Special Prescription. *Godb.* 182. (e) Unless by Special Custom. (f) For if he makes any Thing *de novo* in the Land, he is a Trespasser, but may amend and reform a Thing abused; and therefore if the Land be full of Mole-hills, he may dig them down. 1 *Brownl.* 228. So if there be Holes dug in the Common to the Damage of the Land, the Commoner may put again the Earth dug into its Place. 1 *Brownl.* 228.—Also a Commoner may scour a Trench, as has been used to be done Time out of Mind, and as is done in the Moors of *Somerfet.* 1 *Sid.* 251.

*Lit. Rep.* 38. Every Commoner may (g) break the Common if it be inclosed, and  
& *vide* 1 *Rol. Abr.* 406. although he does not put his Cattle in at the Time, yet his Right of  
*Abr.* 406. Commonage shall excuse him from being a Trespasser.

(g) Where

he may make one or more Gaps to put in his Cattle, if the Common be inclosed, *vide Goldf.* 117. 2 *Inst.* 88.—May throw down the Hedges. 2 *Mod.* 65, 66. 1 *Brownl.* 228.—If the Lord makes a Pond in the Common, the Commoners may let the Water out. 1 *Brownl.* 228.

2 *Leon.* 202, 203. If a Tenant of the Freehold ploughs it, and sows it with Corn, the Commoner may put in his Cattle, and therewith eat the Corn growing upon the Land; so if he lets his Corn lie in the Field beyond the usual Time, the other Commoners may notwithstanding put in their Beasts.

But for the better Understanding of the Commoner's Right and Interest in the Common, and of his Remedies when his Right is infringed, it may be necessary more particularly to consider,

1. What Remedies he has against the Lord or Owner of the Soil.

1 *Rol. Abr.* 405. If a Commoner finds Conies on the Soil spoiling the Grass, he may  
2 *Rol. Abr.* 90. kill and take them, though they are put there by the Lord of the Manor; for he has no Remedy by way of Action against the Lord; but this was a  
*Yelv.* 205. Matter, as appears by the Authorities in the Margin, long doubted of, because the Property was thought to be in the Lord *ratione soli*, and the  
4 *Leon.* 7. Beasts were not at their Natural Liberty; but it was allowed, that there  
1 *Jones* 356. could be no Inclosure on the Common to disturb the Right of Common-  
Cro. Car. 388. ing; and so in respect of the Commoner the Beasts were uninclosed.  
Cro. Eliz. 548, 876.

3 *Leon.* 201. *Owen* 114 *Cro. Jac.* 195, 229. *Godb.* 123. 1 *Lutw.* 108.

It is (a) a general Rule, That a Commoner cannot distrain or chase out the Cattle of the Lord, or Tertenant, Damage-feasant, and (b) that if the Lord surcharges the Common, his (c) proper Remedy is an Action on the Case.

(a) For which vide 2 *Levn.* 203. *Yelv.* 104, 129.

*Cro. Fac.* 208. 1 *Brownl.* 187. *Godb.* 182. (b) That the Commoner may have an Action on the Case. *F. N. B.* 125. 9 *Co.* 112.—And how such Action is to be laid. 1 *Lutw.* 107. (c) And therefore there can be no Relief in Equity where the Lord surcharges. 2 *Vern.* 116.

Also if there be a Custom, that a Close ought to lie fresh and hained every second Year till *Lady-Day* after the Corn cut and carried away; and *J. S.* hath used Time out of Mind to have Common in the said Close after *Lady-Day*, till it is sowed again with Corn, for his Cattle *levant* and *couchant* upon a certain Tenement as appurtenant thereto; in this Case, if the Lord of the Soil of the said Close, puts in his Cattle in the said Close, against the Custom, when it ought to lie fresh and hained by Custom, the said *J. S.* though he be but a Commoner, (d) yet he may take the Cattle of the Lord there Damage-feasant, and justify in an Action of Trespass brought against him by the Lord of the Close where he took the Cattle; for if the Lord may eat the Grass before the Common is to be taken pursuant to the Custom, the Tenant would be defeated of all the Benefit of his Common.

1 *Rol. Abr.* 405, 406. *Trulack* and *White* adjudged.

(d) So where the Lord by Custom is stinted to a certain Number of Cattle, and yet he puts in

more, *Kenrick* and *Pargiter*, *Yelv.* 129. Adjudged by three Judges against two, who doubted, and inclined to think, that a Custom and Usage to distrain ought to have been alledged. *Cro. Fac.* 208. 1 *Brownl.* 187.—But how far the Lord may be restrained to a certain Stint, vide 2 *Rol. Abr.* 267.

(e) If (f) I have (g) Common of Estovers in the Woods of *J. S.* and *J. S.* cuts Part, or all the Wood, yet I cannot take any Part of this which is cut, (b) but shall be put to my Assise, or Case, as my Estate is.

(e) 1 *Rol. Abr.* 406. *Cro. Eliz.* 826. *S. P. per Cur'.*

*Cro. Fac.* 257. *S. P. per Curiam.* 1 *Rol. Abr.* 567. pl. 3. like Point. *Yelv.* 188. *S. P. per Curiam.* 1 *Brownl.* 220. *S. P. per Cur'.* 1 *Bulst.* 93, 94. *S. P.* admitted *arguendo.* (f) So if one grants to me 1000 Cords of Wood, to be taken at my Election, and the Grantor, or a Stranger, cuts down all, or Part of the Wood, I can take no Part of that which is cut down. *Sir Thomas Palmer's Case*, 5 *Co.* 25. *Cro. Eliz.* 820. *Noy* 32. *Moor* 692. Pl. 955. *Yelv.* 188. cited. (g) But if a Man claims all the Thorns, &c. growing on such a Place, he may take them, though cut down by another. *Douglas* and *Kendal*, *Cro. Fac.* 257. adjudged. *Yelv.* 188. adjudged. 1 *Brownl.* 219, 220. adjudged. 1 *Bulst.* 93, 94. (b) For this vide 9 *Co.* 112. 1 *Brownl.* 197. 1 *Rol. Abr.* 108. pl. 22. *F. N. B.* 58. *Hob.* 43. *Yelv.* 188. 5 *Co.* 25.

## 2. Against the other Commoners; and herein of Admeasurement.

The Writ of Admeasurement lies by (i) one Commoner against (k) another; but if the Tenant surcharges the Common, the Lord shall not have a Writ of Admeasurement against the Tenant.

*F. N. B.* 125. (i) *Per 2 Inst.* 86. it lies

against such as have Common appendant; but *Q. & vide F. N. B.* 125. 1 *Rol. Rep.* 365. (k) Yet upon this Suit all the Commoners shall be admeasured. *F. N. B.* 125.

So if the Lord surcharge the Common, or approve without leaving sufficient, the Tenant shall not have a Writ of Admeasurement against him, but an Assise.

No Writ of Admeasurement lies against a Commoner *sans Number*, nor shall his (l) Common be admeasured.

*F. N. B.* 125. (l) But the Tertenant

may distrain his Cattle. 1 *Saml.* 345.

22 *Aff.* pl 65. One Commoner (*a*) cannot distrain the Cattle of another, for the  
*Style* 428. Right of Commonage which every Commoner has, runs through the  
*Yelv* 104. whole Land.

2 *Lutw.* 1240.

(*a*) But if a Man has Common for ten Beasts, and he puts in more, the Surplusage beyond the Ten may be taken Damage-feasant. 46 *E.* 3. 12. *b.* 2 *Lutw.* 1241. cited, and said, That the Avowry being general, it is most probable that it was by the Owner of the Soil.—And 9 *Co.* 112. That an Action on the Case is his proper Remedy.—And where one Commoner may have Relief in Equity against another for oppressing the Common. 1 *Vern.* 308.

### 3. Against Strangers.

15 *H.* 7. 13. A Commoner may justify the Taking of the Cattle of a Stranger Damage-feasant upon the Common in his own Name, for the Interest  
 14 *H.* 7. 3. which he has in the Common.  
 9 *Co.* 112. *b.*  
 F. N. B. 128.

*Bridg.* 10. 1 *Rol. Abr.* 405, 320. *Yelv.* 130. *Godb.* 185. *Fenk.* 144. But can have no Action unless laid *per quod* his Common was impaired. *Kelw.* 47.

3 *Lev.* 104.  
*Wootton* and  
*Salter*, ad-  
 judged.

But in his Avowry he must alledge a particular Damage, as that he could not have Common *in tam amplo modo quo debuit & consuevit*, for without a particular Damage he can no more distrain the Beasts of a Stranger, than bring an Action upon the Case.

2 *Mod.* 6.  
*Smith* and  
*Feuerel*, ad-  
 judged.

If in an Action of Trespas brought by a Commoner against a Stranger, for putting his Cattle in the Common, *per quod Communiam in tam amplo modo habere non potuit*, the Defendant pleads a License from the Lord to put his Cattle there, but does not aver there is sufficient Common left for the Commoners; this is a good Plea; for though it may be objected, the Plaintiff may reply thereto, yet being the very Gift of the Action, the Defendant should have pleaded thereto.

2 *Mod.* 7. *per*  
*Cur.*

But in an Action against the Lord the Plaintiff must particularly shew the Surcharge.

## (D) Of Approbement and Inclosure.

2 *Inst.* 85. BY the Order of the Common Law, there could be (*c*) no Approve-  
 (*c*) But by ment, because the Common issued out of the whole Waste.  
 the Common  
 Law the Lord might improve against any that had Common appendant, but not against a Commoner by Grant. 2 *Inst.* 474.

(*d*) Which But now by the (*d*) Statute of (*e*) *Merton, cap. 4.* “ Because great  
 fee explained “ Men having (*f*) enfeoffed others of small Tenements in their great  
 2 *Inst.* 85, 86. “ Manors, complained they could not make their Profit of the Residue  
*Vaugh.* 257. “ of their Manors, as Waste, Woods and Pastures, it is provided, When  
 (*e*) Made 20 “ such Feoffees bring an (*g*) Assise for their (*b*) Common of Pasture,  
*H.* 3. (*f*) So “ and it is alledged they have not sufficient Pasture (*i*) belonging to  
 that it ex- “ their Tenements, Ingress or Regress, the Truth shall be inquired by  
 tends only to “ the Assise, and if found they have not sufficient, they shall recover  
 enable the “ Seisin by the View of the Inquest, and by their (*k*) Discretion shall  
 Lord to ap- “ his Tenants. “ have  
 prove against  
 2 *Inst.* 85.

(*g*) So it may be tried in an Action of Trespas. 2 *Inst.* 88. *Godb.* 117. Or if the Lord inclose any Part, and leave not sufficient Common in the Residue, the Commoner may break down the whole Inclosure. 2 *Inst.* 88. (*b*) It extends not to Common of Piscary, Turbary, Estovers, &c. 2 *Inst.* 87.  
 (*i*) So that it extends not to Common in Grofs. 2 *Inst.* 86. (*k*) So that if found they have not sufficient, the Inquest shall find what is sufficient, that the Lord may approve the Residue. 2 *Inst.* 88.

“ have sufficient, &c. but if found they (a) have sufficient, &c. the (a) And tho’  
 “ other shall make (b) the Profit (c) of the (d) Residue, and be quit of after it  
 “ the Assise. should prove insufficient,

the Improvement continues. 2 *Inst.* 87, 88. (b) By Inclosure. 2 *Inst.* 87. And not by digging for Coals, &c. 1 *Sid.* 106. And if the Lord makes a Feoffment of Part, his Feoffee may inclose, for the Feoffment in its Nature was an Improvement. 2 *Inst.* 87. (c) And thereby it is discharged of the Common; and if the Tenant Purchase it, his Common is not extinguished. 2 *Inst.* 87. (d) But the Lord cannot approve the Whole, leaving them sufficient in other Lands. 2 *Co.* 25. b.

By the Statute of *Westm.* 2. *cap.* 46. “ The Statute of *Merton* shall (e) Though  
 “ bind (e) Neighbours, and such as claim Common of Pasture appur- he dwells in  
 “ tenant to their Tenements, but not such as claim Common by Special another  
 “ Grant or Feoffment for a certain Number, or otherwise. Town, for  
 the Towns  
 and Com-

mons adjoin. 2 *Inst.* 474.—And if the Lord hath Common in the Tenant’s Ground, the Tenant may improve within this Act. 2 *Inst.* 474.—Seems as if the Common of the Lord was reserved upon the first Feoffment. 2 *Inst.* 475.

“ By Occasion of (f) Wind-mill, Sheep-cote, Dairy, enlarging of a (f) These  
 “ Court (g) necessary, or (h) Curtilage, (i) none shall be grieved by are but for  
 “ Assise of *Novel Disseisin* for Common of Pasture. Example;  
 for the Lord

may erect an House for the Habitation of a Beast keeper. 2 *Inst.* 476. 1 *Lev.* 62. (g) It must be shewed, that it was done for his necessary Resiance. *Nevil and Hamerton*, 1 *Lev.* 62. adjudged. 1 *Sid.* 79. adjudged. 1 *Keb.* 283, 314. (h) Whether necessary it should be an antient one. 1 *Lev.* 62. *dubitatur*. 1 *Sid.* 79. *dubitatur*. And *vide* 1 *Keb.* 283, 314. (i) Though there is not sufficient Common left. 2 *Inst.* 476. 1 *Lev.* 62.

And where any (k) having Right to approve, levies Dyke or Hedge, (k) It is not  
 and (l) it is thrown down (m) in the Night or other Season, &c. and necessary to  
 it cannot be known (n) by Verdict of Assise or Jury by whom, and the set forth  
 Men of the Town near (o) will not indict such as are guilty of the what Estate  
 Fact, the Towns near adjoining (p) shall be distrained to levy the Hedge the Party  
 or Dyke at their own Costs, and to yield Damages. has; for he  
 that hath the  
 Herbage on-

ly may inclose. *Carth.* 114, and *vide* 241. (l) The cutting down of Timber is not within the Act. *Raym.* 487. (m) If the Prostration in the Day or Night was before the Face of the Owners, or so publick that the Offenders might be known, it is not within the Act. 1 *Lev.* 108. A Traverse taken accordingly. (n) For the Inquisition and other Proceedings on this Act, *vide Cro. Car.* 280, 440, 580. 1 *Fones* 307. 1 *Sid.* 107, 212. 1 *Lev.* 108. 1 *Mod.* 66. *Carth.* 241. (o) No Time being appointed, it shall be intended within a Year and a Day. 2 *Inst.* 476 1 *Rol. Rep.* 365 *Per Cro. Car.* 440. A convenient Time. (p) The Lord shall bring his Action upon this Statute, against the Towns bordering round about the Town where the Fact was done, and Judgment shall be given, That they shall at their proper Costs make the Ditch, &c. 2 *Inst.* 477. 1 *Rol. Rep.* 365.

“ By the 3 *E.* 6. *cap.* 3. The Statutes of *Merton* and *Westm.* are con-  
 “ firmed, and treble Damages given to the Commoners that Recover in  
 “ such Assise against the Lord.

It has been ruled in (q) Chancery, That a Common which has been 1 *Vern* 32.  
 inclosed for thirty Years, shall not afterwards be thrown open. (q) Where  
 upon Sugge-

tion that an Inclosure is an Improvement within the Statute of *Merton*, Chancery will grant an Injunction till it be determined at Law. 2 *Vern.* 301, 356.—Where it will decree an Inclosure pursuant to an Agreement, though opposed by two or three wilful Tenants. 1 *Chan. Ca.* 48. 1 *Vern.* 456. 1 *Chan. Rep.* 259.—Where an Agreement to stint a Common. 2 *Vern.* 103.

## (E) Of Apportionment and Extinguishment.

Co. Lit. 122.  
Hob. 235.  
8 Co. 78.  
Owen 122.  
4 Co. 37.

Common appendant, because it is of Common Right, shall be apportioned by the Commoners Purchase of Part of the Land in which he hath such Common; but Common appurtenant shall be extinct by the Commoners Purchase of Part of the Land, in which, &c. both Common appendant and appurtenant shall be apportioned by Alienation of Part of the Land to which the Common is appendant or appurtenant.

For this, and where the whole Common. A Release of Common in one Acre, is an Extinguishment of the Unity of Possession of the whole Land makes an Extinguishment, *vide* 4 Co. 37. 8 Co. 136. 1 Show. 350. 4 Mod. 365. Carth. 342.

Hob. 190.  
Cro. Jac. 253.  
Yelv. 189.  
Noy 136.  
2 Rol. Abr. 61.  
2 Brovnt. 210.  
Moor 667.  
Cro. Eliz. 794.

A Copyholder had Common in his Lord's Waste, the Lord grants and confirms the Copyhold Land and Messuage to him and his Heirs *cum pertinentiis*; it was resolved the Common was extinct, for it was annexed to his customary Estate by the Custom; which Estate being determined, the Common is also gone, and cannot continue without Words to that Intent, and *cum pertinentiis* will not do, for the Common was no Appurtenant to the Freehold Estate granted by the Lord.

Cro. Eliz. 570.  
Bradshaw and Eyre.  
4 Mod. 364.  
S. C. cited.

But if *A.* as Appurtenant to a certain Messuage and twenty Acres of Land, hath Common in the Lands of *B.* and after *B.* enfeoffs *A.* of the said Lands, in which, &c. *per quod* the Common is extinguished; and after *A.* Leases to *B.* the said Messuage and twenty Acres of Land, with all Commons, Profits and Commodities thereto appertaining, *vel occupat' vel usitat' cum Præd' Messuagio*, this is a good Grant of a new Common for the Time; for though it were not Common in the Hands of the Lessor, yet it is *Quasi* Common used therewith, and although (*a*) it be not the same Common as was used before, yet it is the like Common; but yet because it was not there averred, that this Common was therewith used at the Time of the Lease, it was adjudged against the Defendant who claimed the Common.

(*a*) So if a Copyhold Messuage Echeats, to which before Common in the Demesnes of the Lord did belong, and the Lord by Deed grants it *per Nomina Messuag', &c. & communiar' quarumcunque Dicho Messuag' spectant', &c. vel cum eodem Messuag' usitat'.* Cro. Eliz. 794 2 And. 168.

1 Salk. 170, 364.  
Crowther and Oldfield.

A Copyholder, that has Common of Pasture in the Wastes of the Lord out of the Manor, has the same, as belonging to his Land, and if he enfranchise the Copyhold Estate, still his Common remains; but where a Copyholder has Common in the Wastes within the Manor, that belongs to his Estate, and if the Estate be enfranchised, the Common is extinct.

2 Vern. 250.

Also it has been ruled in Equity, That if the Lord of the Manor enfranchises a Copyhold with all Commons thereunto belonging or appertaining, and afterwards buys in all the other Copyholds, and then disputes the Right of Common with the Copyholders he had enfranchised, and recovers at Law; though the Common be extinct at Law, yet it shall subsist in Equity, and the same Right of Common as belonged to the Copyhold will be decreed.

## Conditions.

**B**Y the Word *Condition*, is usually understood some Quality *Co. Lit. 201.*  
 (a) annexed to a Real Estate, by Virtue of which it may be (a) By ex-  
 (b) defeated, enlarged or created upon an uncertain Event. prefs Words,  
 which is cal-  
 led a Condi-

tion in Fact; as where a Feoffment is made of Lands, reserving Rent payable on a certain Day, upon Condition, that if it be not paid on the Day, the Feoffor may re-enter, *Et. Co. Lit. 201.* Or implied by Law, which is called a Condition in Law; as if an Office be granted to one, the Law annexes, without express Words, a Condition, That the Party shall duly and faithfully execute it, and that for Misbehaviour the Grantor may discharge him. *Co. Lit. 233. a.* (b) And note, That it is a general Rule, that a Condition which destroys or defeats the Estate or Grant, is to be construed strictly. *1 Rol. Abr. 438. Co. Lit. 220.*

Also Qualities annexed to Personal Contracts and Agreements, are *Vide Heads of*  
 frequently called *Conditions*, and these must also be interpreted according *Covenants and*  
 to the (c) real Intention of the Parties, and are usually taken most *Obligations.*  
 (d) strongly against the Party to whom they are meant to extend, lest (c) If the  
 by the obscure Wording of his own Contract, he should find Means to Condition of  
 an Obliga-  
 tion be, That  
 the Obligor  
 evade and elude it.

shall make all the Linen the Obligee shall wear during his Life, the Obligee must deliver to the Ob-  
 ligor the Cloth of which it is to be made; for all Contracts are to be interpreted according to the  
 Intent and subject Matter. *1 Lev. 93.* (d) If I covenant to deliver so many Yards of Cloth, and I  
 cut it in Pieces, and then deliver it. *Raym. 464.*—If the Condition of a Bond be to pay 50 *l.* tho'  
 it is not said of Money, yet it must be so intended, and the Obligor cannot tender fifty Pounds weight  
 of Stone. *1 Sid. 151, Et.*

- (A) By what Words created in a Deed.
- (B) By what Words created in a Will.
- (C) Of the Manner of creating the Condition, and at what Time it must be annexed.
- (D) Where the Nature of the Thing will admit of no Condition, but must be absolute.
- (E) To whom the Condition may be reserved.
- (F) To whom it shall be said to extend to be bound by it.
- (G) What shall be said a Condition, and not a Covenant.
- (H) What shall be said a Condition and not a Limitation, and how they differ.
- (I) Of Conditions precedent and subsequent.
- (K) Of void Conditions, being against Law.
- (L) Of repugnant Conditions.
- (M) Of impossible Conditions.
- (N) Of the Effect of a void, illegal, or impossible Condition.

## (O) Of the Breach of the Condition: And herein

1. What shall be a Breach thereof.
2. What the Party must do to intitle him to the Advantage thereof; and herein of Notice, Request, Tender and Refusal.
3. What shall be a Dispensation therewith.
4. How far he, who enters for a Condition broken, is reinstated in his former Estate.

## (P) Of performing the Condition: And herein

1. What Persons may perform it.
2. To whom it may be performed.
3. At what Time it may be performed.
4. At what Place it may be performed.
5. What shall be said a sufficient Performance.

## (Q) What shall excuse the Non-performance: And herein

1. Of the Act of God.
2. Of the Act of Law.
3. Of the Act of the Party.
4. Of the Act of a Stranger.

## (A) By what Words created in a Deed:

*Co. Lit. 203.* MY Lord Coke says, That by inserting the very Word *Condition*, or *sub*  
*(a) Ad effectum ea intentione ad solvendum* in the King's Grants make some Act.  
*(a)* *Conditione*, Conditions are most properly created, but there are also  
*(a)* others, says he, that will do as effectually, as the Word *(b) Proviso*,  
 but then it must not depend upon another Sentence; also it must be the  
 Words of the Grantor, and compulsory to enforce the Grantee to do  
 a Condition.

*1 Rol. Abr. 407. 10 Co. 42. Hob. 231. 4 Leon. 70.*—Where the Words *Si modo* by the Common Law make a Condition; though it is otherwise by the Civil Law, as in a Licence from the Archbishop to accept another Living, *modo sit* within ten Miles of the former. *Vide 1 Jones 304. Cro. Car. 475. Owen 152. (b) 2 Co. 70. b.*

*1 Rol. Abr. 407.* It is said to have been adjudged, That a Feoffment *(c) ea intentione*  
*Co. Lit. 204.* does not make a Condition, and it is only a Confidence or Trust, unless  
 an express Re-entry be limited.

*(c) A Man*  
 made a Feoffment *ea intentione* that his Wife should have an Estate for Life, the Remainder to his youngest Son in Fee, and the Feoffee died without making such Estate; it was resolved the Heir of the Feoffor could not enter, for that there was no Condition, but an Estate executed presently according to the Intent. *4 Leon. 2.*—If the King grants an Advowson in Fee, and further *concessit* that the Grantee may amortize this for the Soul of the Progenitors of the King; this is but a Licence, and not a Condition. *43 E. 3. 34. Fitz. Condition 7. S. C. 1 Rol. Abr. 407. S. C.*

*Cro. Eliz. 73.* Recoverors to an Use before 27 H. 8. Leased by Indenture for ninety-nine Years, and the Lessee, by the same Deed, covenanted with the Recoverors to pay the Rent to *Cestui que use*, his Heirs and Assigns;  
*2 Leon. 128.* *3 Leon. 225.* S. C. By the Report of  
 which the *Proviso* was, That if the Lessee should make his Heir male his Assignee, &c. *Moor 107. S. C.*

*Proviso semper*, that if *Cestui que use* makes not his Heir Male his Assignee, that then he shall pay his Rent to the Recoverors, their Heirs and Assignees; this (*a*) *Proviso* makes not a Condition, but only abridges the Covenant.

S. C. cited. (a) Where the Word *Proviso* makes no Condition, but on-

ly a Qualification, or Explication of a Covenant or Grant. *Vide* 2 *Leon.* 128. 3 *Leon.* 225, 226. *Dyer* 222. 4 *Leon.* 70. 3 *Leon.* 16. *Po. b.* 119. *Moor* 707. *Gouldf.* 131. 2 *Co.* 72. a. 1 *And.* 71, 72.

If a Man Leases to a Woman for forty Years, upon Condition that *si illa tam diu viveret & custodiret se ipsam* a sole Widow, and should inhabit upon the Premises; this is not any Condition, for the Word (*b*) *Si* makes the Intention uncertain, whether another Thing was intended besides the Cesser of the Term, or the Re-entry.

1 *Rol. Abr.* 410. *Sayer* and *Harcy*, adjudged. *Poph.* 99. S. C. adjudged, for none

can imagine what the Conclusion should be; but it was agreed, That if the Lease had been for forty Years, *si tam diu sola viveret & inhabitaret* upon the Premises, the Lease had determined by her Marriage or Death. *Cro. Eliz.* 414. S. C. adjudged by three Judges against one, for every *Si* ought to be answered with a *Tunc*. *Owen* 107, 108. adjudged. *Gouldf.* 179. S. C. adjudged. *Moor* 400. *pl.* 525. S. C. adjudged. (*b*) But if this Word had been omitted, it would have been a Condition; or if *sub conditione quod* had been omitted, it would have been a Limitation. *Gouldf.* 179.

So if a Man leases Lands to another, *Proviso si* the Rent be arrear, this is not a Condition, because the Word *Si* makes the Intention uncertain, for where the (*c*) *Proviso* is Hypothetical, it ought to be shewed what he would have.

1 *Rol. Abr.* 410. *Moody* and *Garron.* 1 *Rol. Rep.* 367. S. C.

*Owen* 107. S. P. By two Judges *arguendo*. *Cro. Eliz.* 414. S. P. by three Judges against one *arguendo*. (*c*) Where this being a proper Word of Condition, though put in an improper Place, shall make the Estate Conditional. 2 *Co.* 72. b.

If a Man leases Land to another, *Proviso if the Rent be behind, it shall be lawful for him to Restrain, and not being sufficient, the Ground to re-enter into the Premises, and the same to have again in his former Estate*, this is no good Condition, for the Words are not, that he shall restrain the Goods upon the Tenement; nor is it known what is intended by the Word sufficient, *scilicet*, sufficient Reparation, Rent, &c. and the Words, *the Ground to re-enter into the Premises*, are insensible.

1 *Rol. Abr.* 410. *Moody* and *Garron.* 1 *Rol. Rep.* 330, 367. S. C. adjudged. 1 *Bullf.* 153, 154. S. C.

adjudged. *Moor* 848. *Pl.* 1551. S. C. adjudged; because not said what shall be restrained, nor who shall re-enter. *Cro. Jac.* 390. S. C. adjourned, and said, *Coke* held *Restrain* to be the same as *Distrain*.

If *A.* enfeoffs *B.* upon Condition that he shall render to *C.* and his Heirs, an yearly Rent of 20 s. and if *B.* and his Heirs fail of Payment thereof, that then *A.* and his Heirs may enter, this is a good Condition; for though a Rent cannot be reserved to a Stranger, yet yearly Rent in this Case (*d*) shall be intended of an yearly Sum of 20 s. in Grofs.

*Lit. Sect.* 345. *Co. Lit.* 213. a.

(d) If a Man grants a

Walk in a Forest, provided the Grantee shall not cut down any Trees *super Premissa*, though the Soil is not granted, and *Premissa* hath properly a Relation to the Thing it self; yet since in this Case it cannot have such Construction, it shall be intended of Trees growing within the Walks. *Cro. Eliz.* 781. adjudged, & *vide Moor* 526. *Dalf.* 54. *Moor* 52.

If *A.* being seised in Fee of the Manor of *B.* and of divers Lands in *C.* then in the Possession of *D.* for several Years to come, makes a Feoffment thereof to *E.* to the Use of himself in Tail Male, Remainder to *F.* in Tail Male, &c. Provided that *F.* or the Heirs Male of his Body in whomsoever of them the Inheritance in Tail of all the Premises shall happen to be, shall pay to the Daughter of *A.* 200 l. according to the Last Will of *A.* and *A.* makes a Letter of Attorney to *J. S.* to enter into the Manor of *B.* and the Lands in *C.* and in his Name to take Possession and deliver it *E.* whereupon Possession is given to *E.* of all but what was in the Possession of *D.* and *D.* never attorns, so that the Lands

*Poph.* 102, 103. *Slaning's* Case, certified to the Chancellor accordingly, as the Opinion of 3 Judges.

in C. passed not, and after A. by Will bequeaths 200 l. to his Daughter, and dies without Issue, yet F. is not bound by this Condition, because he hath not (a) *all the Land* according to the Purport of the Condition, which was, That he that had all should pay, &c. and a Condition ought to be taken strictly.

(a) If a Man makes a Deed of Feoffment of Lands in several Counties, upon Condition the Feoffee shall re-ifeoff him of all the Land within twenty Days after the Date, if Livery is made but of Part within the twenty Days, the Condition is not broke, though all is not reconveyed within the twenty Days, according to the Letter of the Condition, which is intire. *Hob. 24.*

If the Condition of an Obligation be in this Manner, viz. *The Condition of this Obligation is such, That if the Obligor shall appear coram Domino Rege apud Westmon' such a Day, ad Respond', &c. then the Condition of this Obligation shall be void, or else the same shall be in full Power and Vertue*; yet this is a good Condition, for the Sense is perfect without these last Words, and they shall be rejected for their Absurdity and Repugnancy.

2 *Sand. 78.*  
*Malever and Hauxby, ad-judged for the Plaintiff, upon Demurrer, the Defendant having pleaded the Statute of 23 H. 6. 1 Sid. 456. 1 Mod. 35. 2 Keb. 625. S. C. adjudged.*

## (B) By What Words created in a Will.

**A**S the Intent of the Testator chiefly governs in Wills, such Construction is always made of the Words, as will best support his Intent, and therefore these Words *ad faciendum, faciendo ea intentione, ad effectum, &c.* in a Will create a Condition.

*Vide Tit. Devise. Co. Lit. 204. a. Dalf. 58. Moor 57. Pl. 162. Popb. 8. Cro. Eliz. 454. Owen 92. Gouldf. 75.*

So if a Man seised of Socage Lands, having two Daughters, devises it to one of the Daughters, To have and to hold to her and her Heirs, to pay to her Sister a certain Sum of Money at a certain Day; these Words make a Condition; so that the other Sister, if the Money is not paid, may enter in Moiety for the Condition broke, because otherwise she shall be Remediless.

1 *Rol. Abr. 410, 411. Cro. Eliz. 146. S. C. adjudged. 1 Leon. 174. S. C. adjudged. Gouldf. 134. Co. Lit. 236. S. C. cited.*

But if a Man devises Lands to B. for Life, paying to C. 6 l. Rent yearly, which he Wills to be paid at two Feasts Half-yearly, and if it be arrear, that then it shall be lawful to C. to distrain; it seems this Word *Paying* makes not any Condition, in as much as a Distress is limited for Non-payment thereof.

1 *Rol. Abr. 411. and Lane 56. S. C. dubitatur, & vide Lane 78.*

If a Man devises Lands to his (b) Executor to sell, and (c) to make Distribution of the Money for his Soul, and dies; if the Executor does not sell it, the Heir may enter, for this creates a Condition.

(b) For Devises to Executors for Payment of Debts, *vide Titles Devise, and Uses and Trusts.* (c) A Man devises 5 l. yearly out of his Land to his younger Son, towards his Education in Learning; this creates no Condition, so that he shall have the Rent, though not educated in Learning. 2 *Leon. 154. 3 Leon. 65. and vide Dalf. 116.*

38 *Aff. 3. 1 Rol. Abr. 410. S. C.*

(C) Of the Manner of creating the Condition, and at What Time it must be annexed.

Conditions cannot be annexed to Estates of Inheritance, or Freehold Estates, without (a) Deed. 1 Rol. Abr. 413, 414. (a) Cannot regularly be reserved but by Deed indented. 1 Rol. Abr. 413.—But if by Deed Poll, and the Feoffor, &c. gets it into his Custody, he may plead the Condition against the Feoffee, &c. Lit. Seff. 575. Co. Lit. 231.

If a Feoffment be made of two Acres upon Condition, and for Breach, that he may re-enter but in one, this is good. 1 Rol. Abr. 412.

If a Man agrees with me to make a Feoffment to me upon Condition, and after makes a Charter of Feoffment without any Condition, and after makes Livery *secundum formam Chartæ* without any Condition, this is absolute without any Condition, for the Livery is not made according to the Agreement, but according to the Charter. 31 Aff. 1. 1 Rol. Abr. 413.

But if A. agrees to enfeoff B. in Surety of Payment of certain Money, and after makes Livery to him and his Heirs generally, the Estate is holden by some to be on Condition, in as much as the Intent of the Parties was not changed, but continued at the Time of the Livery. Co. Lit. 222. b.

If a Man makes a Charter of Feoffment to another, and in the Deed there is no Condition, but when the Feoffor would make Livery of Seisin to him by Force of the Deed, he expressing the Estate, makes Livery and Seisin to him upon Condition, the Feoffment is of like Force as if no such Deed had been made. Lit. Seff. 359. Co. Lit. 222. b.

If a Disseisor releases to his Disseisor all his Right, and at a Day after, the Disseisor by Indenture grants, that if he pays so much at a Day certain, the Release shall be void; this is a void Condition, (b) as to revive the Right to the Disseisor. 43 Aff. 12. 1 Rol. Abr. 414. Co. Lit. 236. S. P.

(b) For Inheritances executed cannot be defeated by subsequent Defeasance. Co. Lit. 236.—But a Release, Feoffment, &c. may be defeated by Indenture of Defeasance made at the same Time. Co. Lit. 236. 2 Co. 71. b.

Rents, Annuities, Warranties, &c. (being Inheritances (c) Executory) may be defeated by a Defeasance made at the same Time, (d) or at any Time after. Co. Lit. 237. a. (c) But in Case of a Feoffment,

&c. where the Estate is executed it is not to be defeated by Condition or Defeasance, unless contained in the same Deed, or in another executed at the same Time. 2 Sand. 48. (d) Cro. Eliz. 623. Adjudged in Case of a Defeasance to a Bond; but 2 Sand. 47, 48. adjudged contra by Twisden; but it is said by Sanders minus consulte, for the Law is clear, that an Obligation, Judgment, &c. may be defeated by a subsequent Defeasance, and so is the common Practice; but for this vide 1 Rol. Abr. 590.

If the Condition of an Obligation be to save harmless certain Lands from all Incumbrances made by the Obligor; and upon the Back thereof there is a Memorandum wrote, That the Condition shall not extend to the Extent upon a certain Statute acknowledged by the Obligor; (e) this being wrote before the Sealing of the Obligation, is an Explanation thereof. Moor 679. Broke and Smith. (e) Where a Condition wrote on the

Back of a Lease before the Execution thereof, was held good. Cro. Jac. 456. But for this vide 2 Rol. Abr. 22, 23. And where a Proviso, inserted in an improper Place, shall have Reference to the Estate and make it Conditional. 2 Co. 72. b.

(D) Where

## (D) Where the Nature of the Thing Will admit of no Condition, but must be absolute.

*Owen* 12.  
*Gayton's Case.* A Person cannot resign upon Condition, because it is a Judicial Act, to which no Condition can be annexed, any more than an Ordinary can admit, or a Judgment be confessed upon Condition.

1 *Rol. Abr.* 412.  
*Co. Lit.* 300. S. P. So  
The Tenant cannot (*a*) attorn to the Grant of a Seignory (*b*) upon Condition, because this is but a Consent, and no Interest passes from him.

Executors cannot agree upon Condition to a Legacy. 4 *Co.* 28. *b.* (*a*) Because a bare Assent without any Interest. *Co. Lit.* 300. *b.* But a Patron, in respect of his Interest, may assent upon Condition to charge the Glebe of the Parson. *Co. Lit.* 300. *b.* (*b*) *Viz.* Upon Condition subsequent; *secus* upon a Condition precedent. *Co. Lit.* 274. So a License to alien cannot be upon a Condition subsequent; *secus* as to a Condition precedent; because in such Case it is no License till the Condition performed. *Poph.* 106.

*Co. Lit.* 274. *b.* A Disseisee may release his Right to the Disseisor upon Condition.  
*Kelw.* 88. S. P. But a Condition cannot be released upon Condition.

*Co. Lit.* 274. *b.*  
9 *Co.* 85. *b.* S. P.

*Co. Lit.* 274. *b.* An express Manumission of a Villein cannot be upon Condition, for once Free and for ever Free.

*Co. Lit.* 274. Letters Patent of Denization of an Alien may be upon Condition precedent or subsequent.  
But a Naturalization by Parliament cannot be upon Condition, for it is against the Absoluteness, Purity, and Indebility of Natural Allegiance. *Co. Lit.* 129. *a.*

1 *Rol. Abr.* 412. and  
*vide* 1 *Rol. Abr.* 940.  
A Man cannot release a Personal Thing, as an Obligation upon a Condition subsequent, but the Condition will be void, because a Personal Thing being once suspended, is perpetually extinguished.

1 *Rol. Abr.* 412. *Barkley*  
and *Parkes*,  
adjudged.  
But a Man may release a Personal Thing, as an Obligation, or such like, upon a Condition precedent; for there the Action is not suspended till the Condition performed; as where the Release was of an Obligation with a *Proviso*, That he who released might enjoy 120 *l.* due by *J. S.* at a Day then after to come, which being a Condition precedent was adjudged good.

## (E) To Whom the Condition may be reserved.

*Lit. Sect.* 347.  
*Co. Lit.* 214. Conditions can only be reserved to the Feoffor, Donor or Lessor, and their Heirs, but not to any Stranger.

1 *Rol. Abr.* 407, 472.  
*Vide* Title  
*Heir* and *An-*  
*cessor.*  
Also by Implication, without express Words, the Law reserves the Condition to the Heir of the Feoffor, &c. for as he is prejudiced by the Disposition, it is but reasonable that he should take the same Advantages, that his Ancestor, whom he represents, might.

8 *Co.* 43, 440.  
*Co. Lit.* 202. *a.*  
S. P. 336. *b.*  
S. P. (*c*) So  
If a Man seised of Lands in the Right of his Wife, makes a Feoffment in Fee upon Condition, and dies, and after the Condition is broke, the (*c*) Heir of the Husband shall enter; for though no Right descended

if a Man makes a Feoffment in Fee of Lands in *Borough English*, the Heir at Common Law shall enter, but the younger Son shall after enter upon him and enjoy, &c. *Godh.* 3. — If a Man Leases two Acres, one of the Nature of *Borough English*, and the other at the Common Law, upon Condition, &c. and the Lessor having two Sons dies, each of them shall enter for Breach of the Condition. *Co. Lit.* 215. *a.*

to him, yet the Title of Entry by Force of the Condition, which was created upon the Feoffment, and reserved to the Feoffor and his Heirs, descended.

If a Condition annexed to Gavelkind Lands be broken; the Heir at Common Law shall enter; but when the eldest Son enters for the Condition broken, the younger Children shall enjoy the Land with him. *Co. Lit. 11, Lamb. 608.*

If *Cestui que use*, after the Statute of *Rich. 3.* and before the Statute of *H. 8.* had made a Feoffment in Fee upon Condition, the Feoffee should not have entred for the Condition broke, but the *Cestui que use*. *Co. Lit. 202. a. 215. a. Moor 212. pl. 353.*

If a Man seised in Fee makes a Lease for Life, rendring Rent, and for Default of Payment a Re-entry, &c. and after dies without Heir, living the Tenant for Life; though the Lord by Escheat shall have the Rent as incident to the Reversion, and may distrain for it, yet he cannot enter. *1 Leon. 298. Sav. 76. Lit. Sect. 348. Co. Lit. 215. c.*

Guardian in Chivalry or Socage, in the Right of the Heir, may take Benefit of a Condition by Entry, or Re-entry by the Common Law. *Co. Lit. 215.*

If Tenant for Life and the Reversioner join in a Feoffment, the Condition may be reserved to the Lessee only, and by his Re-entry he shall devert but his Estate. *1 Rol. Abr. 407.*

If *A.* enfeoffs *B.* upon Condition, that if the Heir of *A.* pays to *B.* &c. 20 s. then he and his Heirs may re-enter, this is a good Condition, of which the Heir of *A.* may take Advantage, and yet *A.* himself never can. *Co. Lit. 214. b.*

If a Man gives Lands to his eldest Son in Tail, Remainder to his second Son in Tail, &c. upon Condition, that if the eldest Son, or any of his Issue aliens, the Land shall remain to the second, &c. the Consequence of the Condition that the Land should remain to another, is void, though upon such Alienation the Donor himself might enter. *Co. Lit. 379. a.*

(F) To Whom it shall be said to extend to be bound by it.

IF an Estate be made to a Feme Covert, she shall be bound by the Condition, because this does not charge her Person, but the Land. *1 Rol. Abr. 421. Moor 92.*

So if an Estate be made to an Infant upon an (a) exprefs Condition, the Infant (b) shall be bound to perform it. *pl. 229. S. P. 1 Rol. Abr. 421.*

8 Co. 44. b. S. P. (a) But where an Infant shall be bound by a Condition in Law, or not, vide Co. Lit. 233. b. 254. a. 8 Co. 44. b. Hard. 11. Carth. 42. Vide Head of Infants. (b) So where an Estate is devised to an Infant, he is bound to take Notice thereof, and perform the Condition. *2 Lev. 21, 22. 1 Mod. 86. 1 Vent. 200.*

So if an Estate be made to another in Fee, upon Condition his Heir, after his Death, though he be within Age, shall be bound by the Condition. *1 Rol. Abr. 421. 1 Jones 390. Cro. Jac. 374. 3 Bulst. 58.*

If a Man devises Lands to *H.* his Son, and to the Heirs of his Body, the Remainder to *T.* and the Heirs Male of his Body, upon Condition that he or they, or any of them, shall not Alien, Discontinue, &c. this Condition shall extend only to restrain *T.* and the Heirs Males of his Body, and not *H.* or his Heirs. *5 Co. 68. Lord Cheney's Case. 1 Rol. Abr. 422. S. C. Moor 727. S. C.*

If a Man Leases Lands for Years, upon Condition that the Lessee nor his Assigns shall not alien the Term to any but to one of his Brothers, and after the Lessee aliens to one of his Brothers; this Assignee is not within the Condition, but he may alien to whom he pleases. *1 Rol. Abr. 422. Cro. Jac. 290. S. C. adjudge's S. C. adjudged.*

ed. Dyer 152. S. P. 2 Bulst. 290. 1 Rol. Ref. 68, 389

- 2 Leon. 38.  
Owen 5, 55.  
Moor 271.  
S. C. If a Man devises Part of his Lands to his eldest Son in Tail, and the Rest of his Land to his younger Son in Fee; provided that neither of his Sons should sell or Lease, before he comes to the Age of Thirty Years; and that if either of the Sons should, &c. the other Son should have his Lands, &c. the eldest Son, before his Age of Thirty leaves, and the younger enters upon him, he shall hold the Lands discharged of the Proviso; for that extends only to the immediate Estate expressly devised, and not to the new Estate arising upon the Limitation.
- 1 Leon. 35.  
Cob and Prier,  
adjudged.  
Litch 20.  
S. C. ad-  
judged, be-  
cause a Condition to avoid an Estate shall be taken strictly.—And per Moor 11. pl. 40. Dyer 65.  
A Proviso that the Lessee shall not alien, extends not to his Executors.
- Pork. 102,  
103. If *A.* being seised in Fee of the Manor of *B.* and of divers Lands in *C.* then in the Possession of *D.* for several Years to come, makes a Feoffment thereof to *E.* to the Use of himself in Tail Male, Remainder to *F.* in Tail Male, &c. provided that *F.* or the Heir Male of his Body, in whomsoever of them the Inheritance in Tail of *all the Premises* shall happen to be, shall pay to the Daughter of *A.* 200*l.* according to the Last Will of *A.* and *A.* makes a Letter of Attorney to *J. S.* to enter into the Manor of *B.* and the Lands in *C.* and in his Name to take Possession, and deliver it to *E.* whereupon Possession is given to *E.* of all but what was in the Possession of *D.* and *D.* never attorns, so that the Lands in *C.* passed not; and after *A.* by Will bequeaths 200*l.* to his Daughter, and dies without Issue, *F.* is not bound by this Condition, because he hath not all the Land, according to the Purport of the Condition, which was, that he that had all should pay, &c.
- Vaugh. 31,  
32.  
Tristram and  
Countess of  
Ballinglaffs. If *A.* is Tenant for Life, with Power by a Marriage-Settlement, to make Leases for Twenty-one Years, so long as the Lessee, his Executors or Assigns shall duly pay the Rent reserved, and he makes a Lease pursuant to the Power, the Tenant is at his Peril obliged to pay the Rent, without any Demand of the Lessor, because the Estate is limited to continue only so long as the Rent is paid.
- Co. Lit. 163, b. If a Gift be made in Tail, on Condition that the Donee should not Discontinue, and the Donee has Issue two Daughters, and one of them Discontinues, the Donor shall enter and evict them both, because it was the original Condition annexed to the whole Estate, that no Part of it should be discontinued.

### (G) What shall be said a Condition, and not a Covenant.

Co. Lit. 204.  
1 Rol. Abr.  
408. IF a Man makes a Lease for Years, by (a) Indenture, (b) provided always, and it is covenanted and agreed between the Parties, that the (c) That the Lessee shall not alien, this is both a Condition and Covenant. Lessor may take it as a Covenant or Condition, but not as both. Dalf 8. (b) The Word *Proviso* sometimes amounts to a Limitation, and sometimes to a Covenant. Co. Lit. 204. a.

1 Rol. Abr.  
408.  
1 Leon. 246.  
S. C. cited.  
(d) So that the Lessee shall continually dwell upon the House, upon Pain of Forfeiture of the said Term

*terminum suum alicui persone sine licentia* of the Lessor, *sub pœna forisfacturæ termini prædicti*, this is a good Condition. Term and Interest.

409. Co. Lit. 204. Godb. 99. So that neither he, nor his Assigns, grant, assign or sell the Land to any, *prater*, &c. upon Pain of Forfeiture of the Term. 1 Rol. Rep. 68, 69. 2 Bulst. 290.—1er being by Indenture, they are the Words of both Parties. Cro. Eliz. 202. 1 Rol. Abr.

But if a Man leases for Years, and the Lessor covenants that the Lessee shall have House-Boot, Hay-Boot and Plough-Boot, without committing Waste, upon Pain of Forfeiture of the Lease, this is a Covenant on the Part of the Lessor, and therefore no Condition; and by *Anderfon* and *Beaumont* the Covenant is no more than the Law appoints; therefore that, and (a) all that is subsequent to it, is vain. (a) Where a Proviso was

void, because no more was to be done by it than what might be done without. Vide *Poph.* 116. Cro. Eliz. 604.

If a Man leases Lands for Years, rendring Rent, and the Lessee covenants to pay the Rent, and not to do Waste, and the Lessor binds himself in an Obligation that the Lessee shall enjoy the Lands for the said Rent, and doing according to the Covenants of the said Indenture, these Words, (b) *for the Rent*, make not a Condition, because he hath other Remedy for the Rent, *scilicet*, upon the Indenture of Covenants. (b) The Lessee for covenanted that the

Lessee, paying his Rent, should enjoy the Land. 4 Leon. 50. By two Judges against one, the Covenant is Conditional.—But 1 Sid. 280. it is held contrary *per Cur'*; and 2 Mod. 34, 35. it is adjudged *cont.*—So if a Man leases for Years, excepting the Trees and Liberty to fell and carry them away, *reparando sepes & implendo foveas*, the Repairing the Ditches, &c. is no Condition, but a Covenant upon which the Lessee hath Remedy by Action. 2 Fenes 206. and vide *March* 9. 2 Rol. Rep. 466. 1 Rol. Abr. 410. 1 Rol. Rep. 567. S. C.

If a Man leases for Years, rendring Rent, and the Lessee covenants to repair, &c. and after the Lessor devises to the Lessee for more Years, yielding the like Rent, and under such Covenants as were in the first Lease, yet this makes no Condition; for though, after the first Lease is ended, the Lessee shall not be bound by the Covenants, yet the Will expressing that the Lessee should have the Lands, observing the first Covenants, it shall not be taken to be a Condition, by any Intent to be collected out of the Will; for Covenants and Conditions differ much. Owen 54, 92. 3 Leon. 55. 1 And. 230. S. C. adjudged. Goulsf. 74. S. C. Godb. 99. S. C. Poph. 8. S. C. cited. Cro. Eliz. 288. S. C. cited.

(H) What shall be said a Condition, and not a Limitation; and how they differ.

WORDS which properly create a Condition, (c) are *Sub conditione*, *ita quod, si contingat, proviso*, &c. for the Non-performance of which, none but the Heir at Law can enter; and regularly, in Case of a Condition, the Estate of the Party is not determined without Entry or Claim. (c) Per Lord Coke, 10 Co. Co. Lit. 203. 2 Co. 70. 2 Sid. 152. 2 Brownl. 68. Goulsf. 134.

35. *Mary Portington's Case*, if there be expers Words of Condition annexed to the Estate, it cannot be construed a Limitation, but this Opinion has been denied to be Law; and *per Hale*, C. B. 1 Vent. 200. 1 Mod. 86. There is no other Authority to support it; for first, Tho' the Words be proper to create a Condition; yet, if upon the Non-performance thereof, the Estate be limited over to another Person, this shall be a Limitation; for it shall not be in the Power of the Heir, by his not claiming or entering, to defeat the Interest of such Person. 1 Brownl. 65. 1 Rol. Abr. 412. and 1 Vent. 200. *per Hale*, it may properly be called a conditional Limitation; secondly, if Lands are given to the Heir, upon Condition, this upon Non-performance shall be construed a Limitation; otherwise no Advantage could be taken of it, the Benefit of Conditions annexed to Real Estates belonging to the Heir, as those to the Personal Estate do to the Executor. Cro. Eliz. 204. Owen 112. 2 Mod. 7. 1 Lutw. 809. 3 Mod. 52.

*Co. Lit.* 236. *b.* Proper Words of Limitation are, *Dum, dummodo, quamdiu, donec, quousque, ubicunque, usque ad, tamdiu*, or so long as he shall pay such a Rent, or be Abbot or Parson, &c. and in these Cases the Law (*a*) vests the Estate in the Party, without Entry or Claim; but he cannot bring a Possessory Action, as Trespass, &c. without an actual Entry.

*Co. Lit.* 236. *b.* So if an Estate be made to a Woman (*b*) *dum sola fuerit*, this is a Limitation which determines her Estate upon Marriage.

(*b*) If a

Lease be made to a Woman for thirty Years, *si tamdiu viveret & custodiret se ipsam* a Widow, it determines by her Death or Marriage. *Cro. Eliz.* 414. *Poph.* 99. *Moor* 400. *Goulsf.* 179. & vide *1 Rol. Abr.* 411, 843. *Owen* 107.

*1 Rol. Abr.* 411. *Hainf-worth* and *Prety.* *Cro. Eliz.* 833, 919. *Moor* 644. If a Man, having three Sons, devises his Lands to the eldest, upon Condition that he shall pay 20*l.* to every of the other two Sons; and that if he fails in Payment thereof to any of the Sons, that then they may enter and have the Land, this is a Limitation, so that if the eldest does not pay the Money, the two Sons may enter into the Land.

*Noy* 51. *S. C.* adjudged, and *Owen* 8. *2 Leon.* 38. *Cro. Jac.* 56, 592. *Carter* 93. *S. P.* adjudged between *Spittle* and *Davis*.

*1 Rol. Abr.* 411, 412. *Wiseman* and *Baldwin.* *Cro. Eliz.* 376. *Goulsf.* 152. *Owen* 112. *S. C.* adjudged, and the Judgment in *C. B.* reversed accordingly. If a Man hath Issue two Sons, *ff. R.* the eldest, and *H.* the youngest, and also two Daughters, and devises certain Lands to *H.* in Tail, when he comes to Twenty-four Years of Age, upon Condition that he shall pay to my two Daughters, 20*l.* a Year, at their full Age; and if the said *H.* dies before Twenty-four, then I Will that *R.* my Son and Heir, shall have the said Land to him and to his Heirs, he giving and paying to my said Daughters the said Money, in such Manner as *H.* should have done, if he had lived. And if my said Sons *H.* and *R.* (if the said Lands come to the said *R.* by the Death of *H.*) do not pay the said Money to my said Daughters, as aforesaid, then I Will my said Land shall remain to my Daughters and their Heirs for ever; and after the Devisor dies, this is a Limitation upon the Estate of *H.* and not a Condition; so that if *H.* does not pay the Money to the two Daughters, after his Age of Twenty-four Years, and at the full Age of the Daughters, *R.* shall have it by Way of Limitation, and cannot enter as for a Condition broke; because that otherwise, *ff.* if this should be a Condition, it would defeat the Portions given to the Daughters, and the future Devise to them, which is against the Intent of the Devisor; adjudged in a Writ of *Error, per totam Curiam*, and the Judgment given to the contrary *in Banco* reversed.

*1 Rol. Abr.* 412. *Skirne* and *Bond*, by two Judges; but *Quare*. If a Man devises Lands to another in Tail, upon Condition that he shall not alien; and that if he dies without Issue, it shall remain over to another in Fee, and after the Devisee aliens, yet he in the Remainder cannot enter for the Condition broke, but the Heir at Common Law; for this is not a Limitation, but a Condition.

*Cro. Eliz.* 204, 205. *Wollock* and *Hammond*, adjudged. *2 Leon.* 114. *S. C.* If a Copyholder in *Borough English* surrenders to the Use of his Will, and after devises to his Wife for Life, Remainder to his eldest Son, (*c*) paying 40*s.* to each of his Brothers and Sisters, within two Years after the Death of his Wife, &c. this is a Limitation, and not a Condition; for if it should be a Condition, it would extinguish in the Heir, and there would be no Remedy for the Money.

*Cro. Jac.* 592. *3 Co.* 21. *2 Brocvtl.* 68. *S. C.* cited. (*c*) For this vide *Stile* 294. *2 Sid.* 152.

*Cro. Jac.* 56. *Curtis* and *Woolvesher*, adjudged *per totam Curiam* *prater Williams*. If a Copyholder in Fee, in *Borough English*, having three Sons, surrenders to the Use of his Will, and devises to his second Son, upon Condition to pay 20*l.* a-piece to his Daughters, and dies, this is a Condition, and not a Limitation; for there is no Necessity to expound it otherwise; as where a Man devises to his eldest Son.

who held it was a Limitation, and that the Land should go to the youngest Brother, who is inheritable by the Custom; for that otherwise he would be prejudiced; & vide *Carter* 171.

If *A.* devises Lands to *B.* provided that if *B.* marries without the Consent of *C.* and others, or dies without Issue, then to *D.* &c. this is a Limitation, and not a Condition, in Respect the Remainder is limited over to a Stranger, and not to the Heir; for though the Words *proviso* & *si* (*a*) are exprefs Words of Condition, it would be an unreasonable Construction of the Intent of the Devisor, that *B.* should do an Act, by which the Estate of *D.* should be forfeited.

<sup>2</sup> Lev. 21,  
<sup>22.</sup> *Williams* and  
*Fry*, ad-  
judged.  
<sup>1</sup> Vent. 199.  
S. C. ad-  
judged, by  
the Name

of *Fry* and *Porter*. *Raym.* 236. <sup>1</sup> *Mod* 86. S. C. adjudged. (*a*) *Dyer* 316 S. P. *dubitatur*. <sup>1</sup> *Leon.* 283. S. P. *dubitatur*. <sup>10</sup> *Co.* 41. *a.* S. P. *cont.* but in <sup>1</sup> *Vent.* 203. (as in several other Books) this Opinion of *Coke* is taken Notice of, and denied to be Law.

If a Man devises certain Lands to *A.* his Heir at Law, and devises other Lands to *B.* in Fee; and if *A.* molest *B.* by Suit or otherwise, he shall lose what is devised to him, and it shall go to *B.* these Words make a Limitation, and not a Condition; for if it were a Condition, it would descend on the Heir, and then *B.* would receive no Benefit by the Breach of it.

<sup>2</sup> *Mod.* 7.  
agreed by  
*Curiam*.

### (I) Of Conditions precedent and subsequent.

Conditions precedent are such as must be punctually performed before the Estate can vest; but on a Condition subsequent, the Estate is immediately executed; yet the Continuance of such Estate dependeth on the Breach or Performance of the Condition.

*Co. Lit.* 218.  
*Eq. Abr.* 103.

As if I grant, that if *A.* will go to such a Place, about my Business, that he shall have such an Estate, or that he shall have 10*l.* &c. this is a Condition precedent.

<sup>3</sup> *H.* 6. 7.  
<sup>1</sup> *Rol. Abr.*  
414.

So if I retain a Man for 40*s.* to go with me to *Rome*, this is a Condition precedent, for the Duty commences by going to *Rome*.

<sup>3</sup> *H.* 6. 33. *b.*  
<sup>1</sup> *Rol. Abr.*  
414.

So if a Man, by Will, devises certain Legacies, and then devises all the Residue of his Estate to his Executor, after Debts, Legacies, &c. paid and discharged, this is a Condition precedent; so that the Executor cannot have the Residue of the Estate, before the Debts and Legacies are discharged.

<sup>1</sup> *Rol. Abr.*  
415.

<sup>1</sup> *Jones* 327.  
*Cro. Car.* 335.

But if a Man devises a Term to *A.* and that if his Wife suffers the Devisee to enjoy it for three Years, that she shall have all his Goods as Executrix; but if she disturbs *A.* then he makes *B.* Executor, and dies, his Wife is Executrix presently; for though in Grants the Estate shall not vest till the Condition precedent is performed, yet it is otherwise in a Will, which must be guided by the Intent of the Parties; and this shall not be construed as a Condition precedent, but only as a Condition to abridge the Power of being Executrix, if she perform it not.

*Cro. Eliz.* 219.  
*Fennings* and  
*Gore* adjudg'd  
*per totam*  
*Curiam*, tho'  
*Anderson* at  
first inclined  
*cont.*

<sup>1</sup> *Leon.* 229.  
S. C. ad-  
judged, *per*

*totam Curiam*, *Anderson* changing his Opinion. *Winch* 115, 116. S. C. cited.

If *A.* Tenant for Life, and *R.* in Reversion in Fee, covenant to levy a Fine, and that it shall be to the Use of *A.* and his Heirs, *si* *R.* does not pay 10*s.* to *A.* the Tenth of *September* after; and if he does pay, then to the Use of *A.* for Life, and after to the Use of *R.* in Fee; in this Case, this Word *si*, &c. is a Condition subsequent, and not precedent; so that *A.* hath an Estate in Fee till *R.* pays the 10*s.* because there is a Day limited for the Payment of the 10*s.* and the subsequent Words explain the Intent to be a subsequent Condition, *ff.* And if he pays it, then it shall be to *A.* for Life, and after to the Use of *R.* in

<sup>1</sup> *Rol. Abr.*  
415, 416.  
*Spring* and  
*Cesar*, ad-  
judged.  
<sup>1</sup> *Jones* 389.  
*Winch* 109.  
S. C.

Fee, which shews the Intent to be that *A.* shall have an Estate in Fee, till the 10*s.* paid.

3 *Lev.* 132.  
adjudged.

A Copyholder in *Borough English* surrenders to the Use of himself for Life, and after to the Use of his eldest Son and his Heirs, if he lives to Twenty-one; provided and upon Condition, that if he dies before Twenty-one, that it shall remain to the Surrenderer and his Heirs; though by the first Words it seems to be a Condition precedent; yet upon all the Words taken together, it is not, but a Surrender to the Use of the eldest Son, to be defeated upon a Condition subsequent.

1 *t. Sect.* 550.  
*Co Lit.* 216,  
217.

(a) But if  
*A.* leases  
Land to *B.*  
for five  
Years, and  
*B.* enters,  
and after  
*A.* by Deed,

If *A.* makes a Lease for five Years to *B.* upon Condition, that if *B.* pays him 10*l.* within two Years, that then he shall have a Fee-simple in the Lands, and makes Livery and Seisin to *B.* (a) this passes the Freehold immediately, and *B.* has a Fee conditional; because if the Freehold was not to vest in *B.* till the Condition performed, it would be difficult to determine in whom the Freehold lay; for Conditions may be inserted in such Deeds as are perfected privately, as might prove greatly prejudicial to Strangers.

*Co. Lit.* 217.*b.*

But in Case of a Lease for Life, with such a Condition, the Freehold passes not before the Condition performed; because the Livery may presently work upon the Freehold.

*Co. Lit.* 217.

But if a Man grants an Advowson, &c. (which lie in Grant) for Years, upon such Condition, the Grantee shall have no Fee till the Condition performed.

*Co. Lit.* 210.*b.*

If *A.* leases to *B.* for Years, upon Condition, that if *B.* pays Money to *A.* or his Heirs, at a Day, that *B.* shall have the Fee, and before the Day *A.* is Attainted of Treason and Executed; now though the Condition became impossible by the Act and Offence of *A.* yet *B.* shall not have a Fee, because a precedent Condition to increase an Estate must be performed; and (b) if it becomes impossible, no Estate shall rise.

(b) But it  
has been  
ruled in E-

quity, where the Condition of a Bond was to settle certain Lands, in such a Manor, by such a Day, though the Obligor died before the Day, and so the Bond saved at Law, that yet the Agreement should be executed in *Specie*, and so decreed in Chancery, between *Hotham* and *Ryland*. *Eq. Abr.* 18.

1 *Vern.* 79,  
167.

Also in Equity, with Respect to Conditions precedent and subsequent, the prevailing Distinction seems to be, to relieve against the Breach or Non-performance, whether the Condition be precedent or subsequent, where a Compensation can be made.

1 *Chan. Ca.*  
89. *Wallis*  
and *Crimes*.

1 *Mod.* 507.  
*S. C.* cited.

As if *A.* conveys Lands to *B.* &c. and their Heirs, upon Trust, that if *C.* the Son of *A.* within six Months after the Death of *A.* should secure to Trustees 500*l.* for the younger Children of *C.* then after such Security given, to convey to *C.* and his Heirs, and until the Time for giving such Security, in Trust for the eldest Son of *C.* and in Default of such Security, to convey to such eldest Son and his Heirs, if *C.* dies before any such Security given, yet this Condition, though precedent, being only in Nature of a Penalty, the Intent of the Trust shall be regarded, which was to secure 500*l.* for the younger Children.

1 *Vern.* 79,  
167. *Pop-*  
*ham* and  
*Bamfield*.

2 *Vern.* 222.  
*S. C.* cited,  
as a Case in  
which there  
was Relief.

2 *Vern.* 338. *S. C.* cited as a Condition which was relieved against.

The Testator devised his Estate to the Defendants, in Trust, for the Use and Benefit of the Plaintiff; but declared his Will to be, that the Plaintiff should have no Benefit of the Devise, unless the Plaintiff's Father should settle on the Plaintiff two full Thirds of the Estate settled on the Father, on his Marriage; and in Default thereof, the Estate to the Defendants; the Father made no Settlement on the Plaintiff, but devised all his Estate to him for Life, but subject to the Payment of

Debts;

Debts; it was admitted, and so adjudged by the Court, that this Estate was executed in the Plaintiff, by the Statute of Uses; and consequently that this is a Condition subsequent; yet the Court declared, that though Conditions subsequent, which are to devert an Estate, need not be literally performed; yet, even in such Case, if the Party cannot be compensated in Damages, it would be against Conscience to relieve; and therefore ordered the Master to examine the Value of the Estate devised, and the Amount of the Debts which that Estate was charged with, and to report to the Court, whether after Debts paid there would be two full Thirds of the Father's Estate, which was settled on him in Marriage, left to the Plaintiff; and upon a Re-hearing, would not vary the former Order, declaring that the Difference was, whether this Case lay in Compensation or not; and if a Compensation was made, he would relieve against the Breach of the Condition; but in Case (a) a sufficient Compensation was not made, he would then consider farther of it.

(a) That in all Cases of Forfeitures

and Breaches of a Condition, some Kind of a Compensation may be made; therefore this Rule is to be extended no farther than where Compensations have been allowed, and not to Forfeitures by a Tenant for Life, making a Feoffment, levying a Fine, suffering a Recovery, wilful Forfeitures by Copyholders, &c. *Preced. Chan.* 570.

If a Feme Covert, having Power by Will to devise Lands, devises them to her Executors, to pay 500*l.* out of them to her Son; provided that if the Father gives not a sufficient Release of certain Goods to her Executors, that then the Devise of the 500*l.* should be void, and go to the Executors, and after her Death a Release is tendered to the Father, and he refuses, yet upon making the Release after, the Money shall be paid to the Son; for it was said to be the standing Rule of the Court, that a Forfeiture should not bind where a Thing may be done after, or a Compensation made for it; as where the Condition is to pay Money, &c. and though it is generally binding, where there is a Devise over, yet here, it being to go to the Executors, it is no more than the Law implies.

2 Vent. 352. Cage and Ruffel, adjudged in Can.

If a Man devises Lands to J. S. upon Condition to pay 20000*l.* to his Heir at Law, viz. 1000*l.* per Ann. for the first sixteen Years, and 2000*l.* per Ann. after, till the whole should be paid, and the Heir enters for the Nonpayment of one of the 1000*l.* per Ann. J. S. shall be relieved upon Payment of the 1000*l.* together with the Interest, from the Time it became payable, without any Deduction for Taxes; the Court declaring, that where-ever they can give Satisfaction or Compensation for the Breach of a Condition, they can relieve.

1 Salk. 156. Grimston and Lord Bruce. 2 Vern. 594. S. C.

If one having three Daughters, devises Lands to his eldest, upon Condition that she, within six Months after his Death, pay certain Sums of Money to her two other Sisters; and if she failed, then he devised the Land to his second Daughter, on the like Condition, &c. the Court may enlarge the Time for Payment, though the Lands are devised over; and in all Cases that lie in Compensation, the Court may dispense with the Time, though even in Case of a Condition precedent.

2 Vern. 222. Woodman and Blake.

So where one devised Lands to J. S. his Kinsman, paying 1000*l.* a-piece to his two Daughters, who were his Heirs at Law, and J. S. made Default, and the Daughters recovered in Ejectment, yet J. S. was relieved, on Payment of Principal, Interest and Costs, though it was insisted, that this was a Condition precedent, and to the Disinheriton of the Heir at Law, and in Favour of (b) a voluntary Devisee.

(b) Vide 1 Vern. 456.

Where it was given as one Reason, why the Court refused to relieve, that the Party, who had not performed the Condition, was a voluntary Devisee.

*Skin.* 285. A Man having two Daughters, devised to each of them 20000*l.* payable at the Age of Twenty-five Years; but if they, or either of them married before the Age of Sixteen; or if the Marriage were without the Consent of their Mother and Trustees, then they should lose 10000*l.* of the Portion, which should go to his other Children; one of them married before the Age of Sixteen, but with the Consent of all the Parties; and it was held, that the Time being only a Circumstance, might be dispensed with.

2 *W. & M.* by the Lords Commissioners.

2 *Vern.* 223. S. C. Where it is said that the Father treated with the Lord *Salisbury*, about the Marriage, though he died before it was had, and there decreed that both Parts of the Condition need not have been performed, the Father by such Treaty having himself dispensed with it. But in 2 *Vent.* 365. S. C. which came on *Pr. b.* 36 *Car.* 2. it is said that my Lord Keeper was of Opinion that both Parts ought to be observed.

3 *Chan. Ca.* 129. *Bervie* and Lord *Faulkland.* *A.* devised his Lands to Trustees for three Years, and if within the three Years there happened a Marriage between *G.* who was a distant Relation, and of the same Blood with the Testator, and *W.* his Niece, and Heir at Law, then to *W.* for Life, Remainder to her first Son, &c. in Tail Male, by *G.* to be begotten; but if the Marriage should not take Effect within the three Years; or if the Marriage should be before the Years of Consent, and not ratified, when of competent Age, then to *F.* in Tail, who was likewise a remote Relation of the Testator, but not of the same Blood; the Marriage between *G.* and *W.* did not take effect, though several Proposals were within the Time made by her Friends to his Guardians, but not accepted by them; and though she herself had pressed the Match as far as the Modesty of her Sex would permit. She afterwards married the Plaintiff, and by her Bill prayed the Benefit of the Devise; the Condition being answered by her, to what she was capable of doing, having married a Person, as was urged, equal in Circumstances, &c. to *G.* but her Bill was dismissed by the Advice of *Holt* and *Treby* Ch. Justices.

1 *Salk.* 231. S. C. where it is said that the Decree was reversed in the House of Lords.

2 *Vern.* 333. S. C. where it is said that the Matter was ended there by compromise. *Vide* Title *Marriage*, what Conditions relating thereto shall be void.

## (K) Of void Conditions, being against Law.

2 *H.* 4. 9. *Co. Lit.* 206. b. 1 *Rol. Abr.* 418. **I**F a Feoffment be made, on Condition to do a thing that is *malum in se*, as to kill or rob *J. S.* the Estate of the Feoffee is absolute, and a Bond made on such Condition is void; for the Estate settled in the Feoffee shall not be defeated; nor shall a Bond be forfeited for the Forbearance of such an Action; and (a) an Obligee is punishable for taking such a Bond to do a Thing against Law.

(a) 2 *Vent.* 109. 1 *Rol. Abr.* 417. *Cro. Jac.* 248, 274. *Cro. Car.* 180. *Lit. Rep.* 135. *Hutton* 111. 1 *Fones* 220. If a Parson, on his being presented to a Living, gives a Bond, conditioned to resign, such Condition may be lawful, and not against 31 *Eliz.* of Simony; as (b) if the Condition be to restrain the Incumbent from Non-residence, a vicious Life, or that he shall resign when the Patron's Son, Kinsman or Friend, become qualified to take the Living.

2 *Keb.* 445. 1 *Sid.* 389. *Raym.* 175. *Comp. Incumb.* 40, 41. (b) So a Bond conditioned for the Payment of Money to the Son of the last Incumbent, so long as he should continue a Student in *Cambridge*, unpreferred, &c. is good. *Noy* 142.—So where a Patron took Bond of his Presentee, to pay 5*l.* yearly to the Wife and Children of the last Incumbent. *Earl of Suffex's* Case cited by *Foster*, Judge. *Noy* 142.—But *Comp. Incumb.* 39. These charitable Resolutions, if any such there were, do not seem to be Law.

But if the Condition be for a Lease of the Glebe or Tithes, or a Sum of Money, this is clearly Simony within the Statute; and therefore the Condition void, being against Law. *Vide the Authorities supra and Comp. Incumb. 39.*

40. *Comb. 394.*—That the Condition must be averred to have been entered into for a Purpose. *Vide Cro. Jac. 274. Hutt. 110. Moor 64.*—And where a Special Averment may be that an Obligation was made for a Matter against Law. *1 Leon. 73, 203. Godb. 29. Moor 158.*

Also in Equity it has been ruled, that where a Bond of Resignation is general, as to resign upon Request, some special Reason must be shewn to require a Resignation; for though such Bonds may in Strictness of Law be good, yet if they are made an ill Use of, as by extorting Money from the Incumbent, &c. (a) Equity will grant a perpetual Injunction against them. *2 Chan. Ca. 399. 1 Vern. 411, 131. Eq. Abr. 86, 87.*

They may refuse to accept of a Resignation made by the Restraint of such Bonds. *Comp. Incumb. 31.*

If the Sheriff of a County makes B. his Under-Sheriff, and takes a Bond or Covenant from him, that he will not serve Executions above 20*l.* without his special Warrant, this is a void Covenant, because it is against Law and Justice, inasmuch as when he is made Under-Sheriff, he is liable by the Law to execute all Process, as well as the Sheriff is. *1 Rol. Abr. 417. Hob. 12. S. C. Moor 856. pl. 1175. Godb. 212.*

S. C. in which last Book it is said to be otherwise, where he voluntarily covenanted; *1 Brownl. 65. & vide Title Sheriff, and 2 Brownl. 282.*

But if an Under-Sheriff covenants with the High-Sheriff, to discharge and save him harmless from all Escapes of Prisoners arrested by the Under-Sheriff, or any by him appointed, this is a good Covenant; for since the High-Sheriff transfers his Authority, it is but reasonable he should take Security for the faithful Execution of it; and there is nothing intended against Law, but rather to prevent than connive at Escapes. *Heb. 12, 13. Moor 856. pl. 1175. Godb. 212. 1 Brownl. 65. resolved per Curiam.*

If the Condition of an Obligation be, that if the Son of the Obligor, before a certain Time, do as Apprentice, Servant or Master, or otherwise, use the Trade of an Haberdasher within the County of K. then if the Obligor do, upon Request, pay 10*l.* to the Obligee, the Bond shall be void, this Condition is against Law; for a Man (b) ought not to be restrained (c) from his Trade and Livelihood; and if he might be restrained for a certain Time or (d) Place, he might be restrained for longer Time or more Places. *Cro. Eliz. 872. Colgat and Batebolor, adjudg'd Owen 143. S. C. adjudged, and said by Anderson, that he might as well bind*

himself that he would not go to Church. *Noy 98. S. C. cited. Moor 115. pl. 259. S. P. adjudged, 242. pl. 379. S. P. adjudged, 2 Leon. 210. S. P. adjudged. 3 Leon. 217. S. P. adjudged. March 191. S. P. 3 Lev. 241. 2 Show. 345. S. P. adjudged, cont. in B. where the Condition was, that he should not use the Trade of a Taylor in Exeter; but after, upon a Writ of Error, in Cam. Scac. reversed by the unanimous Consent of all the Justices; because this being a penal Obligation to prevent the Exercise of a Trade, though in a particular Place only, it is void; otherwise of an Assumpsit, in which Damages only are to be recovered. (b) For this vide 11 Co. 53. b. 1 Dan. 42. and Tit. Trade. (c) But where a Man may, upon a Consideration, be restrained by Covenant or Assumpsit, because all being to be recovered in Damages, the Jury may assess them, with regard to the Consideration. Vide 3 Lev. 242.—But *secus* of a Bond, Covenant or Assumpsit to pay Money, if he trades, &c. because then the whole Sum must be recovered, be the Damage or Consideration never so small. 3 Lev. 242. and vide Allen 67. March 193. (d) That a Man may restrain himself by Bond, from trading in a particular Shop or Street. *Comb. 122.**

So if the Condition of a Bond is, that the Obligor shall not buy any Sheeps-Trotters of any Person of whom the Obligee had or should buy, this is void, being a Restraint of Trade, and tending to a Monopoly. *Comb. 121. Thompson and Harvey, adjudged.*

If the Condition of an Obligation be, that the Obligor shall be always ready to give Evidence, and to testify the Truth in any of the King's Courts, in all Things which shall be demanded of him, &c. and that he shall not hurt, endanger or molest the Obligee in his Lands or Goods, *ratione alicujus rei*, this is a good Condition, and not against Law; for as to the first Part, if he had not been obliged thereto, he

had been compellable by Law ; and by the last Part it shall be intended that he shall not hurt, &c. tortiously, but not to restrain him from pursuing the Oblige, for Felony, or other just Cause.

*1 Vent. 109. Mason and Watkin, ad. judged upon the first opening; and the Court recommended it to Serjeant Paulet, who was a Judge in Wales, where the Plaintiff lived, to have him prosecuted for taking such Bond.*

If *A.* is imprisoned for Felony, and *B.* bound by Recognizance, to prosecute, if *B.* after gives Bond to *C.* conditioned that *B.* will not give Evidence against *A.* the Condition is against Law, and the Bond void.

*18 E. 4. 28. 1 Rol. Abr. 417.* Condition to do a Thing which will be Maintenance, is void ; as to save harmless from such an Appeal of Robbery as *B.* hath against him.

*Carter 229. Allen 60. S. P.*

*43 E. 3. 6. 1 Rol. Abr. 418.* Lease for Life, upon Condition, that if the Lessee marries without Licence, he shall re-enter, is (a) a good Condition.

(a) Is a Condition to renounce an Administration. *15 E. 4. 30. 1 Rol. Abr. 417.*

*1 Rol. Rep. 334. per Coke.* If the Condition of an Obligation be not to sell the Apparel of the Wife, this is good ; though it was objected it was against Law, because against the Liberty of the Baron.

*1 Rol. Rep. 334. Co. Lit. 206.* So if a Man gives Bond to a Stranger, conditioned for the Payment of (b) 20*l.* yearly to his Wife, this is good

(b) But if the Condition be to enfeoff his Wife, it is void ; because against a Maxim in Law, and yet the Bond is good. *Co. Lit. 206. b.*

## (L) Of repugnant Conditions.

*Co. Lit. 223. 10 Co. 38. b.* A Condition upon a (c) Feoffment in Fee, not to (d) alien, is void ; because it is repugnant to the Estate.

(c) So on a Grant or Devise. *Co. Lit. 223.*—But he may be restrained for a particular Time, or from alienating to a particular Person. *2 Leon. 82. 3 Leon. 182.*—Also a Bond with Condition that the Feoffee shall not alien, or not take the Profits, is good. *Co. Lit. 223.* (d) So is a Condition that the Wife shall not be endowed, or the Husband be Tenant by the Courtesy. *22 E. 3. 19. b. 1 Rol. Abr. 418. 6 Co. 41. S. P.*

*Dav. 34. 1 Rol. Abr. 418.* So of a Condition, upon a Feoffment in Fee, that his Daughters shall not inherit ; for this is repugnant to the Estate, and an Attempt to establish a different Kind of Inheritance than is allowed of by Law.

But a Gift in Tail, on Condition that the Donee shall not Discontinue or Alien in Fee-tail, or for (e) Life, is good ; for these are tortious Acts, which may well be restrained by Condition.

*10 Co. 39. Lit. Sect. 362. Moor 39. pl. 126. 1 Vent. 322. Cro. Eliz. 35. 1 Leon. 292.* (e) Either for the Life of another or his own Life ; for though an Estate for his own Life be Law, yet the Condition is good, because the Reversion is in the Donor. *Co. Lit. 223.*

(f) *Hob. 170.* But (f) a Liberty inseparable from the Estate cannot be restrained by Proviso. Hence it is, that an Estate-tail hath (g) five essential Incidents, none of which can be taken away by any Condition. 1st, To be Dispunishable of Waste. 2dly, That the Wife shall be endowed. 3dly, That the Husband shall be Tenant by the Courtesy. 4thly, That Tenant

(a) And *Co. Lit. 224. 6 Co. 41. 1 Co. 86. 9 Co. 128. b. Moor 601, 633. 1 Co. 14. a. 85. a. 10 Co. 38. b. Cro. Jac. 697. 1 Jones 58. 1 Vent. 322.*

Tenant in Tail (*a*) may suffer a common Recovery. 5thly, That Col- (a) And ac-  
lateral Warranty (whether with or without Affets, if made before 4 & 5 cording to  
*Ann. cap. 16.*) or lineal with Affets, may bar it. 10 Co. 38. b.  
1 Rol. Abr.

418. cannot be restrained from making a Lease, within 32 H. S. or levying a Fine, within 4 H. 7.  
But *Co. Lit. 223. b. cont.* For the Power of making Leases is not incident to his Estate, but given to  
him Collaterally by the Statute.

*A.* made a Settlement of his Lands on his Son in Tail, but took a 2 Vern. 233.  
Bond from him not to Dock the Entail; on a Bill to be relieved, it *Freeman and*  
was ruled in Equity, that the Bond was good, and the Bill dismissed *Freeman.*  
with Costs, though the Alienation was made by the Issue; for if the Son  
had not agreed to give the Bond, the Father might have made him only  
Tenant for Life.

But where *A.* gave Lands to *B.* in Tail, Remainder to *C.* his Bro- 2 Vern. 233.  
ther in like Manner, and made them enter into Recognizances to each *Freeman and*  
other not to alien; and it was decreed in Chancery, that these Recogn- *Freeman.*  
izances should be delivered up and cancelled, as creating a Perpetuity. *Moor 509,*  
*Sto. Pool's*  
Case adjudg-  
ed, by the  
Advice of  
*Coke, Ch. Just.*

So where *A.* settled his Land upon his Daughter in Tail, and took a 2 Vern. 351.  
Bond from her not to commit Waste, the Daughter levied a Fine, and *Ferri's and*  
committed Waste, and the Bond being put in Suit, Equity relieved *Bruton.*  
against it.

A Gift in Tail, upon Condition that the Donee may alien for the 46 E. 3. 4. b.  
Profit of the Issue, is a good Condition. *Co. Lit. 224.*  
S. P.

If a Feoffment be made upon Condition that the Feoffee shall not alien 2 Vern. 233. b.  
in Mortmain, this is a good Condition; (*b*) because such Alienation is *Co. Lit. 223. b.*  
prohibited by Law, and regularly (*c*) what is prohibited by Law, may *(b)* So if a  
be prohibited by Condition. Feoffment  
be made to  
Baron and

Feme, upon Condition that they shall not alien, this is good to restrain any Alienation by Deed;  
because such Alienation is tortious and voidable; but to restrain their Alienation by Fine, it is re-  
pugnant and void. *Co. Lit. 224 a.* (*c*) As the Alienation of an Infant, or of a Bishop without his  
Chapter. *Co. Lit. 224. a.*

(*d*) If *A.* hath Issue two Sons, *B.* and *C.* and (*e*) covenants to 1 Co. 84. a.  
stand seised to the Use of himself for Life, Remainder to *B.* in Tail, *Corbet's Case*  
Remainder to *C.* in Tail, &c. provided that if *B.* &c. or any of the adjudged,  
Heirs Males of his Body shall alien, &c. the Uses to him limited shall though *B.*  
cease only in Respect of him, as if dead, &c. this Proviso is repugnant, had no Is-  
impossible, and against Law; for the Estate of the Tenant in Tail does sue at the  
not cease by his Death, but by his Death without Issue. Time of the  
Breach of  
the Condi-

tion. *Moor 601. pl. 831. S. C. 2 And. 134. S. C. adjudged. (d) Sir Anthony Mildmay's Case, S. P.*  
*6 Co. 40. adjudged. Moor 632. pl. 868. the Court divided. Hob. 170. cited, Cholmley and Humble; S. P.*  
*Cro. Eliz. 379. adjudged. Moor 592. pl. 799. adjudged. 1 And. 346. adjudged. 1 Co. 86. a. cited.*  
(*e*) So in Case of a Devise; *Germin and Astcot, Moor 364. pl. 495. adjudged, and agreed by all the*  
*Judges of England, that the Proviso was repugnant. 1 And. 186. debated, but no Judgment. 2 And.*  
*7. adjudged by all the Justices. 4 Leon. 83. adjudged cont. But 1 Co. 85. cited to have been ad-*  
*judged, as in Moor and And. & vide Cro. Jac. 696. 1 Fones 58. Godb. 102. Moor 543. pl. 721. and*  
*vide Popk. 97. 1 Brownl. 45. Godb. 351. 2 Rol. Rep. 467, 477, 484.*

If a Man makes a Feoffment in Fee, provided that the Feoffor shall 7 H. 6 43. b.]  
have the Profits, this Condition is void, (*f*) because it is repugnant to the *Co. Lit. 206.*  
Grant. *S. P. & vide*

107. (*f*) So if there be a Lease to three, during their Lives, provided that one shall not take the  
Profits, during the Life of the other two. *2 Leon. 132. adjudged, & vide Hob. 170. 1 Bullf. 42.*

If a Man grants a Rent-charge out of the Manor of *D.* (in which the *Co. Lit. 146 a.*  
Grantor hath nothing) with a Proviso that it shall not charge his Person, (*b*) (*b*) So if he  
grants a  
Rent out of Land, to which he hath Title, without a Clause of Distress, provided that it shall not  
charge his Person, this is void and repugnant, if he gives not Seisin upon the Grant. *6 Co. 53. b.*

though

though the Repugnancy does not appear in the Deed, yet the *Proviso* is void, else it would take away the whole Effect of the Grant.

*Co. Lit. 146. a.* If a Man grants a Rent-charge out of Land to another for Life, provided it shall not charge his Person, though the Grantee might notwithstanding charge his Person, yet the *Proviso* is repugnant, because the Land is expressly charged.

*Co. Lit. 146. b.* If a Man grants a Rent-charge out of Land to another for Life, provided it shall not charge his Person, and the Grantee dies, his Executors may bring Debt for the Arrears; (a) for they cannot distrain, because the Estate in the Rent is determined, and the *Proviso* cannot leave the Executors without Remedy.  
*6 Co. 41. b.*  
*S. P.*  
 (a) This must be understood a Case put at Common Law, for the Executors of such Tenant for Life, may at this Day distrain, per 32 H 8. cap. 37.

*Co. Lit. 378. b.* If a Man makes a Lease for Years, upon Condition, that, if the Lessor grants over his Reversion, the Lessee shall have a Fee, if the Lessor grants his Reversion by Fine, the Lessee shall not have a Fee; for when the Fine transfers the Fee to the Conuzee, it would be absurd against Reason, that the same Fine should work an Estate in the Lessee.  
*1 Co. 84.*  
*1 Jones 59.*  
*Ex vide Moor 450.*

*1 Lev. 77.* If an Obligation is conditioned for the Payment of 7 l. by 2 s. per Week till 7 l. is paid, and that if he fails of Payment of the 2 s. at any of the Days on which it ought to be paid, that the Obligation shall be void, or else remain in Force; this Condition shall be taken distributively *reddendo singula singulis, viz.* that if he pays the 7 l. the Obligation shall be void, but that if he fails in Payment of the 2 s. at any of the Days, it shall be in full Force; for the Obligation shall not be taken to be of no Effect, if by any Means it may be made good.

*68. S. C.* adjudged, because the Condition is since less, and therefore the Obligation is single. *1 Sid. 105. S. C.* adjudged, and that the Obligation was single, and the Condition repugnant and void.

*2 Sand. 78.* If the Condition of an Obligation be made in this Manner, *viz. The Condition of this Obligation is such, That if the Obligor shall appear coram Domino Rege apud Westmonasterium such a Day ad respondend', &c. then the Condition of this Obligation shall be void, or else the same shall be in full Force and Vertue,* yet this is a good Condition; for the Sense is perfect without these last Words, and they shall be rejected for their Absurdity and Repugnancy.

*1 Jones 180.* If the Condition of an Obligation be, *That if the Obligor shall die without Issue, that then if he by his Last Will, or otherwise in his Life-time, shall lawfully assure and convey certain Lands to the Obligee and his Heirs, that then the Obligation shall be void, &c.* This Condition is not repugnant, but shall be construed according to the Intention of the Parties, to be collected out of the Words of the Condition.  
*Eaton and Butler, adjudged per totam Curiam, com' Dodderidge. Palm. 553. S. C.*

### (M) Of impossible Conditions.

*Co. Lit. 206. Sav. 96.* IF the Condition of a Bond be impossible at the Time of the Making thereof, as for the Obligor to go to Rome the next Day, the Bond is single, for it is the same as if there were no Condition at all; and a Feoffment on Condition that the Feoffee go to Rome on a Day, is absolute; for the Condition is repugnant to the Feoffment; but (b) if an Estate be for Life upon Condition, that if he goes from the Church of St. Peter in Westminster, to the Church of St. Peter in Rome, within three Hours, to have a Fee, which is impossible; yet because it is precedent no Fee can accrue. *Co. Lit. 206. 1 Rol. Abr. 420.*

to arise, or a Duty to commence on a precedent Condition, that is impossible, they can never have Effect.

If a Woman makes a Feoffment to a Man that is married to another, upon Condition that he shall marry her, this is a good Condition, for his Wife may die, and then he may marry her. Bro. Tit. Condition 115. But Quare

If the Condition of an Obligation be, That the Obligor shall assign to the Obligee a Commission of Bankrupts, this is an impossible Condition, and therefore void, and the Obligation single, for it is impossible to assign the Commission. 1 Rel. Abr. 419.

If the Condition be *quod debet pluere cras*, this is a good Condition, for though the Obligor is not certain thereof, yet if he will take this upon himself, and run the Hazard, he may at his Peril, for this is not impossible of it self. 22 E. 4 26. 1 Rel. Abr. 420.

So for the same Reason, if the Condition be, That the Pope shall be at Westminster To-morrow, this is a good Condition. 22 E. 4. 26. 1 Rel. Abr. 420.

If the Condition of an Obligation be to sustain and maintain an House in sufficient Repairs, and so to leave it at the End of the Term; if at the Time of the Entry into the Bond the Timber was so rotten, that it was impossible to sustain and maintain it in Repairs, yet the Obligation is good. S. v. 96. Wood and Avery, adjudged. 2 Leon. 189. S. C. adjudg-

ed, because tried by his own Act, but the Law never binds Men to Impossibilities.

## (N) Of the Effect of a void, illegal, or impossible Condition.

**I**F a Feoffment be made, on Condition that the Feoffee shall (a) go to Rome on a Day, the Estate of the Feoffee is absolute, and the Condition void and repugnant. Co. Lit. 206. (a) Where the Condition must be performed as near the Intent of the Parties as may be. Co. Lit. 219.

So if the Condition of a Feoffment, &c. be possible at the making thereof, and afterwards becomes impossible by the Act of God, yet the Estate of the Feoffee shall remain. Co. Lit. 206. a.

As if the Condition of a Feoffment, &c. be, that the Feoffor, &c. shall appear in such a Court next Term, and the Feoffor dies before, the Estate of the Feoffee, &c. (b) is absolute because executed, and not to be redeemed back but by Matter subsequent. Co. Lit. 206. a. (b) If the Condition be, That the Feoffee be-

fore such a Day shall re-assign the Feoffor, and before the Day the Feoffee die, his Estate is absolute, because when the Condition becomes impossible by the Act of God, within the Time limited by the mutual Agreement of the Parties, the Feoffee is discharged; but *Quare* of this Case, for by the express Intent of the Feoffment, the Feoffee is but an Instrument to re-convey the Land to the Feoffor. Vide Co. Lit. 219. a.

If the Condition of a Bond be impossible at the Time of the making thereof, as for the Obligor to go to Rome the next Day, the Bond is single, for it is the same as if there were no Condition at all. Co. Lit. 206.

But if the Condition of a Bond, Recognizance, &c. is possible at the making, but before it can be performed, becomes impossible by the Act of (c) God, of the Law, or of the Obligee, &c. the Obligation is saved. Co. Lit. 206. a. (c) Where the Condi-

tion of a Bond was to settle certain Lands in such a Manor by such a Day, and the Obligor died before the Day; though the Bond was saved at Law, yet Chancery decreed an Execution in *Specie*. Eq. Abr. 18.

## (O) Of the Breach of the Condition: And herein,

## I. What shall be a Breach thereof.

*Hob. 24.* IF a Man makes a Deed of Feoffment of Lands in several Counties, upon Condition the Feoffee shall reinfeoff him of all the Land within twenty Days after the Date, if Livery is made but of Part within the twenty Days, the Condition is not broke, though all is not conveyed within the twenty Days, according to the Letter of the Condition, which is intire.

*1 Rol. Abr. 427. Curtis and Marsh. 1 And. 42, 90. S. C. Moor 425. S. C. adjudged.* That the first Grant was a Breach of the Condition, because every Division and Severance of the House and Land, is within the Words and Intent of the Condition.

*1 Rol. Abr. 427. adjudged.* If a Lessee of a House covenants not to Lease the Shop, Yard, or other Thing belonging to the House, to one who sells Coals, nor that he himself will sell Coals there, and after he Leases all the House to one who sells Coals, he hath broke the Condition.

*Moor 823.* If a Man makes a Feoffment in Fee of Lands in five Counties, upon Condition to re-assure, if the Re-assurance is made of the Lands in four Counties, but not in the Fifth, the Condition is broke for the Lands in that County only.

*Lit. Rep. 94, 105, 128.* King Henry VIII. granted Lands to *A.* and his Heirs, provided that he and they *perpetuis futuris temporibus invenirent & sustinerent duns Capellanos in Ecclesia parochiali de W. ad orandum pro anima H. 8.* his Heirs and Successors, & *ad celebranda divina servitia & eorum animarum Parochianorum,* and *A.* conveyed the Lands to *B.* and his Heirs, who appointed two Chaplains, one of which was not Resident, but neglected his Duty; this is a Breach; for the Estate was tied with the Condition, into whose Hands soever it came, and *B.* ought not only to have found Chaplains, but also to have taken Care that they had been such as would have done their Duty.

*2 Jones 195. Nash and Astton, adjudged.* If two Men upon Sale of their Wives Lands, covenant that they and their Wives have good Right to convey Lands, and to make further Assurance; if one of the Women is under Age, this is a Breach, for she hath not Power to convey the Estate according to the Covenant.

*1 Rol. Abr. 428. 2 Inst. 145. Owen 92. S. P. adjudged.* If a Man Leases for Life, upon Condition that the Lessee shall not do any Waste, and after the Lessee suffers the House to fall for want of Covering and Reparation, which is not any Act of doing, but a Permission; yet it seems that the Condition is broke, for the Words are, *any Waste,* and such Waste is within the Statute of *Gloucester,* which speaks of doing Waste; and it seems that the Permission of the House to fall, may properly be called doing of Waste.

*1 Rol. Abr. 428. Basspoole and Long, adjudged by 3 Judges. 1 Leon. 64. S. P. 4 Leon. 39. S. P. (a)* So if the Condition of an Obligation be, That I shall not continue such an Action, and my Attorney without my Privity continues it, this is no Breach. *Cro. Jac. 525. per Dodderidge and Houghton. 2 Rol. Rep. 63. By Mountague and Houghton, cont' Dodderidge,* who said, The Act of my Attorney is my own Act.

If a Man makes a Feoffment in Fee, reserving Rent, upon Condition that if the Rent be behind, and no Distress to be found upon the Premises, to re-enter; if the Rent be behind, and no Distress but a Cupboard in a House locked, so that the Feoffor cannot come at it, this is a Forfeiture, for when the Place is not open to the Distress, it is all one as if there had been no Distress there.

*A.* made a Feoffment in Fee to the Use of himself and his Heirs, and *H. S.* devised the Use to *B.* his younger Son, and the Heirs Male of his Body, Remainder to *C.* his eldest Son in Fee, provided *B.* or any of his Issue should not discontinue or (*a*) alien, but only to make a Jointure for a Wife; and *B.* after the Statute of 27 *H. S.* Leased for three Lives, pursuant to the Statute of 32 *H. S.* and after levied a Fine *Conuzance de Droit come ceo*, &c. with Proclamations to the Use of himself and his Wife, and the Heirs Males of their two Bodies, the Remainder to himself in Tail Male, the Remainder to the Right Heir of *A.* this was a Breach of the Condition, for he might have made an indefeasible Jointure by Fine *sur Grant & Render*; but by this Fine the Tail created by the Devise is docked; and if he had Issue by a former Wife, they should not Inherit.

were before, viz. the Fee is limited to the Heirs of *A.* whereas it was before limited to *C.* (*a*) What shall be said an Alienation. 2 *Leon.* 82. 3 *Leon.* 182.

If there be Lessee for Years, upon Condition not to devise it to any Body but only to his Sons or Daughters, and he devises it to (*b*) a Stranger, and dies, and his Executor never consents to the Devise, yet (*c*) this is a Forfeiture, because he hath (*d*) done all (*e*) that was in his Power to pass it by the Will, and this puts it in the Power of an Executor to execute it.

devises it to his Executors, and they accept the same only as Executors. 3 *Leon.* 67. 4 *Leon.* 5.— So if he devises it to his Executors for Payment of Debts. 1 *Rol. Abr.* 428, 429. (*e*) A Woman covenants not to do any Act to discontinue or countermand an Action, and after she marries, *per quod*, &c. this is a Breach. *Gouldf.* 59. (*d*) *Q.* If extended upon a Judgment or Recognizance against him. 1 *And.* 124. 3 *Leon.* 3. (*e*) *See us* if he devises it, if the Lessor will assent; for there nothing passes till the Assent of the Lessor obtained. *Cro. Eliz.* 60.

If Lessee for Years (*f*) upon Condition not to alien without the Assent of the Lessor, makes his Executor, and (*g*) devises it to him, and the Executor enters generally, the Testator not being indebted to any Body, this is a Forfeiture of the Condition.

Devise is no Breach of such Covenant. (*g*) Where a Devise shall be a Breach of a Condition not to alien. *Dyer* 45. *b. Taunton's Case.* *Owen* 14. *Cro. Eliz.* 350. *Gouldf.* 49, 184. *Poph.* 106. & *vide Cro. Eliz.* 60. So where the Condition is, That the Lessee shall not alien during his Life, and he devises it, for the Devisee shall be said in by Assignment made by the Devisor in his Life time. *Dyer* 45. 4 *Co.* 119.

If there be a Grantee of a Reversion upon Condition not to grant it over to *J. S.* by his Deed, and he grants the Reversion to *J. S.* by his Deed, though the Lessee never attorns, yet this is a Forfeiture, because he hath done his endeavour to grant it, and put it in the Power of a Stranger to perfect it.

If the Condition of an Obligation be, That he shall not be aiding and assisting to *E.* in any Action to be prosecuted against *L.* the Obligee, and after the Obligor joins in a Writ of Error with *E.* and another against *L.* upon a Judgment in Trespass against them three, which is apparently erroneous; this is not any Breach of the Condition, for this is not properly an Action, but a Suit to discharge himself of a tortious Judgment, in which they ought all to join.

8 Co. 91. If a Man devises Lands, upon Condition that if he does not (a) permit the Executors of *E.* to take the Goods that then were in the House, 1 *Roll. Abr.* 430, 431. the Estate should be void, &c. (b) a Denial by Parol is not any Breach of the *Proviso*, but it ought to be an Act done, as the shutting the Door 2 *Brevint.* 277. against the Executors, or laying his Hands on them to resist them, or S. C. adjudg- ed. (a) But such like Acts; so that by Reason of any such Act he did not permit the Condi- tion of a them to take or carry the said Goods according to the *Proviso*. Bond being to permit the Obligee quietly to take, reap, and carry away Corn, coming upon the Land with Staves, and prohibiting the Obligee by Word, 1 *And.* 131. was adjudged a Breach. (b) 1 *Jones* 169. & vide 1 *Roll. Abr.* 434. pl. 12. 1 *Bulst.* 139.

1 *Leen.* 92. If *A.* Leases Lands to *B.* for Years, and devises it to his Wife so long as she continues a Widow, and if she marries, that her Son shall have it, and *B.* dies, and *A.* by (c) Feoffment conveys the Land to the Wife, and covenants, that from thence it shall be clearly exonerated *de omnibus prioribus barganis, &c. & aliis oneribus quibuscumque*, and after the Wife marries, and the Son enters, this is a Breach; for the Term not being extinct by the Acceptance of the Feoffment, the Land continues charged (c) By Fine, with this (d) Possibility. according to the Report of the Case in *Owen and Goult.* (d) Tenant in Tail of a Rent, purchases the Land out of which it issues, and makes a Feoffment thereof, and covenants that it is free from all former Incumbrances; this is a Charge though not in *esse*, but in Suspense; for if Tenant in Tail dies, his Issue may distrain, and then the Covenant is broke. *Owen* 7. But vide *Co. Lit.* 389. a.

*Co. Lit.* 221, 222. If the Party who is bound to perform a Condition, disables himself, this is a Breach; as where the Condition is, That the Feoffee shall re-*infeoff* or make a Gift in Tail, &c. to the Feoffor, and the Feoffee before he performs it, makes a Feoffment or Gift in Tail, or Lease for Life or Years. *in presenti* or *futuro* to another Person, or marry, or grant a (e) Rent-charge, or be bound in a Statute or Recognizance, or become professed, in all these Cases, the Condition is broken; for the Feoffee has either disabled himself to make any Estate, or to make it in the same of Annuity, Plight or Freedom in which he received it, and being once disabled he is ever disabled, though his Wife should die, or the Rent, &c. should be discharged, or he should be deraigned, &c. before the Time of the *initie.* *Co. Lit.* Reconveyance.

222. a. But if Feoffee, upon Condition to re-*infeoff*, is disseised, and after takes (f) Wife, binds himself in a Statute, &c. this is no Disability, for that during the Disseisin the Land is not charged with it; so that if the Wife S. P. (f) A die, or the Conuzee release, &c. and after the Disseisee enters, he may perform the Condition.

enters into a Bond, conditioned that she would from Time to Time, and at all Times, upon Request, do all such Acts for the Assuring of Lands, &c. at the Charge of the Obligee, and after marries; and whether this was a Breach. *Hard.* 463. *dubitatur.* It was said, that by the Marriage her Husband had a Possibility of being Tenant by the Curtesy, and that now an Assurance could not be made without Fine, and so the Obligee must be at greater Charge than intended.

1 *Roll. Abr.* 447, 843. S. P. If there be Feoffee upon Condition to re-*infeoff*, or to re-*infeoff* a Stranger, and after another recovers the Land against him by (g) Default, *Bro. Condition* 26. (g) *Secus* yet till Execution sued the Condition is not broke, for before Execution if upon a he is not disabled; for perhaps he will never sue Execution; and if he feigned Title, sues Execution after he has made the Feoffment, according to the *Con-* *Co. Lit.* 222. b. dition, the Feoffor may re-enter for the Condition broke.

*Co. Lit.* 221. a. If a Man makes a Feoffment upon Condition, if the Feoffor or his (h) So if the Heir pay Money before a certain Day, &c. and the Feoffor is (h) attainted of Treason, and executed before the Day, yet if his Heir is restored before the Day, he may perform the Condition, for that the Condition may be performed at any Time before the Day. *Co.* *Lit.* 221. b.

If *A.* Leases to *B.* for twenty-one Years, and covenants at any Time during the Life of *B.* (*a*) upon Surrender of the old Lease, to make a new Lease, and after *A.* Leases to a Stranger, he hath disabled himself and broke his Covenant.

5 Co. 20, 21.  
Sir Anthony  
Scot and  
Main, ad-  
judged.

2 And. 18. S. C. Moor 452. pl. 619. S. C. Cro. Eliz. 450, 479. S. C. adjudged, and after affirmed upon a Writ of Error. Poph. 109, 110. S. C. adjudged, and said, That admit the Lease to the Stranger was to begin at a Day to come, yet the Obligation is presently forfeited. (*a*) So if the Lessee assign his old Lease, he disables himself of taking Benefit of the Covenant. 1 Bulst. 22.

2. What the Party must do to intitle him to the Advantage thereof; and herein of Notice, Request, Tender and Refusal.

If a Lease be made reserving Rent, and that for the Non-payment the Lessor may re-enter, there must be an actual Demand made previous to the Entry, otherwise it is tortious; because such Condition of Re-entry is in Derogation of the Grant, and the Estate at Law being once defeated, cannot be restored by any subsequent Payment.

Co. Lit. 201. b.  
202. a.  
Hob. 207.  
5 Co. 56.  
Dyer 51.  
Hob. 331.  
Plow. 70.

So it is if there had been a *Nomine Pœnæ* given to the Lessor for Non-payment, the Lessor must demand the Rent before he can be intitled to the Penalty; or if the Clause had been, That if the Rent were behind, that the Estate of the Lessee should cease and be void; in these Cases there must be an actual Demand made, because the Presumption is, that the Lessee is attendant on the Land to save his Penalty and preserve his Estate, and therefore shall not be punished without a wilful Default; and that cannot be made appear without a Demand be proved, and that it was not answered, (*b*) and the Demand in these Cases must be made at the Day prefixt for the Payment, and alledged expressly to have been made in the Pleading.

7 Co. 56.  
Vaugh. 32.  
Hutt. 42,  
114.  
Hob. 207, 331.  
7 Co. 56. b.

But where the Remedy for Recovery of the Rent is by Distress, there needs no Demand previous to the Distress, though the Deed says, That if the Rent be behind, being lawfully demanded, that the Lessor may distrain; but the Lessor, notwithstanding such Clause, may distrain when the Rent becomes due; so it is if a Rent-charge be granted to *A.* and if it be behind, being lawfully demanded, that then *A.* shall distrain, he may distrain without any previous Demand, because this Remedy is not in Destruction of the Estate, for the Distress is only a Pledge for the Payment of it, and the very Taking of the Distress is a legal Demand.

(b) 20 H. 6.  
30, 31.  
1 Rol. Abr.  
458.

Where the Remedy for Non-payment of Rent was by way of Entry, it was (*c*) formerly held, That if the Rent was made payable at any Place off the Land, no Demand was necessary, because the Money being to be paid off the Land, was looked upon a Sum in Gross which the Tenant had at his own Peril undertaken to pay; but (*d*) this Opinion has been intirely exploded; for the Place of Payment does not change or alter the Nature of the Service, but it remains in its Nature a Rent, as much as if it had been made payable upon the Land.

Hob. 207.  
Hutt. 13, 23.  
2 Rol. Abr.  
426.  
Moor 883.

But where the Power of Re-entry is given to the Lessor for Non-payment, without any further Demand, there it seems, that the Lessee has undertaken to pay it whether it be demanded or not, and there can be no Presumption in his Favour in this Case, because by dispensing with the Demand, he has put himself under the Necessity of making an actual Proof that he was ready to tender and pay the Rent.

(c) Plow. 70.  
Kidwelly's  
Case.

(d) 4 Co. 73.  
Moor 408.  
Cro. Eliz. 415,  
435, 536.

Also as to the Necessity of a Demand of the Rent, there is a Difference between a Condition and a Limitation; for Instance, If Tenant for Life (as the Case was by Marriage-Settlement, with Power to make Leases for twenty-one Years, so long as the Lessee, his Executors or Assigns shall duly pay the Rent reserved) makes a Lease pursuant to the Power, the Tenant is at his Peril obliged to pay the Rent without any Demand

Vaugh. 31, 32.

of the Lessor; because the Estate is limited to continue only so long as the Rent is paid, and therefore, for the Non-performance according to the Limitation, the Estate must determine.

1 *Rol. Abr.*  
449. Ad-  
judged by  
three Justices.  
*Moor* 602.  
Like Point  
certified by  
the Judges  
to the Chancellor for Law. 8 *Co.* 92. S. C. cited. 2 *Bull.* 144. S. C. cited. (a) But if at any Time he meets him at the Place, he may tender the Money. *Co. Lit.* 211. *Cro. Eliz.* 14. (b) *Yelv.* 37. *Cro. Jac.* 9, 10. *Co. Lit.* 211. a. *Cro. Eliz.* 298. 13 *Co.* 2. Like Point, & vide 1 *Rol. Rep.* 373.

*Co. Lit.* 211, a.  
220. S. P. If *A.* is bound to *B.* upon Condition that *C.* shall enfeoff *D.* on such a Day, *C.* must seek *D.* and give him Notice thereof, and request him to be upon the Land at the Day, to receive the Feoffment.

*Winch* 26.  
*Trehern* and  
*Claybrook.* If *A.* Leases his Land for forty Years, rendring Rent, and devises the Reversion to *J. S.* in Tail, &c. provided that *B.* and his Wife shall have the Rent to their own Use till *J. S.* comes of Age, upon Condition that *B.* and his Wife within three Months after his Death, enter into a Bond to his Overseers for the Payment of 34 *l.* per Annum, in such Penalty as his Overseers shall advise; and *A.* dies, *B.* and his Wife must give Notice of this to the Overseers, and at their Peril procure them to advise, &c.

*Hob.* 24. *A.* made a Deed of Feoffment of Lands in several Counties, dated cited to have the 15th of *October*, 4 *Mar.* upon Condition the Feoffee should reinfeoff him of all the Lands within twenty Days after the Date of that Deed; been resolved and yet because *A.* made his Feoffment but of Part within the twenty ed 26 *Eliz.* Days, it was held, the Condition was not broke, though all was not reconveyed within the twenty Days according to the Letter of the Condition, which is intire; for it was the Fault of *A.* it was not conveyed, without which it could not be re-conveyed.

5 *Co.* 20, 21.  
adjudged.  
*Moor* 452.  
S. C. adjudged that Co-  
venant lay without ma-  
king any Re-  
quest, tho' by the Cove-  
nant the new Lease was to be made upon Request. *Cro. Eliz.* 450. *Poph.* 109. S. C. adjudged.

5 *Co.* 21. re-  
solved per  
*Cur.* So if a Man covenants to enfeoff *J. S.* upon Request, and after enfeoffs another, *J. S.* may have Covenant without making any Request.

18 *E.* 3. 27.  
1 *Rol. Abr.*  
458. If the Condition of an Obligation be (c) to levy a Fine to the Obligee, he is not (d) bound to levy it if the Obligee (e) does not sue a Writ of Covenant against him.

5 *Co.* 21. &  
vide 1 *Rol. Abr.* 422. S. P. cont'. (c) So if the Condition be, That a Stranger shall levy a Fine to the Obligee. *Hutt.* 48. *Winch* 30.— So if the Condition be to acknowledge a Judgment to *J. S.* he must sue out an Original. *Winch* 30. *Hutt.* 48. (d) Where the Obligor or Covenantor hath disabled himself, the Obligee, &c. may bring an Action without, &c. 5 *Co.* 21. *Moor* 452. *Cro. Eliz.* 450, 479. *Poph.* 109. (e) Where the Condition is to pay all Costs as shall be stated by two Arbitrators, by the Obligor and Obligee to be chosen, the Obligee must chuse an Arbitrator before he can shew any Fault in the Obligor. 1 *Vent.* 71.

If the Condition of an Obligation be, That the Obligor shall make all the Linen the Obligee shall wear during his Life, the Obligee must deliver to the Obligor the Cloth of which it is to be made; for all Contracts are to be interpreted (a) according to the Intent and subject Matter.

1 Lev. 93.  
Oles and  
Thornhil, ad-  
judged, it  
not appear-  
ing the Obli-  
gor was as

Sempstres, or such Person that used to make Linen and find the Materials. (a) As if a Taylor is bound, or promises to make a Suit of Clothes for me, I ought to deliver him the Cloth, because this is usual, and not for him to provide it. 1 Lev. 93. per Curiam.—But if a Shoemaker is bound to make me a Pair of Shoes, he is also bound to find the Leather, because that is usual. 1 Lev. 93. per Cur.

If a Man devises Land to another upon Condition, that if he pays 4 l. yearly out of the Land to the Wife of the Devisor for her Life, adding over and above, that his full Intent and Will was, that she should be yearly paid the said Rent accordingly, the Devisee ought to pay this Rent to his Wife (b) at his Peril, without any Demand of the Wife; otherwise the Condition is broke.

1 Rol. Abr.  
461.  
Lane 78.  
(b) But if a  
Man devises  
Lands to his

Wife for Life, so long as she shall be effectually ready to demise it to his Heir at 50 l. paid yearly, when she shall not dwell on it her self; yet if she goes and lives at another Place, the Condition is not broke without a Tender and Refusal to Lease. Moor 626. pl. 860.

If A. conveys Lands to B. in Tail, upon Condition that B. and the Heirs of his Body, shall pay to the Daughter of A. 200 l. or so much thereof as shall be unpaid at the Death of A. according to the Intent of the Will of A. and after A. by Will devises to his Daughter 200 l. viz. 100 l. to be paid that Day Twelve-month next after his Death, and the other 100 l. that Day Twelve-month next after, &c. and dies, B. is not bound to pay the 200 l. without Demand, for the Payment by the Indenture is referred to be according to the Will, and the 200 l. was devised as a Legacy, which ought to be paid upon Demand, and not at the Peril of the Executor, and therefore the Nature of the Payment is altered by the Will.

Popb. 102.

### 3. What shall be a Dispensation therewith.

If a Lease for Years be made upon Condition not to alien without Licence, and after the Lessor Licenses the Lessee to alien, and dies before any Alienation, yet the Lessee may alien, for the Death of the Lessor is not any Countermand; for this was executed on the Part of the Lessor as much as it could be.

Co. Lit. 52. b.  
1 Rol. Abr.  
453.

So if a Man Leases Land upon Condition that he shall not alien the Land, nor any Part thereof, and after he aliens Part with the Assent of the Lessor, he may after alien the Residue without his Assent, for all the Condition is gone by this; for it cannot be divided or apportioned.

1 Rol. Abr.  
471.

So if A. Leases Land to three upon Condition, that they or any of them shall not alien without License of the Lessor; this discharges all the Condition as to the other two also.

4 Co. 120.  
Noy 32.  
Cro. Eliz. 816.

If (c) Lessee for Years hath Execution by Elegit of a Moiety of the Rent and Reversion against the Lessor, where the Lease is upon Condition, this is a Suspension of all the Condition during the Time of the Extent; and though but a Moiety of the Rent is extended, yet the entire Condition is suspended.

1 Rol. Abr.  
471.

Moor 22.  
pl. 75. ad-  
judged.

(c) So if a Stranger hath Execution by Elegit. Moor 71. pl. 193. Dalf. 72. Moor 91. & vide 4 Leon. 28.

If a Man makes a Feoffment in Fee upon Condition to reinfeoff, and the Feoffor after disseises the Feoffee, and leases for Years, this is a Dispensation with the Condition during the Term.

- Cro. Eliz.* 665. *Owen* 65. *S. C.* If a Man Leases for Years, upon Condition to be performed on the Part of the Lessor, and before the Time of the Performance of the Condition he Leases to a Stranger for Years, by Indenture, the Condition is not suspended or destroyed, but may be performed notwithstanding, for it is an Estoppel only between the Lessor and second Lessee.
- Cro. Eliz.* 665. *per Cur.* But if a Man makes a Feoffment upon such Condition, and after levies a Fine to a Stranger, the Condition is gone.
- 1 Rol. Abr.* 453. If a Condition be to recover certain Land of *7. S.* and thereof to enfeoff another who is Party to the Obligation, if he, to whom the Feoffment is to be made, accepts a Feoffment of the Land before any Recovery had by the other, he hath dispensed with the Condition.

#### 4. How far he, who enters for a Condition broken, shall be re-instated in his former Estate.

- Co. Lit.* 202. *1 Rol. Abr.* 474. Same Rule (a) he that will take Advantage of a Condition must enter if he can; if he cannot he must claim; for a Freehold, whether it lie in Grant or Livery, cannot cease by Condition without Entry or Claim, though the Words are, *Proviso* that if he do not pay, &c. that then the Estate shall cease and be void, whether the Conveyance were by Feoffment, Bargain and Sale, or Devise, &c. *Co. Lit.* 218. (b) A Remainder is granted upon Condition, and after the particular Estate determines, and the Condition is broke, the Grantor shall have the Land in Possession. *2 Rol. Rep.* 60.—A Condition or Limitation annexed to an Estate, ought to destroy the whole Estate. *1 Co.* 36. *b.* *6 Co.* 40. *b.*
- 22 E.* 3. 19. *Fitz. Condition* 12. *S. C.* *1 Rol. Abr.* 474. As if a Feoffment be made to *A.* upon Condition for the Non-payment of certain Rent to re-enter, and *A.* dies, leaving a Wife, after which the Condition is broke by the Heir of *A.* the Feoffor shall re-enter and defeat the Title of Dower that accrued to the Wife of the Feoffee.
- Lit. Sect.* 325. *Co. Lit.* 201, 202. If a Man makes a Feoffment, Gift or Lease, reserving Rent, with a Condition, that if the Rent be behind, that it shall be lawful for the Feoffor, &c. and his Heirs into the Land to re-enter; in these Cases, if the Rent be not paid according to the Deed, the Feoffor or Lessor may enter into the Lands and hold them in his former Estate, because the Feoffment or Lease was not absolute, but defeasible by the Non-performance of the Condition.
- Lit. Sect.* 327. But where a Feoffment is made of Land, reserving Rent, upon Condition that if the Rent be behind, that it shall be lawful for the Feoffor and his Heirs to enter and hold the Land, and take the Profits till he be satisfied and paid the Rent behind, this is not a Condition absolutely to defeat the Estate; but the Feoffor in this Case, shall, upon his Entry only hold the Land as a Pledge, or in Nature of a Distress till the Rent be paid him, and the Profits shall not go into the Account of the Rent, but shall be applied to his own Use, that by such Perception the Tenant may be obliged the sooner to pay the Arrears of Rent.
- Co. Lit.* 203. But if the Condition had been, that if the Rent be behind, that the Lessor shall re-enter and take the Profits until thereof he be satisfied; there the Profits shall go into the Account of the Rent, and consequently when the Profits received are equivalent to the Arrear of Rent, the Lessee may re-enter, and hold it under the former Lease.
- Cro. Jac.* 511. *Co. Lit.* 203. And though Part of the Rent be paid him before Re-entry, yet if the Whole be not satisfied he may enter for any Part that is arrear, because the Condition is to enforce the Payment of the whole Rent; and therefore he may take Advantage for Non-payment of any Part thereof.
- 1 Rol. Abr.* 474. Lessee for Life, and the Reversioner, join in a Feoffment upon Condition reserved to the Lessee, if he enter for Breach thereof, this shall not defeat the entire Estate.

If a Man seised of Lands, in Right of his Wife, makes a Feoffment in Fee upon Condition, and dies; and after the Condition is broke, and the Heir of the Feoffor enters, (a) it is impossible he should have the same Estate which the Feoffor had at the Time of the Condition made; for that was in the Right of his Wife, which was dissolved with the Coverture, and therefore when the Heir hath entred for the Condition broke, and defeated the Feoffment, his Estate vanishes, and presently the Estate is vested in the Wife.

Co. Lit. 202. a.  
356. b.  
8 Co. 44. a.  
S. P. (2) So  
if a Man  
seised of  
Lands as  
Heir, on the  
Part of his  
Mother,  
makes a

Feoffment in Fee upon Condition, and dies, the Heir of the Part of the Father, who is Heir at Common Law, shall enter for the Condition broken, but the Heir of the Part of the Mother shall enter upon him, and enjoy the Land. Co. Lit. 12. b.

If *Cestui que use* after the Statute of R. 3. and before the Statute 27 H. 8. had made a Feoffment in Fee upon Condition, and had after entred for the Condition broke, though at the Time of the Condition made he had but a bare Use, yet by his Feoffment the whole Estate and Right being devested out of the Feoffees, he should have been seised of the whole Estate in the Land.

Co. Lit. 252. a.  
1 Co. 133. b.  
S. P.

Tenant in Special Tail hath Issue, his Wife dies, and he makes a Feoffment in Fee upon Condition, the Issue dies, the Condition is broke, the Feoffor re-enters, he shall be only Tenant in Tail after Possibility of Issue extinct; though when he made a Feoffment he had an Estate Tail.

Co. Lit. 202. a.

If a Man makes a Gift in Tail to A. the Remainder to A. and his Heirs, upon Condition that he shall not alien, the Condition is good; as to restrain any Discontinuance of the Estate Tail, but as to the Fee-simple it is void and repugnant; and therefore some are of Opinion that this is a good Condition, and that it shall defeat the Alienation (b) for the Estate Tail only, and leave a Fee-simple in the Alienee.

Co. Lit. 224. a.

(b) By Special Words  
the Condi-

tion may extend to the particular Estate, or to the Remainder only. Co. Lit. 230. a.

If the Father surrenders Copyhold Lands to the Use of the Son in Fee, upon Condition that he shall perform certain Covenants, and the Son after Admittance surrenders to the Use of A. in Fee, upon Condition that if the Son pays ten Pounds the Surrender shall be void, and the Son pays not the 10 l. nor performs the Covenants, and the Father enters, and dies seised, and it descends to the Son, yet A. cannot enter upon him; for by the Entry of the Father both the Surrenders were defeated, and the Son may confess and avoid the Estate of A.

Cro. Eliz. 239.  
adjudged.

A Man being intitled to be Tenant by the Curtesy, makes a Feoffment in Fee upon Condition, and enters for the Condition broke, and then his Wife dies, he shall not be Tenant by the Curtesy; for though the Estate given by the Feoffment was conditional, yet his Title to be Tenant by the Curtesy was absolutely extinct by the Feoffment.

Co. Lit. 30.

Tenant by Homage Ancestrel makes a Feoffment in Fee upon Condition, and enters for the Condition broke, it shall not be holden by Homage Ancestrel again, for the Right of the Prescription and Privity of Estate were interrupted for the Time; so (c) if a Copyhold escheats, (d) and the Lord makes a Feoffment in Fee upon Condition.

Co. Lit. 202. b.

(c) Co. Lit.  
103. a. 202. b.

(d) For not-

withstanding the Entry for the Condition broke, the Seignory is extinct, for that was exclusively extinct by the Feoffment. Co. Lit. 30. b.

If Tenant for Life makes a Feoffment in Fee upon Condition, and enters for the Condition broke, he shall be Tenant for Life again, but subject to the Forfeiture; for though the Estate is reduced, yet the Forfeiture is not purged.

Co. Lit. 202.

252. a.  
1 Rol. Abr.  
856.

If the Conuzee of a Statute, &c. or he that hath Lands, till such a Sum levied, surrenders to the Reversioner upon Condition, and after enters for the Condition broke, and performs the first Condition, he

4 Co. 82.

2 Rol. Abr.

479.

shall not hold over after the Extent incurred, or such Time as the Money might have been levied.

8 Co. 75. b. If Lessee for Life or Years, upon Condition to have a Fee, if, &c. grants his Estate upon Condition, and after enters for the Condition broke, and performs the first Condition, perhaps the Fee will accrue, for the Possibility was not absolutely destroyed; and when he enters for the Condition broke, he is in of his old Estate.

Dyer 344. a.  
4 Co. 24. a.  
Co. Cop. 82,  
88. If a Man makes a Feoffment in Fee of a Manor upon Condition, and the Feoffee grants Estates by Copy, and then the Condition is broken, yet the Grants by Copy shall stand good, for he was *Legitimus Dominus pro tempore*, and the Copyholder doth not claim his Estate out of the Lord's, but by Custom; and if the Grants were made after the Condition broken, yet it is all one, for till Entry the Feoffee hath a lawful Estate, and the Feoffor may waive the Advantage of the Condition broken; but if a Lease be made of a Manor for Years, on Condition to be void upon the Breach of a certain Condition, and the Condition is broken, no voluntary Grants made afterwards shall bind the Lessor, because the Estate of the Lessee is void; but if it were for Life, &c. then the Grants were good.

## (P) Of performing the Condition : And herein

### 1. What Persons may perform the Condition.

Lit. Sect. 337.  
Co. Lit. 208. a. IF a Man makes a Feoffment in Fee, upon Condition to be void if the Feoffor pays a certain Sum of Money to the Feoffee, and the Feoffor dies before Payment, his Heir cannot pay it, because the Time of Payment is past, for the Condition being general, if the Feoffor pays, &c. it is as much as to say, if the Feoffor during his Life pays.

Lit. Sect. 337.  
Co. Lit. 208. b.  
209. a. But when a Day of Payment is limited, and the Feoffor dies before the Day, his (a) Heir may tender the Money, because the Time of Payment was not past by the Death of the Feoffor.

(a) So may his Executors or Administrators, because they represent the Person of their Testator. Lit. Sect. 337. Co. Lit. 208, 209. a.

Eq. Abr. 106,  
107. Marks  
and Marks. J. S. having Issue three Sons, A. B. and C. A. dying in his Life-time, leaving Issue only a Daughter; J. S. devised certain Lands to his Wife for Life, and after her Death to his Son C. and his Heirs; provided that if B. do, within three Months after the Death of my Wife, pay to C. his Executors or Administrators, the Sum of 500*l.* then the said Lands shall come to my Son B. and his Heirs; the Wife lived several Years, and during her Life B. died, leaving J. D. his Heir, who not being Heir at Law to the Testator, the Question was, Whether he could now, after the Death of the Wife, perform the Condition? And though it was objected that this being a Condition precedent and merely Personal in B. who had neither *jus in re*, nor *ad rem*, and could (b) not therefore devise, release or extinguish the Condition, and consequently that his Heir could not perform it after his Death; yet it was held and so decreed, that the Possibility of performing this Condition was an Interest or Right, or *Scintilla Juris*, which vested in B. himself, and consequently such Right, Possibility or Interest descended on his Heir, and, according to *Littleton supra*, may be performed by him.

(b) Though a Condition in strictness of Law is not devisable, yet since the Statute of *Uses*, the Devisee may take Benefit of it by an Equitable Construction; and in this Case B. might have released or extinguished the Condition. Eq. Abr. 107. per Lord Chancellor.

If *A.* mortgages his Lands to *B.* upon Condition that if *A.* and *C.* pay *Co. Lit. 219. b.*  
 20 s. at a Day to *B.* that then he shall re-enter; (a) *A.* dies before the Day; (2) So if *C.*  
*C.* may pay the Money, &c. and yet the Letter of the Condition is not dies before  
 performed. the Day, *A.*  
 may pay it.

But if *A.* had been living at the Day, and could not have paid the *Co. Lit. 219.*  
 Money, but had refused to pay it, and *C.* had tendred it, *B.* might *Co. Lit. 219. b.*  
 have refused it.

If *A.* and *B.* levy a Fine to the Use of *A.* in Fee, if *B.* does not pay *1 Rol. Abr.*  
 10 s. at *Michaemas* after, and that if he doth then pay the said 10 s. *420.* The  
 that then it shall be to the Use of *A.* for Life, and after to *B.* in Fee, Court di-  
 and after *B.* dies before *Mich.* it seems the Heir of *B.* may pay the 10 s. vided, viz.  
 for this is not more Personal, being the Payment of Money, than in the *Croke* and  
*Cafe of Littleton* upon a Mortgage. *Jones*, That  
 it was Per-  
 sonal; but

*Brampton and Berkely cont.* 1 *Jones* 390. S. C. and the Court divided accordingly. *Winch* 103, 104, 116,  
 118, 119. with the Arguments at large, but no Judgment, & vide *Co. Lit. 205.* That the Heir may  
 perform it.

If a Man devises Land to his Daughter at her Age of eighteen Years, *Hob. 285. ad-*  
 and that his Wife shall take the Profits to her own Use till his Daughter judged.  
 comes to eighteen, provided she shall keep and bring up his Daughter *Hutton 36.*  
 School, &c. and dies; and the Wife marries again, and dies, the Interest S. C. adjudg-  
 in the Lands accrues to the Husband, for the Keeping and Education ed.  
 of the Child is not of such particular Privy, but it may be effectually per-  
 formed by another.

If two are enfeoffed to reinfeoff, if one refuses to reinfeoff, the other *49 E. 3. 16. b.*  
 cannot perform the Condition by a Feoffment of the Whole. *1 Rol. Abr.*

If the Condition of an Obligation be to be a less Sum, if (b) my Ser- *421. S. C.*  
 vant, by my Command, tenders it to the Obligee, this is sufficient. *2 Hen. 6. 3. b.*  
*1 Rol. Abr.*

*421. S. C.* (b) So if a Stranger tenders for and by the Assent of an Infant above fourteen. *Moor 222.*  
*pl. 137. per Curiam.*

If a Man makes a Feoffment in Fee by way of Mortgage, upon Con- *Co. Lit. 206.*  
 dition to be void upon Payment of Money by the Feoffor at a Day, if a *a. b. Watkin*  
 Stranger of his own Head tenders the Money, the Feoffee is not bound to and *Astwick,*  
 receive it. S. P. though  
 tendred for

an Infant. 1 *Leon. 34.* Agreed *per Curiam.* *Moor 222. pl. 3, 61.* admitted *per Curiam.* *Cr. Eliz. 132.*  
 Said by *Coke* to be adjourned. *Owen 34. S. P. per Coke.*

But if the Feoffee accepteth it, this is a good Satisfaction, and the *Co. Lit. 206. b.*  
 Mortgagor or his Heirs, agreeing thereto afterwards, may re-enter, but *207. a.*  
 the Mortgagor may disagree thereto if he will.

Guardian (b) in Socage, or by Knight-Service, may upon such Mort- (b) *Co. Lit. 206.*  
 gage tender Money in the Name of the (c) Heir. *b. Watkin and*  
*Astwick, S. P.*

1 *Leon. 34.* agreed *per Curiam*; but it being found that the Tender was made by his Mother, and  
 that he was within Age generally, it was presumed he was above fourteen, and out of her Custody.  
*Owen 137.* agreed, but found as before, *Moor 222. pl. 361.* admit *per Curiam*, but found the Mother  
 was not Guardian in Socage. *Owen 34. S. C.* cited to have been adjudged, That the Tender of the  
 Mother was not good, because it did not appear within the Verdict, of what Age the Infant was;  
 (b) But if the Heir be an Idiot, a Stranger of his own Head may tender the Money for him. *Co.*  
*Lit. 206. b.*

If *A.* infeoffs *B.* upon Condition that *B.* shall pay Money at a Day, *Lit. Sect. 336.*  
 and *B.* before the Day infeoffs *C.* now *C.* hath an Interest in the Condi- *Co. Lit. 207. b.*  
 tion, and may tender the Money at the Day for the Safeguard of his *5 Co. 96. b.*  
 Estate. S. P. cited.

And so also may *B.* being Party and Privy to the Condition. *Lit. Sect. 336.*  
*Co. Lit. 207. b.*

## 2. To whom the Condition is to be performed.

*Co. Lit.* 210. If a Man bargains and sells Lands, with a *Proviso*, That if the Ven-  
*Dyer* 180, 181. dor, before such a Day, pay so much Money to the Vendee, his Heirs or  
 5 *Co.* 96. Assigns, that the Sale shall be void; the Vendee before the Day makes  
 his Executors, and dies, and the Vendor tenders the Money to the Exe-  
 cutors, this is not good, because the Word *Assigns* must be understood to  
 be Assigns of the Land in its primary and original Signification; and  
 where there is an exprefs Provision, to whom the Tender and Payment  
 is to be made, the Executor is excluded; for *Expressum facit cessare ta-*  
*citum*.

*Co. Lit.* 210. But if a Man makes a Feoffment in Fee, upon Condition that the  
 5 *Co.* 96, 97. Feoffee shall pay 20 *l.* to the Feoffor, his Heirs or Assigns, here the  
 primary Signification of the Word *Assigns* fails, because there can be no  
 Assignment of the Land of which he hath enfeoffed another; and since  
 the original Sense of the Word fails, lest it should be wholly insignificant,  
 the secondary Sense of the Word is to be taken, *viz.* the Assignees in  
 Law, which the Executors are *quoad* the Personal Estate; and therefore  
 the Payment is good either to the Executor or Heir.

If the Condition be to pay the Money to the Feoffee, his Heirs or  
 5 *Co.* 96. Assigns, and he makes a Feoffment over, it is in the Election of the  
*Cro. Eliz.* 384. Feoffor to pay the Money to the first or second Feoffee, because by the  
*Moor* 708. Words he may pay it either to him or the Assignee; so if the first  
*pl.* 989. Feoffee dies, in this Case he may pay it to his (a) Heir, or the Assignee  
*Goult.* 177. for the same Reason; nor is he obliged to take Notice of the Validity of  
*Poph.* 100. (a) If the Condition be the second Feoffment, to which he is a Stranger.  
 to pay to the  
 Feoffee, his Executors or Assigns, and the Feoffee makes his Sons Executors, and dies, and Admini-  
 stration is committed during their Minority, it is the safest Way to pay the Money to the Execu-  
 tors, or one of them; for the Administrator is but a Bailiff to them. 3 *Leon.* 103.

*Lit. Sect.* 339. If a Man makes a Feoffment in Fee, by way of Mortgage, upon Con-  
*Co. Lit.* 209. b. dition to be void upon Payment of the Money by the Feoffor at a Day,  
*Vide for this* if the Feoffee dies before the Day, the Money shall be paid to the Exe-  
*Title Mort-* cutors, and not to the Heirs of the Feoffee; because it shall be intended  
*gages.* the Estate was made by reason of the Loan of the Money, or for some  
 other Duty.

*Lit. Sect.* 339. But if the Condition be, that if the Feoffor pays, &c. to the Feoffee  
*Co. Lit.* 209. b. or his Heirs, if he dies before the Day, the Payment ought to be made  
 5 *Co.* 97. to his Heir, and not to his Executors; for *designatio unius est exclusio*  
*1 Brownl.* 66. *alterius*.  
*S. P. adjudg.*  
 ed.

If the Condition of an Obligation be to pay 10 *l. per Annum*, after the  
*Hettl.* 115. Death of the Obligee, to the Executors of the Obligee, for the Use of  
*Lit. Rep.* 156. his Children, and he dies without making any Executors, the Money  
 S. C. For this shall be paid to his Administrators.  
*vide 1 Rol.*

*Abr.* 916. If *A.* pawns a Jewel to *B.* for 25 *l.* but no certain Time is appointed  
 for the Redemption thereof; and after *B.* being sick, his Wife in his  
*Cro. Fac.* 244. Prefence, and with his Assent, delivers it to *C.* and *B.* dies, the Money  
*Sir John* must be paid to the Executors of *B.* and not to *C.* because by the De-  
*Ratcliff and* livery of the Feme, with the Assent of the Baron, there passed no Inte-  
*Davis, ad-* rest, but a Custody only.  
*judg.*  
*Yelv.* 178.

S. C. adjudged; and said, It would be so though it be delivered over upon a Consideration; and  
 that it was not like a Mortgage, for that there he that hath the Interest ought to have the Money.  
 1 *Bull.* 29, 30. S. C. adjudged, though it appears that *B.* wished *C.* to keep it safely till the Money  
 was paid; but 31, by *Fleming*, Ch. Just. It had been otherwise, if *C.* had paid the Money, &c. *Noy*  
 137. S. C.

If the Condition be to Lease certain Lands, for three Lives, to the Obligee or his Assigns, and after the Obligee demands a Lease to be made to three Strangers for their Lives, he ought to make it them accordingly, or otherwise the Condition is broke; for here, by the Word *Assigns*, is intended *Assigns by Nomination*, for he cannot have other Assigns, in as much as the Estate is not assignable before he hath it.

1 *Roll. Abr.*  
421.  
1 *Roll. Rep.*  
375.  
3 *Bull. 168.*  
*Bridg.* 39.  
S. C. and S. P.

If a Man be bound in 20 *l.* upon Condition to pay 10 *l.* to such Person as the Obligee shall name by his last Will, and after the Obligee names no Person by his Will, the Obligor is not bound to pay it to his Executors, because the Condition hath Reference to his Nomination.

1 *Roll. Abr.*  
421.  
*Lit. Rep.* 173.  
*Hob.* 9.  
*Godb.* 192.

S. C. adjudged; and per *Coke*, There is a Diversity where the Condition is to pay 10 *l.* to the Assignee of the Obligee, and where to the Obligee or his Assigns; for in the last Case it vests as a Duty in the Obligee, and shall go to his Executors. *Moor* 855. adjudged.

If *A.* seised in Fee by Indenture inrolled, covenants with *B.* that if *B.* pays to *A.* his Heirs or Assigns 400 *l.* at a Day, that then *A.* and his Heirs shall stand seised to the Use of *B.* and his Heirs, and *A.* devises to his Wife during the Minority of his Son, and dies, the Money shall not be paid to the Wife, for she is not Assignee, the Reversion being in the Heirs of *A.*

5 *Co.* 97.  
1 *Leon.* 252.

But if *A.* had made a Lease for Life, the Remainder to another in Fee, the Lessee for Life had been an Assignee.

And it was said, That if *A.* had conveyed over his whole Estate in Part, yet so long as *A.* had any Part remaining, the Tender ought to be made to him.

42 *E.* 3. 13. *b.*  
1 *Roll. Abr.*  
421.

If the Condition of an Obligation be to pay 10 *l.* &c. it is a good Performance if he pays it to his (a) Deputy.

(a) A Bond was conditioned for the Delivery of forty Pair of Shoes at *Holbourn-Bridge*, within a Month, to *J. S.* a common Carrier, for the Use of the Obligee, and *J. S.* did not come to *London* within the Month; but the Obligor delivered them to his Porter; and it was adjudged a good Performance; for that the Delivery to the Man was a Delivery to the Master, within the Intent of the Condition. 2 *Mod.* 309.

If the Condition of an Obligation is to pay 20 *l.* to the Obligee, and other the Parishioners of *D.* it (b) may be paid to any two of them.

*Moor* 68.  
*pl.* 183.  
(b) Where

the Condition is to pay Money to Baron and Feme, it may be pleaded to have been paid to the Baron only. *Goult.* 73. & vide 2 *Sid.* 41.

### 3. At what Time it may be performed.

If a Man makes a Feoffment in Fee, upon Condition that the Feoffor upon Payment of such a Sum of Money to the Feoffee without Limitation of Time, should re-enter, the Feoffor hath Time during Life, to pay the Money to the Feoffee during his Life; but if either die before that Time is elapsed, which is set by the Parties for the Performance of the Condition, the Feoffment is absolute; but if the Payment were to be made to the Feoffee, his Heirs or Executors, then the Feoffor hath Time during Life.

*Lit. Off.* 337.  
*Co. Lit.* 208.

But if the Condition be, That the Feoffee shall pay Money to the Feoffor, it must be paid in convenient Time, for it is not reasonable the Feoffee should have the Benefit of the Land without Payment.

If the Condition of an Obligation be to do a local Act to the Obligee to which the Concurrence of the Obligor and Obligee is necessary, as to make a Feoffment, &c. (no Time being limited) the Obligor hath Time during his Life to perform it, if not hastened by Request.

2 *And.* 73.  
*Co. Lit.* 208. *b.*  
6 *Co.* 30. *b.*

But though the Condition is local, yet if it may be performed for the Benefit of the Obligee in his Absence, as the Acknowledgment of Satisfaction upon Record, &c. it ought to be done in convenient Time.

*Co. Lit.* 208. *a.*  
6 *Co.* 30. *b.*  
*Hard.* 10.  
S. C. and

*Co. Lit.* 208. *a.* When by the Condition the Obligor, Feoffor, Feoffee or Stranger, are to do a sole (*a*) Act or Labour, as to go to *Rome*, &c. they shall have (*a*) Which in Time during Life, and cannot be hastened by Request. no Manner concerns the Obligee, Feoffor, &c. nor their Benefit. 6 *Co.* 31. *a. b.* 1 *Leon.* 125.

*Co. Lit.* 222. The Lord *Clifford* held, &c. *in Capite*, and the King licensed him to alien to *B.* and *C.* so that they should give the same to my Lord *Clifford*, and the Heirs of his Body, the Remainder over; and the Lord *Clifford*, according to the Licence, enfeoffed *B.* and *C.* and before any Reconveyance the Lord *Clifford* died; and it was adjudged his Heir might enter; for if they should make the Estate to the Issue of the Lord *Clifford*, the King might seize for want of a Licence, and that in Default of the Feoffees.

6 *Co.* 31. When the Act, by the Condition of an Obligation to be done to the Obligee, is of its own Nature transitory, as Payment of Money, Delivery of Charters, and the like, and no Time limited, it ought to be performed in (*b*) convenient Time.

(*b*) 1 *Rol. Abr.* 436. S. C. and several Cases there cited to this Purpose.

1 *Rol. Abr.* 436. So if the Condition of an Obligation be to pay a less Sum, and no Day of Payment limited, he ought to pay it presently, *scilicet*, within a convenient Time.

1 *Rol. Abr.* 437. If the Condition of an Obligation be to pay a certain Sum to a Stranger, without limiting any Time, this ought to be done (*c*) in convenient (*c*) So where the Condition

was, in convenient Time to assure the Land for the Maintenance of a School, and the Devisee did not do it in eight Years. 1 *Co.* 25. *b.* it was adjudged a Breach.

1 *Rol. Abr.* 440. If the Condition of an Obligation be to pay so much to a Stranger such a Day, if he pays it before the Day, (*d*) this is a good Performance; (*d*) *Co. Lit.* (*e*) because Payment before contains Payment at the Day.

212. *a.* *Cro. Car.* 284. *Cro. Jac.* 435. *Moor* 367. pl. 502. & vide 2 *Sid.* 78. (*e*) And upon *solvoit ad diem*, such Payment may be given in Evidence. *Moor* 267. *Cro. Eliz.* 142. 1 *And.* 198. *Sav.* 96. *Owen* 45. *Dyer* 222. *Godb.* 10. *Moor* 47. adjudged.

1 *Rol. Abr.* 457. If a Devise be to *A.* upon Condition that he pays the Debts of the Testator, he must pay them in a convenient Time, otherwise the Condition is broken; but where Lands are devised to be sold for that Purpose, the Devisee is not obliged to pay the Debts before he can find a Purchaser for the Lands.

2 *Co.* 78. If *A.* conveys a Manor, to which an Advowson is appendant to *J. S.* in Fee, upon Condition that *J. S.* shall re-grant the Advowson to *A.* for his Life; and if it happens not to be void in his Life, then one Turn to his Executors; though in this Case *J. S.* hath all his Life to regrant it, if he be not hastened by Request, and the Church becomes not void in the mean Time; yet if the Church becomes void during his Life, before any Request, the Condition is broke, because the Feoffee cannot have all the Effect which was intended him by the Re-grant, which was to have all the Presentations during his Life.

*Co. Lit.* 208. *b.* If *A.* enfeoffs *B.* the first of *May*, upon Condition that he shall grant to *A.* an Annuity or Rent, during his Life, payable yearly at *Michaelmas*, and the Annunciation; in this Case the Feoffee hath not Time to do it during his Life, but he ought to do it (*f*) before the first of the said Feasts; for otherwise *A.* cannot have all the Advantage of the Rent intended him by the Condition. (*f*) Where one is to grant a Reversion, he may do it any Time during his Life, if it so long continues a Reversion, if he be not hastened by Request. 1 *Lev.* 44.

If an Obligor or Feoffee be, by Force of the Condition of a Bond or Feoffment, to pay Money, or make a Feoffment to a Stranger, they must do it presently, and (a) must give Notice to the Stranger, and they shall not save the Condition by making a Tender thereof, if the other refuses to accept of it; for where one undertakes to do an Act to a Stranger, he must at his Peril take Care of the Performance of it. Co. Lit. 208. (a) But if the Condition be to be performed to the Party himself only, who is to take Advantage of the Breach of the Condition, the Feoffee is not bound to do it before Request. 1 Rol. Abr. 439. Moor 472.

If A. be bound to B. that C. shall enfeoff D. C. has Time during his Life to do it, unless he be hastened by Request; and if C. make a Tender thereof, and D. refuse, the Bond is saved; for the Obligor undertakes not to do any Act himself, but his Intent is to engage for the Readiness of a Stranger to do an Act to another who shall be intended to be a Friend of the Obligee, and under his Influence; but in the said Case, if the Condition were, That C. should enfeoff D. on such a Day, C. must seek D. and give him Notice thereof, and request him to be on the Land at the Day. Co. Lit. 208. b. 6 Co. 31. a. S. P. Vide Perk. 756. cont.

If the Condition be to make a Gift in Tail to the Feoffor, the Remainder to a Stranger in Fee, the Feoffee has Time during his Life to do it, because the Feoffor, who is Party and Privy to the Condition, is to take the first Estate. Co. Lit. 219. b.

If a Feoffment be upon Condition to re-enfeoff the Feoffor and his Wife, he (b) ought to do it upon Request. 1 Rol. Abr. 439. 6 Co. 31.

(b) But if not hastened by Request, he hath Time during his Life, because the Feoffor who is privy to the Condition, is to take jointly with her. Co. Lit. 219. Hestl. 59. But if the Baron dies, the Feoffment must be made to the Wife without Request. Hestl. 56.

If the Condition of an Obligation be, That whereas A. the Obligor hath conveyed Lands to B. the Obligee, if A. the Obligor, and C. his Son, shall do all Acts, and Devises for the better Assurance of these Lands to B. which shall be devised by B. or his Counsel, then the Obligation shall be void; and after B. devises and tenders a Release to be sealed by A. and C. his Son, and A. presently seals, but C. because he was not Lettered, nor could read it, prays B. to deliver it to him, to shew to some Man learned in the Law, who might inform him whether it was according to the Condition; and if it was according to the Condition, he would seal it; this was a Breach of the Condition, because he did not require the Writing to be read to him, and he was bound to take Conuzance of the Law, whether it was according to the Condition, and shall not have reasonable Time to shew the Writing to his Counsel learned in the Law, to be instructed by them. 2 Co. 3. Manser's Case. 1 Rol. Abr. 440. S. C.

If the Condition be to make such Assurance, &c. to the Obligee, as the Obligee shall devise, and after the Obligee devises an Indenture, &c. and tenders it to him, and he requires Time to shew it to his Counsel, to be advised thereupon, which is denied to him; yet if he does not seal it (c) presently, the Condition is broke, because the Condition is peremptory, *scilicet*, to be performed presently. 1 Rol. Abr. 424. 2 Co. 3. 1 Leon. 62. 2 And. 53. Moor 182. S. C.

(c) But where a Man shall have Time to advise with his Counsel. 4 Leon. 190. Cro. Eliz. 9. 1 Rol. Abr. 441. Moor 143.—That if the Condition be to make such Assurance as his Counsel should devise, his Counsel ought to draw and engross it, &c. Moor 595.

If the Condition of an Obligation be, If the Obligor do at all Times hereafter within the Space of one Month, when he shall be required, make such further Act and Acts, Assurance and Assurances, as the Obligee shall by his Counsel demand, for the Recovery of one Annuity of 30*l.* due from J. S. then the Obligation to be void; in this Case, if 1 Rol. Abr. 441. Wentworth and Wentworth. Style 241. S. C. adjudged.

(a) If the Condition of an Obligation is to pay 50*l.* upon the Tenth of *January* next, on three Months Warning, the Obligor must pay the Money upon the Tenth of *January* next, giving the Obligee three Months Warning; for the Words shall be taken most strongly against the Obligor. 1 *Lev.* 85. *Raym.* 61. but said by *Windham*, admitting the Obligee is to give Warning, and omits it, yet the Money is not lost, but shall be paid on any three Months Warning. 1 *Keb.* 381, 415.

8 *H.* 4. 14. If the Condition be to do a Thing within a certain Time, he may perform it the last Day of the Time appointed.  
*vide Cro. Eliz.*  
 14. *Moor* 122. *pl.* 266. 1 *Rol. Abr.* 442.

*Plow.* 173. If upon a Mortgage, a Tender be made of the Money at the Place,  
 5 *Co.* 114. at any Time of the Day specified in the Condition, and the Mortgagee  
*Co. Lit.* 206. refuses, the Condition is saved for ever, and the Mortgagor need not stay  
 7 *E.* 4. 3. at the Place appointed, till the last Instant of the Day; because by the  
 9 *H.* 6. 12. express Letter of the Condition, the Money is to be paid on the Day  
 22 *H.* 6. 37. indefinitely; nor needs there be any new Tender afterwards within con-  
 47 *E.* 3. 26. venient Time; because by the Words of the Contract, both Parties  
 ought to acquiesce.

1 *Leon.* 101. If the Condition of an Obligation be to deliver to the Obligee twenty  
 adjudged. Quarters of Corn, the Twenty-ninth of *February* next following the  
 Date, and the next *February* hath but twenty-eight Days, he is not bound  
 to deliver it till a Leap-year.

#### 4. At what Place it may be performed.

1 *Rol. Abr.* If a Place be limited and agreed on by the Parties, where the Con-  
 445, 446. dition is to be performed, the Party who is to perform it, is not obliged  
 to seek the Party to whom, &c. elsewhere, nor is he to whom it is to be  
 performed, (b) obliged to accept of the Performance elsewhere.  
 (b) But he may accept it at another Place, and it is good. *Moor* 367. *pl.* 502.

21 *E.* 4. 6. Rent reserved, payable yearly, is to be paid on the Land; so if a  
 20 *E.* 4. 18. b. Man Leases, rendering Rent, and the Lessee binds himself in 20*l.*  
 (c) But where to perform the Covenants, this does not alter the Place of Payment of  
 the Condition is for the Rent; for it may be tendered (c) on the Land, without seeking the  
 Performance Obligee.  
 of Homage,  
 or other Special Corporeal Service, to the Person of the Lord, the Tenant by the Law of Con-  
 venience ought to seek him in any Place in *England.* *Co. Lit.* 211. a.

*Lit. Sect.* 78. But if a Man makes a Feoffment, upon Condition that the Feoffor,  
*Co. Lit.* 210. upon Payment of 10*l.* may enter, &c. the Money being a Sum in  
 Gros, and Collateral to the Title of the Land, the Feoffor must tender  
 the Money to the Person of the Feoffee, if in *England.*

If the Condition of a Bond or Feoffment, is to make a (a) Feoffment, it is sufficient to tender it upon the Land; because the Estate must pass by Livery.

*Co. Lit. 210.*  
(a) Otherwife, if to make an

absolute Estate of Inheritance, unless he first gives Notice that he will do it such a Time by Feoffment. *Allen 24. Stile 61. adjudged.*

If the Condition of an Obligation or Feoffment be to deliver twenty Quarters of Wheat, or twenty Load of Timber, &c. to the Obligee or Feoffee, the Obligor or Feoffor is not bound to carry the same about, and seek the Feoffee, but the Obligor or Feoffor, before the Day, must go to the Obligee or Feoffee, and know where he will appoint to receive it, and there it must be delivered.

*Co. Lit. 210.*  
*3 Leon 260.*  
S. P.

5. What shall be said a sufficient Performance.

If a Man makes a Feoffment in Fee, upon Condition that the Feoffor, within a Year after the Death of the Feoffee, pay to his Heirs, Executors or Administrators 100*l.* that then the Feoffor should re-enter, the Feoffee makes a Feoffment over, and dies, the Feoffor paid the 100*l.* within the Year, and the Heir paid back 30*l.* this is a partial and fraudulent Payment; and no good Performance of the Condition, to defeat the Estate of the Feoffee; but if the whole Money had been paid, it had been good; because the Payment is to be made to the Persons mentioned in the Condition, and not to the Assignee of the Land, who is not named therein.

*Co. Lit. 95. b.*  
*96. a.*  
*Cro. Eliz. 383.*  
*384.*  
*Moor 708.*  
*Goulsf. 177.*  
*Poph. 99.*  
*Co. Lit. 209.*  
*Godb. 299.*  
S. C. between *Goodal* and *Wiat.*

If *A.* is bound to *B.* in an (b) Obligation, conditioned that *A.* shall deliver to *B.* before such a Day an Obligation, in which *B.* is bound to *A.* if *A.* sues *B.* upon the Obligation, and recovers, and after, before the Day, delivers it to *B.* this is no Performance of the Condition; for notwithstanding the Delivery of the Obligation, he may take Benefit of the Judgment; and so the Intent of the Condition is not performed.

*Cro. Eliz. 7.*  
*Moor 709.*  
*Goulsf. 177.*  
*1 Leon. 52.*  
S. P.  
(b) *1 Sid. 48.*  
*Raym. 25.*  
*1. Keb. 103.*  
*1. Rol. Abr. 448.*

Like Point in Case of a Covenant.—So in Case of a Promise.

If *A.* being a common Brewer, covenants that *B.* shall have seven Parts of all his Grains made in his Brew-house, for seven Years, and after *A.* puts in great Quantities of Hops into his Malt, of which the Grains were made, by Means whereof the Grains are spoiled, this is a Breach; because in all Contracts the Intention of the Parties is to be considered; and here it was the Intention of the Parties, that *B.* should have the Grains for the Use of his Cattle, and they will not eat them when Hops are put into them.

*Raym. 464.*  
*2 Jones 191.*  
S. C. between *Griffith* and *Goodland*, adjudged, though objected Case would lie,

and no Covenant; for that was performed by the Delivery of the Grains, the Plaintiff shewing for a Breach, that the Defendant had *subdole & callide*, to deceive the Plaintiff of the Benefit of the Covenant, mix'd Hops with his Malt, by which he had disabled himself to perform the Intent of the Agreement.

So if I covenant to deliver so many Yards of Cloth, and cut it in Pieces, and then deliver it, this is a Breach; for the Law regards the (c) real and faithful Performance of Contracts, and discountenances all such Acts as are done *in fraudem legis*.

*Raym. 464.*  
(c) If the Condition of a Bond be to pay 50*l.* though it is

not said of Money, yet it must be so intended; and the Obligee cannot tender fifty Pound Weight of Stone. *1 Sid. 151.* Said by *Twifden*, that he remembered it to have been adjudged.—But if a Man covenants that his Son, then *infra annos nubles*, shall marry the Daughter of *B.* before such a Day, and he marries her accordingly, but at the Age of Consent disagrees to the Marriage, yet is the Covenant performed; for it was a Marriage, though subject to be defeated by Disagreement, and no other could be had within the Time. *Owen 25. adjudged.*

*Allen* 68. If a Man assumes to make a Surrender of a Copyhold, upon Request, he is not bound to make it into the Hands of two Customary Tenants; *Stile* 107. adjudged. —So if a Man be bound to

make an Assurance as the Obligee shall devise, he is not bound to acknowledge a Fine by *Dedimus*; for that is but a Special Way of taking the Cognizance. *Allen* 69.—*Secus* if there is a *Proviso* that he shall not go above five Miles from his House, and his Houle is above five Miles from *Westminster*. *Allen* 69.—Covenant to make an Estate to *A.* and it is made to *B.* to the Use of *A.* and whether good. *Godb.* 95. *per Curiam dubitatur*, & vide *Cro. Eliz.* 825.—If one Man is bound to make to another, a sure, sufficient and lawful Estate in certain Lands, by the Advice of *J. S.* if he makes an Estate to him according to the Advice of *J. S.* be it insufficient, or not lawful, he is excused of the Obligation. *5 Co.* 23. *b.*—Where the Condition is to deliver a Release to the Obligee, it is not enough to say that it was writ, and Wax affixed to it, and that he was ready to seal and deliver it, but that the Obligee refused to accept; for he ought to have done all that he could; and he might have sealed it notwithstanding. *2 Rol. Rep.* 258.

*1 And.* 27. If a Man by Indenture bargains and sells his Lands to another in Fee, and Covenants to make thereof to the Vendee a good and sufficient Estate, before *Christmas* next, and before *Christmas* the Vendor causes this Deed to be enrolled, yet this is not a good Performance; for by the Intention of the Covenant, some other Assurance was to be made. *Bendl.* 36. *3 Leon.* 1. *S. C.* adjudged.

*Cro. Eliz.* 476, 665. If one be obliged to assure twenty Acres of Lands, the Acres shall be accounted according to the Estimation of the Country where the Land lies, and not according to the Measure limited by the Statute. *6 Co.* 67. *Popb.* 55.

*Cro. Eliz.* 681. If *A.* covenants with *B.* to make such Assurance of all his Lands, at the Costs of *B.* as *B.* or his Counsel shall (*a*) advise, *B.* may require one Assurance for one Parcel, and another Assurance for another Parcel; for being to be made at the Costs of *B.* it is no Prejudice to *A.* *Moor* 570. (*a*) If a covenants

to make such Assurance of Lands to *B.* as the Counsel of *B.* shall devise, himself, though learned in the Law, cannot devise the Assurance, but it ought to be devised by some of his Counsel; for if the Party himself might advise it, then it would be no Plea to say *Quod concilium non dedit advisamentum.* *5 Co.* 19. *b.* *Cro. Eliz.* 297. *S. C.* *1 Rol. Abr.* 466. *S. P. cont.*

*Moor* 570. But if the Assurance is to be made at the Costs of the Covenantor, *Cro. Eliz.* 681. if an Assurance of Part only is required, he must make it; but then he is discharged from making any Assurance of the Residue.

*Yelv.* 44. If the Condition of an Obligation be, that the Obligor, before *Michaelmas*, shall make, &c. all and every reasonable Act and Thing for assuring the Manor of *D.* to *J. S.* and his Heirs, and the Obligee requests him generally to convey, the Obligor must make an Assurance; *Moor* 682. *S. C.* adjudged, the Condition being to do all Acts, &c. and if thereupon the Obligor makes a Feoffment, and the Obligee after requests a Fine, the Obligee must acknowledge it; and so upon every Request, he ought to make several Assurances.

to be required by the Obligee; but said, if it had been to be devised by the Obligee or his Counsel, he ought to have shewed he had devised and required such a particuar Feoffment or Fine.

*Cro. Jac.* 251. If a Man covenants to make further Assurance, and to do any Act or *Moor* 810. Acts, &c. as shall be devised, &c. and a Note of a Fine is tendred, and he is required to acknowledge it before a Judge of Assise, he must acknowledge it, though no Writ of Covenant is depending; for he hath covenanted to do every Act; and this Note of a Fine is an Act; and whether it be well levied, or to no Purpose, is not material.

Fine; and the Writ of Covenant may be sued out after; and so it is an Act for further Assurance, though the Writ of Covenant is not depending. *1 Bulst.* 90. *S. C.* & vide *Litch* 186. *1 And.* 56.

If *A.* (a) enfeoffs *B.* upon Condition that *B.* shall make a Gift in Tail to *A.* and his Wife, and the Heirs of their two Bodies, Remainder to the right Heir of the Feoffor, and *A.* dies, *B.* ought to make an Estate for Life to the Wife, (b) without Impeachment of Waste, Remainder to the Heirs of *A.* for the Estate shall be made as near the Intent of the Condition as it can be.

*Lit. Sect.* 352.  
*Co. Lit.* 219.  
(a) But if the Condition of a Bond be to enfeoff two before a Day, and

one dies, the Obligee is not bound to enfeoff the other. *N. Bendl.* 35. But for this *vide* *1 Jones* 180.  
*1 Rol. Abr.* 451. *Eq. Abr.* 19. (b) And yet if the Wife accepts the Estate for Life, without this Clause, it is good; because the Estate for Life is the Substance of the Grant, &c. *Co. Lit.* 219. b.

If the Condition be in the Copulative, and it is not possible to be performed, it shall be taken in the (c) Disjunctive.

*Owen* 52.  
*1 Leon.* 74.  
*Gouff.* 71.

*1 Rol. Abr.* 444. (c) As if the Condition be, that he and his Executors shall do such a Thing, this is in the Disjunctive, because he cannot have an Executor in his Life-time. *21 E. 4.* 44. b. *1 Rol. Abr.* 444. S. C.—So if the Condition be that he and his Assigns shall sell certain Goods, this is in the Disjunctive, because both cannot do it. *21 E. 4.* 44. b. *1 Rol. Abr.* 444. S. C.

If a Lease be made to Husband and Wife, for twenty-one Years, if the Husband or Wife, or any Child between them so long lives, and the Wife dies without Issue, yet the Lease shall continue during the Life of the Husband; for the Disjunctive referreth to the whole, and disjoineth not only the latter Part, as to the Child, but also to the Baron and Feme; so that the Sense is, if the Baron, Feme, or any Child shall so long live.

*Co. Lit.* 225. a.  
*Moor* 239.  
*Owen* 52.  
*Gouff.* 71.  
*1 And.* 161.  
*1 Leon.* 244.  
*Cro. Eliz.* 269.

So if an Use be limited till *A.* shall come from beyond Sea, and attain to his full Age, or die, if he comes from beyond Sea, or attains his full Age, the Use ceases.

*Co. Lit.* 225. a.  
*1 Leon.* 245.  
*Cro. Eliz.* 270.

If a Devise be made upon a Disjunctive Condition, to be performed by the Devisee, he hath his (d) Election.

*Palm.* 76.  
(d) So if the Condi-

tion be to enfeoff the Obligee of *D.* or *S.* the Obligor hath Election. *18 E. 4.* 17. b. *5 Co.* 22. a. But for this *vide* Title Election, and *1 Rol. Abr.* 446.

If an Obligation be conditioned to pay *B.* or his Heirs, annually 12 *l.* at *Midsummer* and *Christmas*, or to pay him or his Heirs, at any of the said Feasts, 150 *l.* the Obligor hath Election to pay the 12 *l.* or the 150 *l.* though he may at any Time determine the Payment of the 12 *l.* by Payment of the 150 *l.*

*Cro. Jac.* 594. adjudged.

If *A.* covenants with *B.* that *A.* or his Son *C.* or either of them, shall work with *B.* at the Grinding and Polishing of Glasse, *B.* paying to each of them so much, &c. and *B.* requests *C.* to work with him, &c. if he doth not, the Covenant is broke; for *B.* had the Election to require both, or any one of them, to work with him.

*2 Sid.* 107.  
*Sir Paul Neele* and *Reeve*, adjudged.

If an Obligation be conditioned to pay Money, if a Ship puts to Sea, or the Goods, or the Obligor return safe, and the Obligor dies before his Return, yet the Money is payable; for all those Things being contingent, and uncertain which of them will happen, the Law supplies the Words *which shall first happen*, and forecloses the Election of the Obligor; (a) and is not like the Case where a Man is bound to pay Money at *Lady-Day* or *Michaelmas*, and he dies after *Lady-Day*, and before *Michaelmas*.

*1 Lev.* 54.  
*Sayer* and *Glean*, adjudged.

(a) *Vide Cro. Eliz.* 380.

So where the Condition of a Bond was, that the Obligor should bring the Son and Daughter of *J. S.* at their full Age, to give such Releases as a third Person should require, the Defendant pleads that the Son is alive, and under Age; and on Demurrer to this Plea, it was held, that the Force of the Bond was not suspended till they are both of Age, because it is to be taken not conjunctively, but respectively and distributively; for the Obligor undertakes that the Daughter shall release at her full Age, as well as Son; and if she does not, the Condition is broken.

*1 Vent. Refuel* and *Coats*, adjudged.

1 Leon. 69.  
Moor 241.

If the Condition of an Obligation be to pay 30*l.* or twenty Kine, within a Month after the Death of *K.* at the Election of the Obligee, he must, at his Peril, make his Election within the Time limited; for the Obligor is not bound to tender both; but where the Condition is to pay such a Day 10*l.* in Gold or Silver, at the Election of the Obligee, if he does not make his Election before the Day, yet the Duty remains payable, being Parcel of the Penalty.

1 Mod. 265.  
adjudged by  
three Judges  
nisi against  
Windham,  
who said the  
Condition is  
not Disjunctive  
till Request  
to seal a Deed  
of Annuity;  
and that therefore  
the Obligor ought  
to pay the 300*l.*  
2 Mod. 201. S. C.  
adjudged *per totam Curiam.*

If the Condition of an Obligation be, that if the Obligor, within six Months after the Death of *B.* shall assure a Rent of 20*l.* yearly to *C.* as the Counsel of *C.* shall advise, at the Costs and Charges of *C.* if *C.* require the same; or if the Obligor shall not grant the Rent, if then he shall pay to *C.* 300*l.* the Obligation shall be void, and *B.* dies, and *C.* tenders no Grant of the Rent within the Time, the Obligor is not bound to pay the 300*l.*

2 Mod. 304.  
Wright and  
Bull, ad-  
judged.

If the Condition of an Obligation be, that the Obligor shall work out 40*l.* at the usual Prices in Packing, when the Obligee shall have Occasion for himself or Friends to employ him therein, or otherwise shall pay 40*l.* if the Obligee hath no Occasion to make use of him in Packing, he must pay the 40*l.*

## (Q) What shall excuse the Non-performance: And herein,

### 1. Of the Act of God.

1 Rol. Abr.  
449.  
Co. Lit. 206. a.  
Same Rule.  
Et vide 1 Leon. 304.

Regularly, if a Condition, which was possible at the making thereof, (a) becomes impossible by the Act of God, the Obligation is discharged.

(a) Where the Sickness of the Wife will excuse the Husband and Wife from levying a Fine, the Condition being to levy it upon the reasonable Request of the Obligee. Moor 124. pl. 270.

But for this  
vide Title  
Bail. And  
1 Rol. Abr.  
449.

If a Man be let to Mainprize, it is a good Plea at the Day when the Manucaptors ought to have the Body, &c. for the Manucaptors to say that he who was let to Mainprize was dead before the Day, so that they could not have his Body at the Day.

1 Rol. Abr.  
450.

If a Man covenants to build an House before such a Day, and after the Plague is there before the Day, and continues there till after the Day, this shall excuse him from the Breach of the Covenant, for the not doing thereof before the Day; for the Law will not compel a Man to venture his Life for it, but he may do it after.

5 Co. 22.  
Laughter's  
Case.  
Poph. 98.  
Moor 357.  
Cro. Eliz.  
398. S. C.  
The Condi-

If the Condition consists of two Parts in the Disjunctive, in which the Party hath an Election, which of them to perform, and both possible at the Time of making the Condition, and one becomes impossible afterwards, by the Act of God, this shall excuse the Performance of that and the other also; for otherwise his Election should be taken away by the Act of God.

tion being, that if *B.* aliened his Wife's Lands, if then he purchased other Lands of as good Value to his Wife and her Heirs, or should leave her the Value by his Will, then the Bond should be void, and he aliened his Wife's Lands, and before any Purchase made the Wife died, living *B.* but *Gandy* held that he ought to purchase Lands to the Heir of the Wife. Et vide *Cro. Eliz.* 277, 364. *Moor* 432, 645. 2 *Jones* 95. 3 *Keb.* 758, 761, 770. 1 *Mod.* 265. 3 *Mod.* 234.

But it has been held, where the Condition was to make the Oblige a Lease for Life, by such a Day, or pay him 100*l.* that though the Obligee die before the Day, that his Executor shall have the 100*l.* and the Ground of *Laughter's Case* was denied to be universal.

1 *Salk.* 170.  
Per *Trelby*  
Ch. Jult.

If a Condition consists of two Parts, of which one was not possible at the making of the Condition to be performed, he ought to perform the other.

5 *Co.* 22.  
*Cro. Eliz.* 780.  
S. P.

As if the Condition be to enfeoff *J. S.* or his Heirs, when he comes to such a Place, he is bound to enfeoff *J. S.* when he comes, because the other is not possible; for he cannot have an Heir during his Life, and so he had not any Election.

21 *E.* 3. 30.  
1 *Roll. Abr.*  
450.  
1 *Roll. Abr.*

If a Condition of an Obligation be to make an Assurance of certain Land to the Obligee and his Heirs, and after the Obligee dies, yet he ought to make the Assurance to his Heir; for this Copulative and his Heirs shall have the Signification of a Disjunctive.

450.  
1 *Jones* 180.  
*Palm.* 532.  
Et vide *Cro. Eliz.* 399.

If the Condition of an Obligation be to enfeoff two before such a Day, and one dies before the Day, yet he ought to enfeoff the other.

3 *Mod.* 233.  
1 *Roll. Abr.*  
451.

*N. Bendl.* 35. S. P. cont. per *Montague.*

If the Condition of an Obligation be, that whereas a Marriage is intended between *A.* and *B.* if the said Marriage takes Effect, and if *B.* the Wife survives *A.* and does not receive 300*l.* of *A.* by his Will, or by the Custom of *London*, within three Months after the Death of *A.* that then if the Obligor pays to *B.* or her Executors, 500*l.* within six Months after, the Obligation shall be void; and after the Marriage takes Effect, and *B.* survives *A.* and dies within three Months, without receiving any Thing of the said 300*l.* by the Will of *A.* or by the Custom of *London*; it seems the Death of *B.* within the three Months, shall not excuse the Obligor to pay the 500*l.* to the Executors of *B.* because it is not any disjunctive Condition of which the Obligor hath any Election to do the one or the other; but the Condition is, that if a Stranger does not pay so much within a Time, that he himself will pay another Sum, so that the Death of the Party who is to receive from the Stranger, shall not excuse the Obligor.

1 *Roll. Abr.*  
45. *Wood*  
and *Bates.*  
But 1 *Jones*  
171. S. C.  
adjudged,  
cont. per *totam Curiam.*  
*Palm.* 513.  
S. C. adjudged cont.  
and it was said that there was no Difference when the Election is in a

Stranger, or in the Obligor.

If *A.* binds himself Apprentice to *B.* for seven Years, and *B.* enters into a Bond to *A.* conditioned to pay *A.* his Executors or Assigns 10*l.* at the Time of the End or Determination of his Apprenticeship, and *A.* serves six Years, and then dies, the Money shall not be paid to his Executor, though it was objected that his Apprenticeship ended at his Death.

2 *Brownl.* 97.  
*Cheney* and  
*Sell.*  
*Godb.* 153.  
S. C. adjudged.

If *A.* enters into a Bond to *B.* conditioned that *C.* shall perform an Award to be made between *B.* and *C.* and it is awarded that *C.* shall pay to *B.* 10*l.* at *Michaelmas*, and 10*l.* at *Lady-Day*, yet because the Sum awarded is a Duty, it is as if the Condition of a Bond had been for the Payment of the Money; and if not paid, the Bond is forfeited.

2 *Leon.* 155.  
*Kingwell* and  
*Chapman.*  
*Cro. Eliz.* 10.  
S. C. adjudged.

But if the Condition of an Obligation be, that the Obligor shall enfeoff the Obligee at such a Day, and before the Day the Obligor dies, and the Land descends to his Heir, the Condition is become impossible by the Act of God, and the Performance thereof excused.

2 *Leon.* 155.  
*Co. Lit.* 218. a.  
S. P.

But it has been held in Equity, that if the Condition of a Bond be to settle certain Lands in such a Manor, by such a Day, though the Obligor die before the Day, by which the Bond is saved at Law, yet an Execution ought to be decreed in Specie.

*Eq. Abr.* 18.  
Decreed accordingly,  
and said to have been after done.

One devised to his eldest Daughter, upon Condition she should marry his Nephew, on or before she attained the Age of Twenty, the Ne-

1 *Salk.* 170.  
*Thomas* and  
*Howel,* ad-

judged in *C. B.* and affirmed in *B. R.* *Skin.* 301, 319. S. C. adjudged,

pheW died young, and the Daughter never refused, and indeed never was required to marry him; after the Death of the Nephew, the Daughter being about Seventeen, married J. S. and it was adjudged that the Condition was not broken, being become impossible by the Act of God.

## 2. Of the Act of Law.

1 Rol. Abr.  
451.

If an Annuity be granted upon Condition that the Grantee shall be Attorney for the Grantor, in all Pleas, if he be after made Sheriff, yet this shall not excuse him from the Performance of the Condition; but he ought to be his Attorney; otherwise the Condition is broken.

1 Rol. Abr.  
451.

Slade and  
Thomson,  
adjudged  
Cro. Jac.  
374.

1 Rol. Rep.  
198.

3 Bulst. 58. S. C. adjudged. Hard. 10, 11. S. P. appears, and long Argument, whether the King should be bound by the Condition.

Yelv. 207.

Roffe and  
Pie, ad-  
judged.

1 Bulst. 155.

S. C. per  
Curiam, and  
said that  
though the

Hands of the Judges were shut, and foreclosed by the *Certiorari*, yet they might have entred his Appearance. Cro. Jac. 281. S. C. adjudged, and that he ought to have procured his Appearance to be recorded.

2 Lev. 26.

1 Vent. 175.

2 Keb. 831.

S. C. ad-  
judged a-  
gainst the  
Opinion of  
Twifden.

If a Recognizance be conditioned for the Appearance of *B.* at the next Assises held for the County of *S.* and before the next Assises, *B.* sues a *Certiorari* out of the King's Bench, to remove the Recognizance, and at the next Assises delivers the *Certiorari* to the Judge, yet this does not excuse his Appearance; for though the *Certiorari* was the Command of the King, yet the Purchase thereof was the Act of *B.* and he could by no such Slight save his Recognizance.

If a Man hath good Title to Lands, by Virtue of a Fine, and sells the same, and covenants with the Vendee, his Heirs and Assigns, that he shall enjoy against him and *B.* and all claiming under him; and after by an Act of Parliament, reciting that *B.* had settled this Estate upon *C.* and that certain Persons had unduly procured the said Fine from her, it is enacted that the Fine shall be void, and that every Person may enter, as if no such Fine had been; and after one enters, claiming Title under *C.* this is a Breach of the Covenant; for the Act makes no new Title, but removes the Obstruction of the old; and it was said, that doubtless *B.* was named in the Covenant for this Purpose, in Case this Fine unduly obtained should be avoided.

## 3. Of the Act of the Parties.

8 Co. 92.

Co. Lit. 206.

S. P. Upon  
the Condi-  
tion of a  
Feoffment.

If the Condition of an Obligation be, that the Obligor shall enfeoff the Obligee of the Land, before such a Day, and after, before the Day, the Obligee disseises the Obligor, and keeps it by Force till after the Day, so that the Obligor cannot enter, this will excuse the Performance of the Condition.

1 Rol. Ab.

453. but

454. S. C.

cont. & vide

Cro. E. 374.

S. C. ad-

judg'd, it not being alledg'd that the Lessor held him out, and disturbed him in doing it. Moor 402. Owen 65. Godb. 69. (a) But if it had been a Covenant adhering to the Land, and in Respect of the Enjoyment thereof, it would have been otherwise; but then it must have been shewed that he held him out of Possession. Moor 402. pl. 534. Owen 65.

If a Man be bound to build an House, &c. he is excused if the Obligee will not suffer him to build it; for he cannot come upon the Land against his Will.

*Bro. Covenant 31.*  
*1 Rol. Abr.*

So if a Condition be to repair a House, he is excused thereof, if a Stranger, by the Command of the Obligee himself, disturbs him, and will not suffer him to do it.

455.  
*9 H. 6. 44. b.*  
*1 Rol. Abr.*  
453.

If the Condition be to erect a Mill, and after he comes to the Obligee, and says all is ready for the Erecting thereof, and demands of him when he shall come with the Mill to erect it; if the Obligee says he will not have the Mill, and intirely discharges him of the Mill, this shall excuse him of the Performance.

*3 H. 6. 37.*  
*1 Rol. Abr.*

If Lessee for Years of an House covenants to repair it, and to leave it in as good Plight as he found it, and after certain Sparks of Fire come out of the Chimney of the Lessor, into an House not much remote, by which the House of the Lessee is burnt, this will excuse the Performance of the Covenant to the Lessee; so that he is not bound to rebuild, because this comes by the Act of the Lessor himself.

*1 Rol. Abr.*  
454.

If a Lease be made upon Condition that the Lessee shall not permit or harbour any Whore within the House to him let, and that if he suffers such Woman to stay there six Weeks after Warning, &c. it shall be lawful for the Lessor to enter; and after the Lessee suffers such Woman to be there, and Warning is given him by the Lessor, although after the Lessor commands the Woman to stay there for six Weeks, yet this shall not excuse the Performance of the Condition, because the Lessor did not do any Act; and notwithstanding the Command, the Lessee might have removed her.

*35 H. 6. 162.*  
*8 Co. 91. b.*  
*Godb. 70.*  
*S. C. cited.*

to procure a Marriage between the Obligee and B. before a certain Day, and before the Day the Obligee calls B. Whore, and tells her if he marries her, he will tie her to a Post; by Reason whereof the Obligor could not procure B. to marry him, this will excuse the Non-performance. *Cro. Eliz. 694.* Admit *per Cur'*; but then it must be shewed in pleading, that the Obligor did what he could to procure her to marry, &c.

(a) If a  
Bond be  
conditioned

But if the Lessor ousts the Lessee, and with Force, and against the Will of the Lessee, puts in the Woman, and violently makes her stay there with Force, against the Will of the Lessee, for six Weeks, this shall excuse the Performance of the Condition.

*35 H. 6. 162.*  
*8 Co. 92.*

If A. is bound to B. that J. S. shall marry Jane G. before such a Day, and before the Day B. marries her, he shall take no Advantage of the Condition, because by his Means it could not be performed.

*Co. Lit. 206. b.*

If a Man makes a Feoffment in Mortgage, upon Condition to be void upon Payment of Money by the Feoffor, &c. to the Feoffee, at a Day, if at the Day, the Feoffee is out of the Realm, the Feoffor is not bound to seek him, or to go out of the Realm to him; and therefore because the Feoffee is the Cause that the Feoffor cannot tender the Money, the Feoffor may enter into the Land, as if duly tendred.

*Co. Lit. 210. b.*

If A. leases to B. for Years, upon Condition that if B. pays Money to A. or his Heirs, at a Day, that B. shall have the Fee; and before the Day, A. is Attainted of Treason, and executed; now though the Condition became impossible by the Act and Offence of A. yet B. shall not have a Fee; because a precedent Condition to increase an Estate must be performed; and if it becomes impossible, no Estate shall rise.

*Co. Lit. 218. a.*

If A. leases to B. certain Lands for Years, rendring 40*l.* per Ann. and a Stranger covenants with A. that B. shall pay unto him the 40*l.* for the Farm and Occupation of the Lands; and before any Day of Payment, A. ousts B. of his Farm, B. is excused of the Payment of the Rent; for the Covenant was, that B. should pay 40*l.* for the Farm and Occupation; so that it is a conditional Covenant; and there ought to be *quid pro quo*; and here the Consideration upon which the Cove-

*3 Leon. 159.*  
adjudged,  
*Bedel's Case.*

nant

nant is conceived, *viz.* the Farm, and the Occupation of it, is taken away by the Act of *A.* himself.

*Cro. Eliz.* 672. *A.* entred into a Bond to *B.* conditioned to save *B.* harmless from a Bond made to *C.* for Payment of 100*l.* at a Day and Place, and at the Day of Payment *A.* was going to the Place to pay it, and *B.* by Covin caused *A.* to be imprisoned till after Sun-set, to the Intent the 100*l.* should not be paid; and this being pleaded to an Action of Debt upon the Bond, it was adjudged upon Demurrer, that such a bare Surremise was no Bar.

8 Co. 76. b.  
*Strafford's*  
Case, ad-  
judged.  
2 *Brownl.*  
252. S. C.  
adjudged.

If the King grants a Reversion in Tail, upon Condition that if the Grantee pays 20*s.* at the Receipt of the *Exchequer*, &c. the Grantee shall have a Fee, if afterwards the King, under his Great Seal, refuses to receive the Money, yet if the Grantee tenders it at the Receipt of the *Exchequer*, he shall gain a Fee; for the King by no Means can countermand or hinder the Increase of the Estate in such Case.

*Hob.* 130.  
adjudged.  
So if by  
pleading it  
had been ap-  
plied to the  
Lease, &c.

If the Condition of an Obligation be, that the Obligor shall pay 10*l.* to the Obligee, which is for the Rent of certain Land, and the Obligee enters upon the Land, and so suspends the Rent, yet this shall not excuse the Payment; for it is but a Recital that it was for Rent, and not material.

*Hetley* 54.  
*Feakil* and  
*Linn*, ad-  
judged.  
So in Case  
an Obligati-

If a Parson by Indenture leases his Parsonage for Years, rendering Rent, and the Lessee covenants to pay his Rent, and before any Day of Payment, the Parsonage (*a*) is sequestred, for the Nonpayment of the First-Fruits, yet the Lessee shall not be excused of the Payment of his Rent.

on for Payment of the Rent. (*a*) Otherwise, if Lessee for Years is evicted by a prior Title. *Hetley* 54. 1 *Rol. Rep.* 198. *Yelv.* 23. *Cro. Car.* 415.

*Poph.* 39.

*Cro. Eliz.* 313.  
*Owen* 104.  
*Moor* 597.  
S. C. ad-  
judged.

If *A.* leases Lands to *B.* for Seventeen Years, and after *B.* enters into an Obligation to *A.* conditioned to pay an annual Rent to *C.* for the Term of Seventeen Years, if *C.* lives so long; and the said *B.* or his Assigns, or any claiming under him, shall or may so long enjoy the said Land, and *B.* after surrenders to *A.* yet he must continue the Payment of the Rent, because merely Collateral, and to be made to a Stranger.

*Poph.* 40.

*Owen* 104.  
*Cro. Eliz.* 313.  
Like Point  
by *Popham*;  
Bond.  
for that the

But if the Condition had been that *C.* during the Term should hold Part, without the Interruption of *B.* or his Assigns, if after the Surrender, *A.* had interrupted him, *B.* should not have forfeited his Bond.

Obligee should not take Advantage of his own Act.

22 *E.* 4. 26.

1 *Rol. Abr.*

455.

(*b*) So if he

takes him, and after within the Term, commands him to be gone. 1 *Rol. Abr.* 455.

If the Condition of an Obligation be, that the Son of the Obligor shall serve the Obligee for seven Years, if he tenders his Son, and the Obligee (*b*) refuses, it is no Forfeiture.

20 *E.* 4. 1. b.

22 *E.* 4. 26.

1 *Rol. Abr.*

448.

*Co. Lit.* 207. S. P. because the Sum mentioned in the Condition is Parcel of the Obligation; and the Obligee hath Remedy for it by Law. *Cro. Eliz.* 755. S. P. (*a*) And therefore if an Action be brought against him upon the Obligation, and he pleads the Tender and Refusal, he must also plead that he is yet ready to pay the Money, and tender it in Court. *Co. Lit.* 207. a.—But if the Plaintiff will not then receive it, but takes Issue upon the Tender, and it is found against him, he hath lost the Money for ever. *Co. Lit.* 207. a. *Hob.* 198, 199. *Noy* 110.

But if the Condition of an Obligation of 100*l.* be for the Delivery of *Co. Lit.* 207. *a.* Corn, Timber, &c. Performance of an Arbitrament, or other Act, &c. this is Collateral to the Obligation, and no Parcel of it; and therefore a Tender and Refusal is a perpetual Bar.

4. Of the Act of a Stranger.

Regularly, if the Condition be to be performed by a Stranger, and <sup>1 Rol. Abr.</sup> he refuses, the Obligation is forfeited; for the Obligor has taken upon <sup>452.</sup> him that the Stranger shall do it.

As, if the Condition be that my Son shall serve *ȝ. S.* if he will not, <sup>22 E. 4. 26. b.</sup> my Obligation is forfeited.

*A.* and *B.* submit themselves to the Award of *C.* and *A.* enters into <sup>22 E. 4. 25. b.</sup> an Obligation to *C.* to stand to the Award, and *B.* also, and *C.* awards <sup>1 Rol. Abr.</sup> *A.* to pay 10*s.* to *B.* who tenders it, and *B.* refuses, the Obligor is <sup>452.</sup> excused (*a*) because *B.* is not a meer Stranger, but privy, and so is the <sup>(a) So if a</sup> Obligee. <sup>Recogni-</sup> <sup>zance, Bond,</sup>

*ȝc.* is made to *A.* to the Use of *B.* conditioned to pay Money, &c. to *B.* and *B.* refuses, &c. *Cro. Eliz.* 755. *Cro. Jac.* 14.

But if the Condition be, that the Son of the Obligor shall marry the <sup>Hutt. 45.</sup> Daughter of the Obligee, if the Daughter of the Obligee refuses the <sup>Winch 30.</sup> Son, yet the Condition is forfeited; for the Daughter is a meer Stran- <sup>3 Bulf. 30.</sup> ger, and the Obligor hath taken upon him that his Son shall marry her.

So if the Condition (*b*) be to enfeoff a Stranger, who refuses, yet the <sup>(b) 2 E. 4. 2.</sup> Obligation is forfeited. <sup>39 H. 6. 10. b.</sup> <sup>Co. Lit. 209.</sup>

*S. P.*—But otherwise, if to be made to the Obligee, or to any other for his Benefit. <sup>Co. Lit. 209. a.</sup> *See us* where the Condition is that a Stranger shall enfeoff a Stranger. *Co. Lit.* 209. *a.*

If there be a Feoffment upon Condition to enfeoff a Stranger, if the <sup>19 H. 6. 34. b.</sup> Stranger refuses, yet the Condition is broke; because the Intent was <sup>Co. Lit. 209.</sup> not that the Feoffee should retain it. <sup>1 Leon. 266.</sup> <sup>2 Leon. 222.</sup>

But otherwise it had been if the Condition was to make (*c*) a Gift *S. P.* in Tail to a Stranger, and he refuses; for there the Intent was that he <sup>2 E. 4. 2.</sup> should have the Reversion. <sup>Co. Lit. 209.</sup> <sup>1 Leon. 266.</sup>

<sup>2 Leon. 222.</sup> *S. P.* (*c*) So if the Condition be, that he shall grant a Rent-charge to a Stranger, and he refuses, because intended the Feoffee should retain the Land. *Co. Lit.* 209.

If the Condition of an Obligation be, that whereas the Obligor and <sup>1 Rol. Abr.</sup> Obligee are jointly seised of the Office of the Court of Admiralty, if <sup>453.</sup> the Obligor shall permit the Obligee to use the said Office, and to take <sup>2 Leon. 114.</sup> the Profits thereof only to his own Use, during his Life, without Inter- <sup>3 Leon. 142.</sup> ruption made by the Obligor, then, &c. although after the Admiral dies, <sup>S. C.</sup> and the new Admiral grants the said Office to a Stranger, (as he may by <sup>Godb. 47.</sup> Law) and he interrupts and ousts the Obligee, yet if the Obligor after <sup>S. C. and</sup> this interrupts the Obligee also, the Condition is broke. <sup>S. P. per</sup> <sup>Curiam, and</sup> <sup>said whether</sup> <sup>the Obligee</sup>

occupy by Right or Wrong, the Obligor is not to interrupt him against his own Bond.

If *A.* is bound to (*d*) *B.* to pay 10*l.* to *C.* if *A.* tenders it to *C.* <sup>Co. Lit. 208. b.</sup> and he refuses, the Bond is forfeited. <sup>(d) Other-</sup> <sup>wife, if</sup>

bound to pay it to the Obligee, or his Assigns, and the Obligee appoints *C.* to receive it as his Assignee, and it is tendred to *C.* and refused by him. *Dalf.* 38.

If *A.* disseises *B.* and after leases to *C.* for Years, and *C.* covenants <sup>Cro. Eliz. 656.</sup> at the End of the Term to leave and yield up the Tenements well re- <sup>adjudged.</sup> paired to *A.* and after *B.* enters, &c. *C.* is excused.

5 Co. 23. b. adjudged, Cro. Eliz. 716. S. C. Moor 645. And Cro. Eliz. 864. S. C. cited, & vide like Point, Lit. Rep. 13. 1 Lev. 191. 1 Sid. 313. (a) So if the Condition of an Obligation be, that a Stranger shall release all the Right which he hath, or pretends to have in a certain Manor, the Obligor must procure him to make a Release *de facto*, though he hath no Right. 1 Sand. 215.

Winch 26, 69. If *A.* leases his Land for forty Years, rendring Rent, and devises the Reversion to *J. S.* in Tail, &c. provided that *B.* and his Wife shall have the Rent to their own Use till *J. S.* comes of Age, upon Condition that *B.* and his Wife, within three Months after his Death, enter into a Bond to his Overseers, for the Payment of 34*l.* per Ann. in such Penalty, and as his Overseers shall advise, and *A.* dies, *B.* and his Wife must give Notice of this to the Overseers, and at their Peril procure them to advise.

## Constable.

- (A) How chosen and appointed.
- (B) Who are obliged to serve.
- (C) Of their Power and Duty in acting without any Warrant from a Justice of the Peace.
- (D) Of their Power and Duty in executing such Warrants.

### (A) How chosen and appointed.

Of the High Constable of England, Vide Title Courts. (b) Were before the Statute of Winchester, 2 Hawk. P. C. 61. 4 Inst. 267. Vide Somner's Antiquities of Canterbury. Lamb. Constable 8. Vide Stat. 13 & 14 Car. 2. cap. 12.—By Common Law, they are to be chose by the Lect or Torn. 4 Inst. 265.—And by 2 Hawk. P. C. 62. it is difficult to determine to whom the Power of choosing them doth of common Right belong; for by Dalt. Sheriff 400. 1 Rol. Rep. 34. both High and Petty Constables are to be chosen and appointed by the Sheriff, in his Torn; and by 2 Jones 212. Lamb. Constable. 8 Salk. 175. They are to be chosen by the Decennary; but it seems clear, that whether a Constable be to be chosen by the Sheriff or Decennary, yet he is to be sworn and placed in his Office by the Sheriff, as being Judge of the Court. Also it seems certain, that a Custom either Way is good. 2 Hawk. P. C. 62. and that a Sheriff or Steward, having Power to place a Constable in his Office, have by Consequence a Power of removing him. 1 Bulst. 174. 2 Hawk. P. C. 63.

admitted by the Lord or his Steward, in his Leet; but where there was no such Feudal Lord, the Sheriff in his Torn had the swearing and placing of them in; also if there was no Feudal Lord of the Hundred, an annual Officer was chosen, who was to preside over the whole Hundred, who was called the High Constable; but if the Hundred was Feudal, as it often antiently was, then such Lord of the Hundred administered the Office himself.

It seems by the better Opinion, that a Custom in a Town, that the Inhabitants thereof shall serve the Office of Constable by Turns, is good, and that the Objection, that by such Means it may come to a Woman's Turn to serve, is of no Force, since she is allowed to make a Deputy, or procure one to serve for her, who shall be considered as the proper Officer.

Also the Office of Constable being necessary for the Preservation of the Peace, Justices of the Peace, have by an uninterrupted Usage, not now to be disputed, taken upon them not only to swear Constables who have been chosen at a Torn or Leet, but also to nominate and swear Constables, where none have been sworn at such Courts, through the Neglect of the Sheriff or Lord, and also to (a) displace those who have been so chosen; and this Point has been carried so far as to allow the Sessions of the Peace to swear one Constable who had been elected at the Leet, and unduly rejected by the Steward, who had sworn another in his Place.

And by the 13 & 14 Car. 2. cap. 12. par. 15. reciting, "That the Laws and Statutes for apprehending Rogues and Vagabonds, had not been duly executed, sometimes for want of Officers, by reason Lords of Manors do not keep Court-Leets every Year for making of them; it is enacted, "That in Case any Constable, Headborough, or Tithingman, shall die, or go out of the Parish, any two Justices of the Peace may make and swear a new Constable, Headborough, or Tithingman, until the said Lord shall hold a Court, or until next Quarter-Sessions, who shall approve of the said Officers so made and sworn as aforesaid, or appoint others, as they shall think fit; and if any Officer shall continue above a Year in his or their Office, that then in such Case the Justices of the Peace in their Quarter-Sessions may discharge such Officers, and may put another fit Person in his or their Place, until the Lord of the Manor shall hold a Court as aforesaid.

The Justices of the Peace of the County of Northampton, at their General Sessions chose a Constable for *Holmby*, and for not coming in to take the Oath, proceeded against him; which Proceedings being removed by *Certiorari* into *B. R.* it was moved on Affidavits, that there had not been a Constable there for fifty Years before, that he might be discharged, alledging likewise, that *Holmby* was a privileged Place, and that all the Inhabitants were the Duke of York's Tenants: But the Court held, that they (b) could not discharge him on Motion, and said, That they must determine the Matter by Action of False Imprisonment, or some other Way, and inclined strongly, that he could not any way be discharged; for *per Cur'*, Though originally Constables were chosen in Leets, yet the Constable being an Officer, whose Duty it is to keep the Peace, the Justices may chuse him in Cases of Necessity; as in the Hamlets about the *Tower*, the Justices, by reason of the Increase of Buildings, where there was formerly but one Constable, did chuse five; and it was ruled they might do so; and they seemed to incline, that though formerly there had been none, yet they might chuse one if they should think it convenient.

of awarding a *Mandamus* where it shall be necessary. *Vide* 1 *Rol. Abr.* 535. 2 *Rol. Rep.* S2. 2 *Hawk.* P. C. 65.

*Cro. Car.* 567. A Person duly elected Constable, refusing to take upon him the Office, *Co. Ent.* 572. may, if present, be (a) fined by the Court, and if absent, on having a certain Time and Place appointed him for the taking of the Oath before *5 Mod.* 130. a Justice of Peace, may, after Notice of such Appointment and Present- *Salk.* 175. (a) But cannot, at the next Court, be amerced. *8 Co.* 38. not be law- fully committed without more. *2 Hawk. P. C.* 64.

*2 Hawk. P. C.* 64. Also in either Case he may be indicted, either before Justices of *Oyer* and *Terminer*, or at the Sessions of the Peace; but such Indictment ought specially to set forth the Manner of every such (b) Election, Appoint- (b) That it is insufficient to say in general, that the Party was *debito modo electus*, or *Legitime electus*. *5 Mod. Rep.* 96, 129. adjudged. (c) That the Special Circumstances of such Notice must be set forth. *Allen* 78. *5 Mod.* 96, 130. *1 Keb.* 418. ad- judged. (d) *1 Mod.* 24. *vide 2 Sand.* 290.

*1 Keb.* 416. Neither is an Indictment, for not finding a sufficient Person to serve the *2 Hawk. P. C.* 64. Office of Constable, good, unless such Indictment shew that the Party re- fused to serve it himself.

## (B) Who are obliged to serve.

*Vide Title Privilege.* *(e) Noy* 112. *March* 30. *Cro. Car.* 389. *2 Keb.* 477. *(f) That Practising Barristers at Law,* and the Servants of Members of Parliament, have the same Privilege. *1 Mod.* 22. *2 Keb.* 578. *1 Mod.* 13. *(g) 2 Keb.* 508. *Cro. Car.* 389. *1 Lev.* 265, 266. *2 Hawk. P. C.* 63.

*Alderman Abdy's Case.* *Cro. Car.* 585. *1 Jones* 462. *S. C.* So if an Alderman of *London* has an House at *D.* in the County of *Effex*, and he as an Inhabitant there is chosen Constable, yet he is not compellable to serve, for that as an Alderman he is bound to be present in the City, for the good Government thereof.

*Vide Keb.* 309. *1 Sid.* 272, 355. *1 Lev.* 233. *1 Keb.* 933. But a Captain of the King's Guards being presented to serve as Con- stable, in Pursuance of a Custom in respect of his Lands in a Town, cannot claim this Privilege; for though by his Office he is bound to a Personal Attendance on the King, yet such Office being of late Institu- tion, shall not prevail against an antient Custom.

*2 Hawk. P. C.* 63. *(b) 1 Keb.* 439. *cont.* *2 Keb.* 578. Yet if such an Officer, or a (b) Gentleman of Quality, who hath no such Office, or a practising Physician be chosen Constable of a Town, which has (i) sufficient Persons besides to execute this Office, and no Special Custom concerning it, perhaps he may be relieved by the King's Bench.

*(i) But no Privilege can exempt fitting Persons from serving the Office of Constable, where there are not suf- ficient besides them to execute it. 2 Hawk. P. C.* 63. *1 Sid.* 272. *1 Keb.* 933. *Vide Title Privilege.*

*Vide 2 Keb.* 578. By the *5 H. 8. cap. 6.* "The Wardens and Fellowship of Surgeons "infranchised in *London*, and all Barber Surgeons admitted and ap- "proved according to the Statute made in that Behalf, not exceeding "the Number of Twelve, shall be discharged of Constableship and "Watch, &c.

By the 32 *H. 8. cap. 40.* " The President of the Commonalty and Fellowship of Physick in *London*, and the Commons and Fellows of the same, shall not be chosen Constables in the City of *London*, or Suburbs of the same, &c.

By the 6 *W. & M. cap. 4.* " All Persons using the Art of an Apothecary, who have been brought up and served as Apprentices in the said Art for seven Years, according to the Statute of 5 *Eliz.* shall be freed and exempted from the Office of Constable.

*A.* was indicted for not taking on him the Office of High Constable; and the Question on a Special Verdict was, Whether a Tenant in ancient Demesne may be made Constable of an Hundred, which reaches farther than the Demesnes; and it was adjudged that he might.

*2 Show. 75. The King and Bettesworth. 1 Vent. 344. S. C. adjudged.*

**(C) Of their Power and Duty in acting, Without any Warrant from a Justice of the Peace.**

**A**S Constables were originally instituted for the better Preservation of the Peace, they may by the Common Law arrest Felons, and all suspicious Persons that go abroad in the Night, and sleep by Day, or resort to Bawdy-Houses, or keep suspicious Company.

Also by the (*a*) ancient Common Law, the Constable was to Present at the Tourn or Leet, all those within his Precinct who were not admitted into some Thing, and who had not sworn to the King's Allegiance; and it seems, that by (*b*) the Law in use at this Day, he ought to present (*c*) all Offences inquirable in the Tourn or Leet.

*(a) Lamb. Constable 5, 6. 45 E. 3. (b) Crompt. 212. Dalt. Sheriff*

388. See *Raft. Ent. 151.* (*c*) Yet in the Oath set down by *Kitchen 47.* he only swears to present all Bloodsheds, Outcries, Affrays and Rescous done within his Office.

A Constable is not only impowered, as all private Persons are, to part an Affray in his Presence, but is bound at his Peril to endeavour it, not only by doing his utmost himself, but also by demanding the Assistance of others, which they are bound to give him under Pain of Fine and Imprisonment.

*3 Inst. 158. H. P. C. 135. Lamb. 132. Dalt. cap. 8.*

And it is said, That if he see Persons actually engaged in an Affray, whether the Violence were done or offered to another, or even to himself, or see them upon the very Point of entering upon an Affray; as where one threatens to beat another, &c. he may either carry the Offender before a Justice of Peace, in order to his finding Sureties for the Peace, &c. or may imprison him himself a reasonable Time till the Heat be over, and afterwards detain him till he give such Surety by Bond; but he seems to have no Power to commit the Offender in any other Manner, or for any other Purpose, for he cannot commit him to Gaol till he shall be punished; neither ought he to lay Hands on those who barely contend with Words, without any Threats of Personal Hurt; but all he can do in such Case, is to command them, under Pain of Imprisonment, not to fight.

*Lamb. 132. Dalt. c. 1, 8. Bro. Surety 23, 36. Cro. Eliz. 375. 9 E. 4. 26. a. Moor 284. 22 E. 4. 35. b. 10 E. 4. 18. 5 H. 7. 6. a. Savil 97. 1 Rol. Rep. 238. 2 Bullst. 329.*

If an Affray be in a House, the Constable may break open the Doors to preserve the Peace, and if Affrayers fly to a House, and he freshly follow, he may break open the Doors to take them.

*Dalt. cap. 8. 67. 13 E. 4. 9. a. 7 E. 3. 12. b.*

But he cannot of his own Authority compel a Man to find Sureties who is delivered into his Hands, as having broken the Peace in his Absence, but ought to carry him before a Justice of the Peace; neither can he

*H. P. C. 92. 135. Lamb. 133. Cro. Eliz. 375. Owen 105.*

he arrest a Man for an Affray out of his View, without a Warrant from a Justice of the Peace, unless a Felony were done, or likely to be done.

*Moor* 284.  
2 *Hawk. P.*  
C. 77. And  
so may a pri-  
vate Person.

If a Constable see a Person expose an Infant in the Street, who refuses to take it away, he may lawfully apprehend and detain such Person till he or she shall consent to take Care of it.

### (D) Of their Power and Duty in executing the Warrants of Justices of the Peace.

**A**S the Constable is the proper Officer to a Justice of Peace, he is bound to execute his Warrants. Hence it hath been (a) resolved, that where a Statute authorizes a Justice of the Peace to convict a Man of a Crime, and to levy the Penalty by Warrant of Distress, without saying to whom such Warrant shall be directed, or by whom it shall be

(a) 5 *Mod.*  
130.  
*Salk.* 175.

(b) *Salk.* 381.  
2 *Rol. Rep.* 78.

executed, the Constable is the (b) proper Officer to serve such Warrant, and indictable for disobeying it.

1 *Rol. Abr.*

591.  
*Moor* 845.  
*Crompt.* 222.  
3 *Bulst.* 77.  
*Dalt. cap.* 1.

Yet in as much as the Office of Constable is wholly Ministerial, and no way Judicial, it seems that he may appoint a Deputy to execute a Warrant directed to him, when by Reason of Sickness, Absence or otherwise, he cannot do it himself, but without some such special Cause a Constable cannot make a Deputy.

1 *Rol. Rep.* 274. 1 *Sid.* 355. 1 *Lev.* 233. *March* 30. 2 *Keb.* 309.

1 *Salk.* 176.  
*Carth.* 508.

If a Warrant be directed generally to all Constables, no one can execute it out of his own Precinct; but if it be directed to a particular Constable by Name, he may execute it any where within the Jurisdiction of the Justice.

6 *Co.* 54.  
9 *Co.* 69.

A sworn Constable, in executing a Warrant, need not shew it to the Party, although he demand a Sight of it; but in making an Arrest he ought to acquaint him with the Substance of it.

*Dyer* 244.  
*Fitz. Bar.* 248.  
*Crompt.* 149.  
2 *Keb.* 705.

An unlawful Arrest without a Justice's Warrant, cannot be made good by a Warrant taken out afterwards.

*Crompt.* 148.  
2 *Keb.* 206.

If the Constable, after he hath arrested the Party by Force of a Warrant, suffer him to go at large on his Promise to return again, he (c) cannot, by Force of the same Warrant, arrest him again.

*Dalt. cap.* 117. 13 *E. 4.* 9. a. (c) But by the better Opinion, if the Party voluntarily returns into Custody, the Constable may lawfully detain him, and bring him before the Justice, in Pursuance of the Warrant. 2 *Hawk. P. C.* 81.

14 *H. S.* 16.  
*Crompt.* 147,  
148, 149.

A Constable cannot justify an Arrest by Force of a Warrant from a Justice of the Peace, which expressly appears in the Face of it to be for an Offence whereof a Justice of Peace hath no Jurisdiction, or to bring the Party before him at a Place out of the County for which he is a Justice.

*Dalt. c.* 117.  
2 *Hawk. P.*  
C. 81.

But it seems that he ought to execute a general Warrant to bring a Person before a Justice, to answer such Matters as shall be objected against him on the Part of the King.

But for this  
*vide* 2 *Hawk.*  
*P. C.* 81, 82.  
*Sk. n.* 568.  
And how far  
a Constable  
may execute  
a general  
Warrant to  
search for

Also by the better Authorities it seems holden, that it is not material whether the Party arrested by Virtue of a Warrant from a Justice of Peace, were guilty or innocent, or whether the Felony, &c. were actually committed or not; for it would be a great Discouragement to Officers, to subject them to Actions in such Cases, for doing what they apprehend to be their Duty; and the Liberty of the Subject seems sufficiently secured by subjecting the Justice to an Action.

Felons or stolen Goods. 2 *Hawk. P. C.* 82.

## Coparceners.

In *Coparcenary* these Things are to be considered,

- (A) The Nature and Reason of such Inheritance.
- (B) The Nature of such Estate, both in respect of their own Actions, and Actions brought by Strangers.
- (C) Of a Partition, when the Things are dividable or intire, and the Manner thereof.
- (D) Of Partition by the Writ de Partitione facienda.
- (E) Of Hotchpot, and the Nature and Incidents of this kind of Partition.
- (F) Of the Nature and Incidents of their Estate after Partition made.

### (A) The Nature and Reason of such Inheritance.

**I**F one seised of an Estate of Inheritance die, leaving only Daughters, Sisters, Aunts, or other Females of Kin in equal Degree, and the Estate descends to any of these, they are said to hold in *Coparcenary*, and to make but one Heir to their Ancestor.

*Bracton, lib. 2. cap. 30. Co. Lit. 241.*

In this Inheritance sometimes the Descent is *in Capita*; as where a Man hath Issue two Daughters, and dies, the Descent is *in Capita*; therefore each shall inherit alike; and sometimes the Descent is *in Stirpes*; as if a Man hath Issue two Daughters, and dies, and the eldest Daughter hath Issue three Daughters, and the youngest one Daughter; all these four shall inherit, but the Daughter of the Youngest shall have as much as the three Daughters of the Eldest.

*Co. Lit. 164. b.* This came over to us from the Civil Law, and they took the Descent *in Stirpes* from

this Reason, that the Child was intitled to his Portion by the Law of Nature during his Father's Life, though he was not to possess it, or be a compleat Heir according to the Civil Law of the Country, till after his Death; and that founded the Fiction, that the Children should stand in the Place that he possessed.

If a Man hath Issue two Daughters, and the Eldest hath Issue several Sons and Daughters, and the Youngest hath Issue several Daughters, the eldest Son of the eldest Daughter, shall only inherit his Ancestor; but all the Daughters of the Youngest shall hold their Mother's Moiety in *Coparcenary* with him.

*Co. Lit. 164. b.*

If a Man seised of Lands in Fee, hath Issue two Daughters, and one of them is attainted of Felony, and the Father dies, both Daughters being alive, one Moiety shall descend to the innocent Daughter, and the

*Co. Lit. 163.* For in the first Case the other Lord by Escheat must

make a Title to devise the Estate, which was once lawfully vested in the Ancestor, which he cannot do, because there is no Defect, in this Case, since the Ancestor may be legally represented, and the innocent

innocent Daughter may legally represent; and therefore there can be no Title in the Lord to evict that Moiety, though he has Title to the Moiety of the offending Daughter, who after her Crime can represent no Man; but in the second Case the Sisters are to make Title to the Remainder, which they cannot do, because to make Title to the Remainder, they must bring themselves within the Words of the Donation, and the innocent Daughter cannot take upon her the Character of an Heir alone, since they both make but one Heir to the Ancestor, and both cannot join, because one is attainted and incapable of that Character.

### (B) The Nature of such Estate, both in respect of their own Actions, and Actions brought by Strangers.

*Co. Lit. 164.* **P**arceners, in respect of their Ancestor make but one Heir; and therefore to recover the Possession of their common Ancestor, they must join in the *Præcipe*; so when they come into Possession before Partition, they are seised of an undivided Possession, though having a Right to a Writ *de Partitione facienda*, they have a Right to sever and divide the Possession that before was joint in them.

*5 Mod. 141. Mich. 7 W. 3.* In Replevin, the Plaintiff declared for taking of Bricks, &c. and the Defendant made Conuzance as Bailiff to one *John Bennet* and *Grace* his Wife, setting forth, That one *Simon Bennet* was seised in Fee of the Lands, &c. and made a Lease thereof for forty Years, rendring Rent, and died, and the Lands descended to his Daughters and Co-heiresses, one whereof married the said *John Bennet*, and the other was the Countess of *Salisbury*, and so made Conuzance for a Moiety of the Rent; and upon Demurrer Judgment was given for the Plaintiff, because one Coparcener cannot make Avowry for a Moiety of the Rent before Partition, though they have several Inheritances. *1 Salk. 390. S. P.* adjudget between *Stedman* and *Pates*, where it is stated, That the Defendant made Conuzance as Bailiff to the Countess of *Salisbury*.

*Co. Lit. 164. a. 2 Keb. 700. Bro. Tit. Several Prec. (1).* If Co-heirs are disseised before Partition, their Possessory Action must be joint, for their Remedy must follow the Nature of their Possession, and that being joint, it must be joint too; but if they had made Partition before the Disseisin, then their Possessions would have been several, and then they could not have Recovered by a joint *Præcipe*, or on a joint Demise in an Ejectment.

*Co. Lit. 164. a. Bro. Tit. Several Prec. (1). Joinder in Action 43.* But where a joint Right descends from one common Ancestor, as where a Man is disseised and leaves two Daughters, there they must both join in an Action, and so must their Issue, if they die before Recovery of their Right, because their Remedy must follow their Right. *Co. Lit. 164. a.*

Two Parceners in Tail alien and die, leaving Issue, the Issue of each shall have a several Remedy, and when one of them Recovers, the other cannot enter with him, because the Alienation of their several Ancestors amounted to a Partition; for by such Alienation each conveyed distinctly and separately that Moiety which belonged to her, and so broke and divided the Estate. Bro. Tit. Co. par. (2).

Though Parceners before Partition have one intire Freehold in respect of any Stranger's *Præcipe*, yet to many Purposes among themselves, they have in Judgment of Law several Freeholds; for each Parcener, where there are two of them, has really but a Title to a Moiety of the Land, and is not, as in Case of Jointenancy, seised *per my & per tout*; the same Law holds, where there are more Parceners; for in such Case each has but a Title, in Judgment of Law, to her Proportion; therefore Parceners may enfeoff each other of their Share, as well as convey it to Strangers. Co. Lit. 164.

The Parol shall demur during the Minority of one of the Daughters, because both of them must be in Court, to demand, as one Heir to their Ancestor, and the Infant cannot appoint an Attorney to continue the Suit in Court for her. Co. Lit. 164.

If one Coparcener enter upon the Discontinuee of their Ancestor, and is afterwards disseised by him, and thereupon brings an Assise, and recovers by false Verdict, the other Coparcener may enter and hold in Coparcenary with her; for tho' the Action was not well laid, yet she recovered as Heir to the common Ancestor, and consequently under that Title which is common to both the Parceners, since they both make but one Heir to the common Ancestor. 2 Rol. Abr. 254. 1 And. 243.

So if two Parceners bring a *Formedon*, and one of them is summoned and severed, and the other recovers a Moiety, and enters by Execution, the severed Parcener shall enter with the other, and enjoy the Land in Parcenary, for the Severance is only an Order of the Court for disuniting joint Interests, when one of the Parties is negligent in prosecuting or defending, and not a Disheirson; therefore the severed Parcener may well enter into the Land which the other recovers as Heir to the common Ancestor, since both make but one Heir to him; otherwise if the Person summoned and severed releases or aliens her Part, for then she has departed with all her Title to the Inheritance, and consequently can never pretend to any Share in an Interest which she has thus conveyed away to another. 1 And. 242, 243. Bro. Tit. Co. par. (2).

### (C) Of Partition, When the Things are Indivisible or intire, and the Manner thereof.

A Villain is an Inheritance indivisible in its own Nature; yet if he descend to Coparceners, the Profit of him may be divided; as one of them may have the Service of him one Day, one Week, or the like, and the other another Day, Week, &c. Co. Lit. 164. b.

So an Advowson is in it self intire; yet in Effect the same may be divided between Parceners, for they may agree to Present by Turns; however, this was held only a Partition of the Presentation, for the Advowson continued in the Right of Coparcenary, and they must all have join'd after such Partition in a Writ of Right of Advowson; but since the Statute 7 A. if their Joining does not seem necessary. *Vide Com. In-cum.* 72. Co. Lit. 164. b. 2 Rol. Abr. 255. If a Partition be made of a Manor to which an Advowson belongs, with-

out Mention made of the Advowson, it shall remain in common among them. F. N. B. 62.

- Co. Lit.* 164. A Rent-charge is partible among Co-heirs, and by the Act of Law the Tenant is subject to their several Distresses, which is no Injury to him if he punctually discharge his Duty, since he is not thereby burthened with an Increase of Rent.
- Co. Lit.* 165. a. Reasonable Estovers, as House-boot, Hay-boot, &c. appendant to a Freehold, Corody in certain, granted to a Man and his Heirs, a Piscary incertain, or Common *sans Number*, cannot be divided between Co-heirs, because a Partition of them would enlarge the original Grant beyond the Intention of the Grantor, and likewise prove a greater Charge than was originally intended to the Tenant of the Soil; but the Manner of enjoying them among Co-heirs, is commonly settled in the following Method. If any other Inheritance descends to them besides, then the Eldest only shall take them, and the Rest shall have a Contribution or Allowance in Value out of the other Inheritance which descended to them; but if no other Inheritance descended to them, then one shall take the Estovers, Piscary, &c. for a fixt Time, as a Month, a Year, &c. and the other for the like Time after, which will effectually secure the Owner of the Soil from any Prejudice; or in Case of the Piscary one may have the first Fish, the other the second, &c. or one of them may have the first Draught, and the other the second, &c.
- 2 Rol. Abr.* 255. *Co. Lit.* 165. a. So in Case of a Park or Mill, which cannot be divided, the one to have the first Beast, the other the second, &c. and in Case of the Mill, the one to have it for a Time certain, and then the other for the like Time; or the one to have the first Toll-dish, the other the second, &c.
- But this If there are three Coparceners of a Manor who make Partition, each must be understood of a Partition before the Statute of *Quia Emptores*; for though that Statute allows of the Creation of a Rent to make Partitions equal, yet it will never allow the Erection of new Manors by Partition, made of an old Manor, since such Partitions, as appears, may be equal without such new Creations. *Dav.* 61. *2 Rol. Abr.* 257. *6 Co.* 69.
- Co. Lit.* 165. a. *2 Rol. Abr.* 254. *cont.* If an Earl hath his Dignity to him and his Heirs, and dies, leaving only a Daughter, the Dignity shall descend to the Daughter; for it is agreeable to the original Intention of the Grant, to devolve it on such single Person; but if there had been several Daughters, though the Possessions of the Earldom, like other Lands, should be divided among them, yet the Dignity it self shall return to the Crown, who may confer it on which Daughter they please; but no Partition can be made of it between the Daughters, because it is not partible in its own Nature; for that would be to make several Honours out of one, contrary to the Grant; and the eldest alone cannot have it, because all make but one Heir; therefore to prevent Disputes, it returns to the Crown from whence it proceeded.
- Co. Lit.* 165. But there is a Difference between a Dignity or Name of Nobility, and an Office of Honour; for if a Man holds a Manor of the King to be High Constable of *England*, and dies, having Issue two Daughters, this Office shall not return to the Crown; for if it should return to the Crown the Manor must go with it, which would destroy the Grant it self; therefore if the eldest Daughter marries, her Husband shall exercise the Office alone, and before her Marriage it shall be exercised by some sufficient Deputy.
- Co. Lit.* 165. a. *2 Rol. Abr.* 254. A Co. If a Castle, used for Defence of the Realm, descend to two or more Co-heirs, this shall not be divided, because that would expose it to the Circumvention of Enemies, when the Garrison was under distinct Interests and Powers; but a Castle designed only for private Use may be divided. *Co. Lit.* 164. b. A Reversion may be divided, *viz.* That one shall have the Reversion of so many Acres, and the other the Reversion of other Acres. *E. N. B.* 62.

*A.* seized of the Manor of *D.* in Fee, by Indenture inrolled bargains, *Co. Lit.* 164. b  
 &c. the same to *B.* in Fee, provided always, and the said *B.* does cove- 165. a.  
 nant, &c. to and with the said *A.* his Heirs and Assigns, that he the said 1. Lord M. ut.  
*A.* his Heirs and Assigns, may dig for Ore in the Lands (which were 2. j. y's Case  
 great Wastes) Parcel of the said Manor, and dig Turf also for the  
 making of Allom; and three Points were resolved. 1st, That this did  
 amount to a Grant of an Interest and Inheritance to *A.* to dig, &c.  
 2dly, That notwithstanding this Grant, which is like Common *sans Num-*  
*ber*, *B.* and his Heirs may dig also; for the Grant is not framed so as to ex-  
 clude him. 3dly, That *A.* may assign his whole Interest to one, two or  
 more; but then they can make no Division of the Interest so assigned,  
 for that would be a Surcharge to the Tertenant, but they must work to-  
 gether with one Stock; and for this Reason *A.* cannot assign Part of his  
 Interest in the Waste, and retain another Part to himself; the plain Con-  
 sequence of those Resolutions is, That if this Inheritance descend to  
 Coparceners, it is not partible among them.

Coparceners may voluntarily agree according to their Numbers to make *Lit. Sect.* 245,  
 Partition; as if there be two of them, to divide the Tenements between 244, 245.  
 them in two Parts, in Severalty and of equal Value, and they may  
 chuse certain Friends to make Partition in the Form aforesaid; in which  
 Case the Eldest shall chuse first, and so on according to the Priority of  
 Age, unless it be otherwise agreed among them; for they may agree that  
 one shall have such Tenements, and another such, &c. without any  
*primier* Election; so if by common Agreement the eldest Sister makes  
 Partition in the Form mentioned, to prevent Partiality, she shall chuse  
 last.

This Part, which the Eldest takes by Virtue of her Priority of Age, is *Lit. Sect.* 245;  
 called the *Enitia pars*, and is purely Personal, so that it differs from any *Co. Lit.* 166.  
 Privilege which the Law gives the Eldest without her Act, for such a *Kelw.* 1. a.  
 Privilege shall descend; as if there be two Parceners of an Advowson, and *49. a.*  
 they cannot agree to Present, the Law gives the first Presentment to the *2. And.* 21.  
 Eldest, and this Privilege shall descend to her Issue; nay, her Assignee  
 shall have it, and so shall her Husband, who is Tenant by the Curtesy;  
 and the Reason of this Difference is, because the *Enitia* is only the ho-  
 norary Respect paid to Age among Equals; but where it is not a Respect  
 merely to Age, nor purely Honorary, but a real Benefit, there it shall  
 descend, not only to the Issue, but shall go to the Assignee and Tenant  
 by the Curtesy; for since they come in the Place of the Person in whom  
 it first vested, they are entitled to all the Benefits the Law gave him, but  
 the meer respect to Age was only Personal.

There is another Manner of voluntary Partition or Allotment, and *Lit. Sect.* 246.  
 that is, when after Partition each Division is written in a little Scroll,  
 and that is covered all over with Wax like a little Ball, so as the Scroll  
 cannot be seen, and then all the Balls are put into a Hat, to be kept in  
 the Hands of an indifferent Person, after which the eldest Daughter  
 draws first, and then the Rest according to their Seniority.

Coparceners may agree to make Partition for Life, or for a fixt Term *F. N. B.* 62.  
 of Years; for private Persons, for their own Convenience, may make  
 Contracts to bind themselves, as long as those Contracts are consistent  
 with Law.

If two Houses descend to two Parceners, one worth 20 *s. per Annum*, *Lit. Sect.* 251,  
 and the other but 10 *s.* each Parcener shall have a House, but she that *252. Note;*  
 has the House worth 20 *s. per Ann.* shall pay to the other and her Heirs *To these*  
 5 *s. per Ann.* thereout, that the Partition may be equal, and Distress *Grants no*  
 may be of common Right, for this 5 *s. per Ann.* into whose Hands so- *Deed is ne-*  
 ever the House comes. *cessary, tho'*  
*a Rent be*  
*granted by*

Equality of Partition. *Co. Lit.* 169. a. But in Exchange a Deed is necessary; so when Jointenants  
 make Partition. *Co. Lit.* 169. 2 *Rel. Abr.* 255.

2 *Rol. Abr.* 257. Rent granted for Equality of Partition shall go in Coparcenary; and if such Rent be granted to two Sisters, it shall not survive. *Bro. Tit. Copar. (6). Co. Lit. 169. b.* If two Coparceners, says my Lord Coke, alien by Deed indented, both their Parts to another in Fee, rendering a Rent to them two and their Heirs, they are not Jointenants of this Rent, but shall have it in a Course of Coparcenary. *Co. Lit. 169. b.* But *Q.* for the 38 *E. 3. 26. b.* which he cites to warrant this Opinion, seems to maintain the contrary; for this Rent being newly created by the Deed, and a new Purchase must be governed by the Words thereof; and of this Opinion he himself seems to be. *Co. Lit. 12. b.*

*Lit. Sect. 255.* If two Parceners of Land in Fee, at full Age, make an unequal Partition, yet it shall bind them; for as the Lands being in Fee may be aliened, so they may be disposed of by Partition; besides, the Parties being of full Age are presumed to know what they do, and therefore their Acts are binding upon them.

*Lit. Sect. 258.* But if one of them had been within Age, it would not have bound, for though Partition, if equal, will bind an Infant, because compellable to make Partition, and whatever one is compellable to, may be done by the same Person voluntarily, yet when the Partition is unequal, and the lesser Part allotted to the Minor, this shall not bind her; for then the Security which the Law has provided for Infants, to prevent their being over-reached, would be usefess.

But yet such unequal Partition is not absolutely void, but the Infant has Election either to affirm it at full Age, by taking the Profits of the unequal Part allotted to her, or to avoid it, either during her Minority, or at full Age, by entering into the other Part with her Sister.

*Co. Lit. 171.* But *Q.* if she takes the Profits after full Age, of an exact Moiety of the Whole, what Effect this will be of.

2 *Rol. Abr.* 256. A *Prochein Amy* may make Partition on Behalf of an Infant, and it will bind the Infant, if equal; for the *Prochein Amy* is appointed by the Law to take Care of the Inheritance of the Infant, and this Separation and Division of his Part from what belongs to another, is so far from being a Prejudice to the Infant, that it is really for his Benefit and Advantage.

*Co. Lit. 173. b.* If a Partition between Parceners of Tailed Lands be equal when it is made, no Alienation by one of them after shall avoid it, or let in her Issue upon the other, because they were at first compellable to make Partition, and the Partition they did make was binding, because it was just and equal.

But if such Partition be unequal, tho' they are bound by it during their own Lives, yet the Issue of the Coparcener, who had the lesser Part allotted to her, is not bound, but may enter and occupy in common with his Aunt.

*Lit. Sect. 260.* If Lands in Fee and in Tail, of equal Value, descend to *A.* and *B.* as Coparceners, who make Partition, and *A.* has all the Fee-simple Lands, and *B.* the Tail, the Issue of *B.* cannot avoid the Partition as to the Fee-simple Lands; but the Issue of *A.* may avoid the Partition as to the Lands in Tail, if *A.* aliens any Part of the Fee-simple Lands; for the Issue of both having *per formam Doni* an equal Right to the Tailed Lands, the Act of their Ancestor, unless an Equivalent be left to descend, shall not bar them of such Right; but as to the Fee-simple Lands, the Allotment thereof by *B.* to *A.* was equivalent to an Alienation of *B.*'s Part therein, which would have bound her Issue; but if *A.* had left the

may be Docketed by a Common Recovery; but if *A.* had made only a Lease for Life it would be otherwise; because the Tenant for Life could not hurt the Reversion. *Co. Lit. 173. a.* And in this Case, if a Writ of Partition had been brought, neither of the Coparceners would have been obliged to take all the Tailed Lands, but they and the Fee simple Lands would have been divided in Moieties equally between them, to avoid the Inconveniencies that might happen upon allotting the whole Tailed Lands to one. *Co. Lit. 173. b.*

whole Fee-simple Lands to descend to her Issue, then such Issue could not avoid the Partition, because a full Recompence descended to him, and also, because it would be unjust that he should defeat the Partition for the Tailed Lands, when the Issue of *B.* is bound and cannot avoid the Partition for the Fee-simple Lands.

If Parceners of *non sane* Memory make Partition, unless it be equal, it shall only bind the Parties themselves, but not their Issue: 2 Rol. Abr. 256. And the Reason that

it binds the Parties themselves, is the same that all other Contracts bind them.

If two Parceners seized in Fee take Husbands, and the Husbands make Partition equally in Value, this shall bind the Wives and their Heirs, because being compellable by Law to make Partition, they may by Agreement make it without Process of Law; but if the Partition had been unequal, the Wife who suffered by the Inequality might have avoided it after his Death, and so might her Heirs. Lit. Sett. 257. Co. Lit. 171. a. 11 Aff. p. 23. 8 Co. 101. b.

If two Coparceners, and one of them lets her Part to another for Years, and after on a Writ of Partition brought against the Lessor, too little is allotted to the Lessor, some hold, that the Lessee cannot avoid it, because he will not be allowed to object Partiality to Men on their Oaths, and to the Proceedings of a Court of Justice thereon; but if two Parceners are of three Acres of Land, each of equal Value, and one Coparcener lets her Part, and after they agree to make Partition, and one Acre is only allotted to the Lessor, the Lessee is not bound by it, but may enter and take the Profits of another half Acre, which justly belongs to him, for the gross and apparent Partiality of the Partition. Co. Lit. 46 a. Dyer 52. a.

A Partition that shall bind on Account of its Equality, must not only be founded on an Equality in the Value of the Land, but likewise on an Equality of Advantage and Profit redounding from each Share to the several Owners; as if one Share be incumbered with an Assise, from which the other is free, though each Share be equal in its intrinsic Value, yet the Partition is not equal; for the Expence of managing the Assise, from which the other is free, which is a real Action, and therefore dilatory and expensive, may eat up the whole Profits of that Part which it incumbers, and so make the Partition unequal. 2 Rol. Abr. 256.

When a Partition is unequal, the Whole must be avoided, because what is the Surplusage of the unequal Part, cannot be distinguished but by a new Division; also the Inequality makes the Partition, which consisted in the Equality of it, voidable in the Whole. Co. Lit. 170 b.

Besides the several Sorts of Partition already mentioned, there are likewise these following. 1st, Where Lands descend in Coparcenary, and they agree that one of them shall have and occupy the Land from *Easter* till the first of *August* in Severalty, and that the other shall have and occupy the Land from the first of *August* till *Easter* yearly, to them and their Heirs. Co. Lit. 167.

Also if two Coparceners have two Manors by Descent, and they make Partition, that one shall have the one Manor for one Year, and the other the other Manor for the same Year, and so *alternis vicibus* to them and their Heirs, this is a good Partition, and each of them has an Inheritance, though they have the Occupation but for a fixt Term. Co. Lit. 167. b. F. N. B. 26. b.

## (D) Of Partition by the Writ de Partitione facienda.

*Lit. Sect.* 247. *Co. Lit.* 167. a. *Booth* 244. *F. N. B.* 62. THE Writ de Partitione facienda lies for one Coparcener against another, when she will not agree to make Partition voluntarily, or by one Parcener against three or four, or generally against all those that will not consent to make Partition, by them that do consent.

*F. N. B.* 62. *Booth* 244. The Manner of making Partition by this Writ, is thus: 1st, The Writ of Partition is directed to the Sheriff, to summon the refractory Coparcener, to shew Cause why she will not make Partition, according to the Laws and Custom of the Kingdom, of those Lands which she and the other Coparcener or Coparceners hold *simul & pro indiviso* of the

(a) But it seems not to be absolutely necessary to mention in the Writ, that the Inheritance is of the common Ancestor. *3 Leon.* 231. *F. N. B.* 62.

*Booth* 245. *Lit. Sect.* 248. *Co. Lit.* 167. b. *168. a.* In this Action there are two Judgments; the first is *quod Partitio fiat inter partes Prædict' de Tenement' Prædict' cum pertinentiis*, and upon this there goes out a judicial Writ to the Sheriff to make Partition, which recites first the Writ of Partition and Judgment, and then commands the Sheriff, together with twelve Men of the Vicinage, &c. to go in Person to the Tenements to be divided, and there, in the Presence of the Parties (if they appear on Summons to be made) by the Oath of these twelve Men, to make an equal and fair Partition, and allot to each Party their full and just Share, and then return the Inquisition of the Partition annexed to the Writ, under the Seals of the Sheriff, and the Jurors, whose Names are likewise to be returned.

*Co. Lit.* 169. a. When the Inquisition is thus returned, upon Motion made to the Court the second Judgment is given in this Manner, *Ideo considerat' est per Cur'*, *quod Partitio firma & stabilis in perpetuum teneatur*.

*Infants and Feme Coverts. Co. Lit.* 171. b. In this Manner of Partition there is no Preference of one Sister to another; so that it is left to the Discretion of the Sheriff who shall have first. *Lit. Sect.* 249.

*Cro. Eliz.* 65. If Errors happen in the executing a Writ of Partition, and one of the Defendants releases all Errors to the Plaintiff, this shall not bar the other.

*Cro. Eliz.* 9. *10. Clay's Case.* According to the Direction in the Judicial Writ, the Sheriff must be upon the Lands in Person, and if he were not, the Court upon Information thereof, before filing the Return, will order the Filing to stay; and if upon Examination it be so found, will award a new Writ; for in all Cases where the Writ commands the Sheriff to go in Person, as in Waste, &c. there the Writ is his Commission, from which he cannot deviate; but if the Sheriff returns, that he was there in Person, and this Return be received and filed, then any Information to the contrary comes too late, because by the Filing it is become Matter of Record; against which no Averment in *Pais* lies; neither can the Party have Error upon the Return.

*Fitz. B.* 62. *Booth* 245. There are some Alterations made in this Writ by the 32 *H. 8. cap. 32.* which gives it to more Persons than could bring it at Common Law.

*Co. Lit.* 175. a. *167.* *Dyer* 98. At Common Law this Writ lay against one Coparcener, Tenant of the Freehold, against the other, and against the Alienee of such Coparcener.

*Lit. Sect.* 264. But it lay not for the Alienee, nor for the Tenant by the Curtesy; nor if one Coparcener had made a Lease for Life, could she after bring such Writ during the Continuance of such Estate. *Co. Lit.* 167. a.

If three Coparceners, and the Eldest Purchases the Part of the Youngest, *Co. Lit. 175. a.* yet she shall have a Writ of Partition at Common Law against the middle Sister; for though she has one Part by Purchase, yet this does not strip her of the Character of a Coparcener. *Dyer 243. pl. 55.*

So in a stronger Case, if three Coparceners are, and the Eldest marries, and her Husband purchases the Part of the Youngest, though he is a Stranger and no Parcener, yet he and his Wife shall have at the Common Law a Writ of Partition against the middle Sister. *Co. Lit. 175. Dyer 243.*

Tenant by the Curtesy shall have a Writ of Partition upon the Statute *Co. Lit. 175. 32 H. 8. cap. 32.*

And as by the Statute one Jointenant, or Tenant in Common, may have a Writ of Partition against another; so at this Day the Alienee of one Parcener may have a Writ of Partition against the other Parcener, because they are Tenants in Common. *Co. Lit. 175. a.*

But if three Coparceners are, and a Stranger purchase the Part of one of them, he cannot join with either of the two Coparceners in a Writ of Partition, either at Common Law, or by Force of the Statute; for the Words of the Preamble of the Statute are, *And none of them by Law doth or may know their several Parts, &c. and cannot by the Laws of this Realm make Partition without their mutual Consents;* now in this Case, one of them, viz. the Parcener, may have a Writ of Partition at Common Law, and therefore cannot come within the Preamble and Intent of the Act, and so cannot join with the Purchaser in a Writ of Partition brought upon it. *1 And. 30. pl. 72. Co. Lit. 175. b. Kelw. 208. Dyer 128. Ballard v. Bendl. 42. pl. 76.*

It seems, if after the Awarding of the Judicial Writ, and before the Return of it, the Defendant dies, yet the Partition is good, and the Writ shall not abate, because before the Death of the Defendant Judgment was given, That Partition should be made; and though upon the Return of the Judicial Writ there is another Judgment given, yet that is given in Confirmation of the first Judgment: It seems like a Case upon the Return of the Judicial Writ, no Exception can be taken to it; therefore it is not material whether the Defendant be dead or alive, since he can have no Advantage by any Plea on the Return of the Writ. *Dalison 59.*

A Writ of Partition is brought against two, and one of them appears and grants the Partition, and the other makes Default; *Dyer* is of Opinion, that the Judicial Writ shall be awarded to the Sheriff, with a *Cessabit Executio*, till the Parcener who made Default comes in, for all must be included in a Partition by Writ, because it is final; otherwise in a Partition by Agreement. *Dalison 23.*

Three Coparceners, and one of them aliens in Fee her Part, and then one of the other two brings a Writ of Partition against the Alienee and the other Parcener upon the Statute; and because this Writ lay at Common Law, in this Case, and the Statute does not give it, but where the Common Law would not allow it, it was resolved that the Writ should abate. *Dyer 243. pl. 55.*

A Writ of Partition brought by a Coparcener and her Husband, in which the Coparcener, who was formerly married to a Peer, of the Name of *Powis*, is stiled *D'na Anna Powis Uxor* of her present Husband; this was reckoned a *Misnomer*, though she was a Woman of Quality by Birth; upon which a new Writ was brought *ad respondend' H. & Annæ Uxori sue nuper Uxori Domini Powis defuncti*; and in the Count it was set forth, That the Plaintiff Coparcener was Co-heir in Tail with the Defendants of the Inheritance of their common Ancestor, without shewing the Commencement of the Tail, and allowed to be well enough in this Action, in which the Possession of the Defendants is affirmed, and no Land demanded from them, but only a fair and equal Division, that each may know their several Shares. *Dyer 79. pl. 51. Howard and Duke of Suffolk. Mo. 21.*

## (E) Of Hotchpot, and the Nature and Incidents of this kind of Partition.

*Lit. Sect.* 266, 268, 269. *Co. Lit.* 165. a. **A** Man seised of Lands in Fee-simple, as for Instance, of thirty Acres of Land, each of the annual Value of 12s. and hath Issue two Daughters, one of whom being married, the Father gives ten Acres of the thirty to the Husband, with his Wife in Frankmarriage, and then dies, leaving the Residue; in this Case, the unmarried Sister shall enter into and enjoy the Residue, unless the Husband and Wife will put the ten Acres given in Frankmarriage, with the twenty Acres into *Hotchpot*, that is to say, *together*; and then finding each Acre to be of the same yearly Value, allot fifteen Acres to the unmarried Sister, and take five Acres to the ten which they have already in Frankmarriage, which puts them on an exact Level with the Sister that is unmarried; for upon the Death of the Ancestor the Remnant, shall descend to the other Coparcener, because the Gift in Frankmarriage shall *prima facie* be intended a sufficient Advancement of the other Sister, and as a full Share of the Inheritance as she could have pretended to, in Case it had intirely descended in Coparcenary; but if these Lands given in Frankmarriage are of less Value than those that descend to the unmarried Sister, then, as hath been said, she shall have the Benefit of a Partition in the Manner before expressed; for it would be an unreasonable Construction, to make what was designed for her Advancement, turn to her Prejudice, especially when we consider, that this Gift in Frankmarriage was made by a Tenant in Fee, who might have disposed of it as he pleased.

*Lit. Sect.* 269. In this Manner of Partition the Lands given in Frankmarriage cannot be allotted to the other Coparcener, for they must descend according to the Form of the Gift; and if they should be transferred to another, contrary to the original Intention of the Donor, the Issue of such Marriage would avoid the Alienation.

*Lit. Sect.* 273. *Co. Lit.* 179. a. If the Lands given in Frankmarriage be of equal Value, at the Time of the Gift, with the Residue that continues in the Hands of the Ancestor, and remain so upon the Death of the Ancestor, they shall never be put into *Hotchpot*; but if in this Case the Lands given in Frankmarriage, without Default of the Donees, decline in Value by the Act of God, or if the Donor Purchase more Land after the Gift, or if the Remnant be improved in his Hands, so that the Lands, which descend to the other Sister, are of greater Value than those given in Frankmarriage, then the Partition in *Hotchpot* shall be made, that each Sister may have her just and equal Proportion.

*Lit. Sect.* 272. *Co. Lit.* 178. b. The Lands given in Frankmarriage, and the Lands in Fee-simple, which descend to the other Sister, must move from the same Ancestor, otherwise there shall be no *Hotchpot*.

*Lit. Sect.* 275. *Co. Lit.* 179. b. This way of Partition by *Hotchpot* is appropriated to Lands in Frankmarriage; for if an Ancestor enfeoff one of his Daughters of Part of his Lands, or purchase Lands to him, and her, and their Heirs, or makes her a Gift in Tail, she shall have her full Share of the Remnant without putting her Share into *Hotchpot*.  
The Reason seems to be this, That when she is enfeoffed, &c. she is considered as a Purchaser, and what she acquires by Purchase, can never be made a Precedence to exclude her from what comes to her in a Course of Descent.

*Lit. Sect.* 274. *Co. Lit.* 179. If Lands in Fee-tail descend from the Donor in Frankmarriage, the Donee shall have an equal Share of them without putting the Lands given in Frankmarriage into *Hotchpot*; for she claims the Lands in Tail *per formam Doni*, by Force of which Gift both Parceners must equally inherit,

inherit, because both make up but one Heir to the Ancestor, and consequently one without the other cannot claim under the Words of the Donation.

If Lands given in Frankmarriage are of greater Value than the Lands descended in Fee-simple, the other Sister has no Remedy against the Donees, for it was lawful for the Donor, being Tenant in Fee-simple, to dispose of his own Lands at his Will and Pleasure. *Co. Lit. 169. d.*

If the Donees in Frankmarriage, and all the other Parceners die before Partition made in *Hotchpot*, yet the Benefit of this kind of Partition shall descend to their Issues. *Lit. Sect. 270. Co. Lit. 178. d.*

This kind of Partition hath the same Incidents with the common Partition; so that the Donee, if impleaded of the Lands in Frankmarriage, shall have Aid of the other Parcener, for it is unreasonable, that what was designed for the Donee's Advancement, should put her in a worse Condition than she would have been if the Gift had not been made. *Co. Lit. 177. b.*

### (F) Of the Nature and Incidents of their Estate after Partition made.

Though the Law gives every Parcener a Power to sever her own Moiety, and to carry it over into the Family into which she marries; yet since the Partition is compulsory, the Law will not put Parceners in a worse Condition after Partition, than if they had enjoyed their Moieties without Division; and therefore on a Suit commenced for any Part, or an Ejection of any Part after Partition, they shall have like Remedy as if they had enjoyed in common; in which Case, if a Suit had been commenced, both Parties must have been impleaded, and on the Recovery there had been an equal Loss to both; therefore after Partition there is a Warranty annexed to each Part, so that if either be impleaded she may vouch her Sister, and thereby deraign the Warranty paramount annexed to the Purchase of the Ancestor; and if she loses, she may recover one Moiety of her Loss in Value, against the other Sister. *Co. Lit. 173. b. 4 Co. 121. Bullard's Calc.*

So if Parceners enjoy in common, and any Part is evicted by Entry without Action, they shall enjoy what is left in common; therefore that Parceners may not be in a worse Condition by the Partition which the Law compels them to, there is a Condition annexed to the Partition, that if either the Whole of any one's Share, or an Estate for Life, or in Tail, be thereout evicted by Entry without Action, that the Party so evicted may enter on her Sister's Moiety, and avoid the Partition by Enjoyment of an undivided Moiety of what is left.

But if after Partition either Sister aliens with Warranty, and the Alienee is impleaded, he shall only vouch the Alienor to recover in Value, who may with the other Sister deraign the Warranty paramount; for the Parceners shall not be in a worse Condition by the Partition than if none had been made; so they shall not be in a better by the Warranty or Condition which the Law annexes upon the Partition; now if a Parcener before Partition aliens her Part with Warranty, and the Alienee is impleaded, he can only vouch his Warrantor, who may vouch the other Sister to deraign the Warranty paramount, but not to Recover in Value; for there is no Reason that the Sister, who did not enter into the Contract of Warranty, should be subject to it, since it is fit that she, whose Folly it was to insure the Title, should answer for the Consequences of it. *Hob. 21, 26. 2 Rol. Rep. 418. Co. Lit. 174. d.*

*Co Lit. 174. a.*  
*2 Rol. Abr.*  
 418. If one Sister after Partition aliens to her Heir apparent, and dies, and the Son is impleaded, though he be in by the Feoffment of his Mother as a Purchaser, yet he shall pray in Aid of the surviving Parcener to deraign the Warranty paramount; for though he claims the Land by Purchase from his Mother, and so never having it in Parcenary cannot recover *pro ratâ*; yet upon the Contract of Warranty, whereby the Vendor did warrant to the Ancestor and his Heirs, he, together with his Aunt, make up one Heir to such Ancestor; and therefore they must join to deraign the Warranty; otherwise this is not that Heir before the Court, that by Virtue of such Contract is to take the Benefit of the Warranty.

*Co. Lit. 174. b.* If a Man seised of Lands in Fee have Issue two Daughters, and make a Gift in Tail to one of them, and dies seised of the Reversion in Fee, which descends to both the Sisters, and the Donee or her Issue is impleaded, she shall not pray in Aid of the other Sister to deraign the Warranty paramount, because this Estate was never in Coparcenary, and by Consequence they never possessed as Heir to the common Ancestor, whereby they may pray in Aid of each other, and there being no Warranty in Deed annexed to the Tail granted, she has no Means to bring in her Sister, without whom she cannot take Benefit of the Original Contract of the Warrantor, since such Warranty ran to the Heirs of the Ancestor, and the Tenant in Tail and the other Sister make but one Heir to the Ancestor.

*Mo. 95.* If two Acres descend to two Parceners, and one of them before Partition grants a Rent-charge out of one of the Acres, and afterwards upon Partition the Acre charged is allotted to the other Sister, she shall hold it discharged; for a Parcener before Partition having no separate Title to a distinct Moiety, cannot pretend to charge any particular Part of the Lands, so as to make it subject to that Charge in the Hands of another who does not hold under her; therefore this Grant by the Sister, who at the Time of the Grant had only a Title to an indistinct and undivided Moiety, shall never affect the other Parcener who does not claim under her, and who at the Time of the Grant, had as good a Title to that Acre out of which the Rent was to arise, as the Grantee had.

## Copyhold.

(A) The Nature of the Tenure, and what shall be deemed Copyhold.

(B) In what respect Copyholds partake of the Nature of Freehold Lands.

(C) What Acts of Parliament shall be said to extend to Copyholds: And herein,

1. Of the Statute *de donis*, the Intailing of Copyholds by Custom, and the Manner of Docketing such Intails.
2. Of such Statutes which may be said to relate to them.

(D) Of such general Customs as may be said to relate to all Copyhold Estates.

(E) Of particular Customs that are good and peculiar only to some Copyholds.

(F) Of granting Copyhold Lands: And herein,

1. What Persons may make good Grants.
2. What Acts shall destroy the Power they had of making such Grants.
3. What Things may be granted to be holden in Copyhold.
4. Of the Operation of the Grant, and the Estate and Interest that passes thereby.

(G) Of Surrenders, Presentments and Admittances: And herein,

1. Of the Necessity of a Surrender, and where the Copyholder shall be said to be in before Admittance.
2. Where the want of a Surrender will be supplied in Equity.
3. What Persons may surrender.
4. What Persons may accept such Surrenders, and make Admittances.
5. What Words or Acts amount to a Surrender.
6. What Acts amount to an Admittance.
7. Of the Construction to be made when the Surrender, Presentment, and Admittance differ.
8. Of the Time of making the Surrender, Presentment and Admittance, and where they shall be effectual, though any of the Parties die before they are completed.

(H) Of

**(H) Of the Operation of the Surrender in passing the Estate: And herein,**

1. Of the Persons to Take, and what shall be sufficient Certainty in the Description of them.
2. What shall be said to pass by the Surrender.
3. What Estate or Interest passes by the Surrender.
4. Of the Power and Authority of the Lord and Steward, and therein of the Difference of their Acts.

**(I) Of Fines payable by Copyholders: And therein,**

1. Where a Fine shall be said to be due, and by whom, and to whom payable.
2. At what Time payable.
3. Of the Certainty and Reasonableness of the Fine.

**(K) Of the Extinguishment of the Copyhold: And therein,**

1. Where the whole Copyhold shall be extinguished or suspended.
2. Where Part only, or what is incident to it shall be extinguished.

**(L) Of Forfeiture: And herein,**

1. Of Forfeiture for Non-attendance at Court, and not doing Service.
2. Forfeiture for Non-payment of Rent.
3. Forfeiture in the Copyholder's taking upon him to dispose of the Copyhold, and make Leases.
4. Of Forfeiture in committing Waste, and therein of Lords or Tenants Interest in the Fees.
5. Forfeiture by Inclosure.
6. Forfeiture for Treason and Felony.
7. In what Cases a Forfeiture of Part shall be a Forfeiture of the Whole.
8. Who shall be affected by a Forfeiture, or take Advantage thereof.
9. What Persons shall be excused from a Forfeiture.
10. Where the Forfeiture shall be said to be dispensed with.

**(M) Copyhold, where and how to be sued for and recovered.**

## (A) Of the Nature of the Tenure, and What shall be deemed Copyhold.

THE (a) Original of this Tenure arose from Grants of Lands made by Lords to their Villains, to hold of them by base Tenures; those Villains or Tenants were inrolled on the Lord's Roll, and said to hold by Copy thereof; and were capable of taking no greater Estate than at the (b) Will of the Lord; for otherwise they had been enfranchised; yet to prevent the frequent ending of these Estates, they granted them in Fee, but still at the Will of the Lord; who, notwithstanding such Grant, (c) might have ousted them when he pleased; which being a very great Inconvenience (d) was, it seems, altered by some positive Law, (though such Law does not now appear) which (e) preserved their Estates to them and their Heirs, doing their Services, but yet in other respects left them only Estates at Will.

(a) As to the Name and Origin of Copyhold, *vide* 9 Co. 76. Co. Lit. 76. 1 Rol. Rep. 236. (b) Lit. Sect. 172. (c) 4 Co. 21. a. (d) Co. Copyholder 6, 7. (e) Preced. Chan. 574.

(e) They are now established by Custom, and such Tenant, so long as he doth his Services, and does not break the Custom of the Manor, is not to be ejected by his Lord. 4 Co. 21. b. 22. a.

Lands, Parcel of the Manor of C. in *Wilts*, and Parcel of the Dutchy of *Cornwal*, although they pass by Surrender and Copy of Court-Roll, yet if by the Rolls or Copies they appear only to have been granted *tenendum* (f) *secundum consuetudinem Manerii*, and not (g) *ad voluntatem Domini Manerii*, they are not Copyhold but a Customary Freehold.

*Carth.* 432. *Gale* and *Noble*, resolved on a Trial at Bar, and a Verdict for the

Plaintiff accordingly, against whom there was a Verdict at *Nisi Prius*, for a Forfeiture by committing Waste, he and all the other Tenants taking them to be Copyhold. *Comb.* 387. S. C. resolved accordingly. (f) That he was seised *secundum consuetudinem Manerii* does not necessarily import a Copyhold. 3 *Bulst.* 230. 1 *Rol. Rep.* 211. 5 Co. 84. 2 *Vent.* 144.—That Copyholds are Parcel of the Manor, and not held *ut de Manerio*, *vide* 1 *Salk.* 185, 186. 3 *Lev.* 405. (g) The Omission of these Words aided after Verdict. 1 *Salk.* 364, 365.

The Bishop of *N.* 10 *H.* 8. was seised of the Manor of *N.* in Right of his Bishoprick, and at a Court holden within the same Manor, granted Parcel of the Demesnes of the said Manor, to one *T.* and his Heirs, by Copy; whereas in Truth the Land was never demised by Copy before, and so the Land continued in Copy till 23 *H.* 8. when *T.* committed a Forfeiture, and the Bishop seised the Land, and granted the same again by Copy to *T.* in Fee, from which Time it continued in Copy till the 8th of *Eliz.* which was forty-seven Years; and it was held by the whole Court, (b) That fifty Years Continuance is requisite to fasten a Customary Condition upon the Land against the Lord, and that though the original Commencement of granting those Lands by Copy, was 10 *H.* 8. from which Time to 8 *Eliz.* was above sixty Years; yet that the Seifure for a Forfeiture which happened 23 *H.* 8. interrupted utterly the Continuance from the Time, which might by the Law have perfected the Customary Interest; so that the Commencement of the Copyhold was to be reckoned from 23 *H.* 8. which not being sufficient Time to make good a Custom, the Lord might enter upon the Copyholder as upon his Tenant at Will.

3 *Leon.* 107. *Style* 141. *Taverner* and *Cromswell.*

(b) *Q.* If such Copyholder can plead Time out of Mind. *V. de* 4 Co. 24.

## (B) In what Respect Copyholds partake of the Nature of Freehold Lands.

4 Co. 22. a. MY Lord Coke says, that Copyholders have only a Fee-simple *secundum quid*, that though they are Tenants at Will, yet their Estates shall descend to their Heirs, and such Descent shall be governed by the Rules of the Common Law; but not *simpliciter* to have all the collateral Qualities of Estates in Fee-simple.

4 Co. 21. a. Therefore where a Copyholder by Licence made a Lease for Years, and the Lessee entred, and the Lessor died, having Issue a Son and a Daughter, by one Venter, and a Son by another, the eldest Son dies, *pl. 272. adjudged.* it was adjudged the Daughter of the whole Blood should inherit; (a) *Vide 4 Leon. 38.* for the Possession of the Lessee for Years was the Possession of the elder Brother, who may have Possession before Admittance.

(a) The same Law of a Guardian. Co. Copyb. 113. Dyer 292. Cro. Car. 411. 1 Rol. Abr. 502. That there shall be a *Possessio fratris* before Admittance. 1 Rol. Abr. 502. 3 Leon. 70. 1 Mod. 102, 120. 1 Vent. 261. Dalif. 110. S. P. but said that if the Lord, by Custom, during the Nonage of the Heir, demises it to a Stranger for Years, this will not make a *Possessio fratris*, and *vide Co. Copyb. 114.* where my Lord Coke saith, that if the Lease for Years determine, and the elder Brother die before Entry, the youngest Brother shall inherit; but *Quere.*

4 Co. 23. a. But though it be governed by the Rules of Common Law, concerning Descents, yet it partakes not of the Nature of Freehold Lands in other Respects; for it is not Assets in the Heir's Hands; neither shall a Woman be endow'd of it, nor a Man be Tenant by the Courtesy, unless by Special Custom; nor shall a Descent take away an Entry.

4 Co. 23. a. A Man seised of Copyhold Lands, in Right of his Wife, surrenders to the Use of another in Fee, this is no Discontinuance, but the Wife may enter after the Death of her Husband; for this is not like a Feoffment at Common Law, which by the Notoriety of it took away the Entry of the Wife, for the Benefit of Strangers, that they might not be at a Loss against whom to bring their *Præcipes*; but in Case of Copyhold Lands, as there is no such Inconvenience, so the Nature of the Conveyance will not admit of such Exposition.

So if Tenant for Life surrender to the Use of another in Fee, it is no Forfeiture; for it may be seen by the Court-Rolls who is Tenant; and so the Stranger is at no Loss to sue.

Co. Copyb. If a Copyholder in Fee surrenders to the Use of A. and B. and the longer Liver of them, and that for Want of Issue of A. the Lands should remain to the youngest Son of J. S. in this Case A. has but an Estate for Life; for an Estate Tail in Copyhold Lands shall not pass by Implication.

A Man may surrender a Copyhold Estate to the Use of his Wife; for she takes the Estate from the Lord, as an Instrument to convey the Estate to her; and so it comes not within the Reason of other Cases, that they being but one Person cannot contract; for he gives the Estate to the Lord, and he admits the Feme to it.

There can be no Occupant of a Copyhold Estate, because of the Prejudice it would do the Lord; and therefore if a Copyholder being Tenant *per auter vie* die, the Lord shall enter.

## (C) What Acts of Parliament shall be said to extend to Copyhold Estates: And herein,

## I. Of the Statute De Donis, the Intailing Copyhold Estates by Custom, and the Manner of Docketing such Intails.

THE Intailing of Copyholds, and whether they are within the Statute *De Donis*, appears to have been Matter of great Controversy; and it seems now agreed, that the Statute *De Donis* creates no Intail of Copyhold Lands, because they are intirely subject to the Custom of the Manor, and governable by it; and because they are not within the Word *Tenementa*, which comprehends only an Estate of Freehold.

Also it seems now agreed, that if the Custom of the Manor has admitted of Limitations of Remainders upon such Gifts, that then the Custom of the Manor, (a) pursuing the Model of the Statute, creates a good Intail; but such Intail doth not arise by Virtue of the Statute; but it shall be presumed there was the same Law of that Manor by Custom Time immemorial, as began in the Kingdom by the Statute.

of the Manors, the Statute co-operating with it, Copyholds may be intailed; but there cannot be Estate Tail in Copyholds by Custom only, nor no Estate Tail by the Statute only, the Meaning of which seems to be, that Estates Tail were before the Statute, as to the Manner of the Limitation, by the Custom of some Manors; as that an Estate was granted to a Man, and the Heirs of his Body begotten, the Remainder over to another; but that in other Respects, those Estates were not Estates Tail before the Statute; as that the Tenant should no ways alien to debar his Issue, or them in Remainder; and that if he discontinued, they should have a *Formedon* in Descender or Remainder; but these Things were introduced by the Statute upon the Estate, which was the same in Limitation by the Common Law. And this seems supported by the following Authorities. *Carter* 22. *Cro. Eliz.* 307, 717, 907. *Moor* 173, 188. 1 *Lein.* 175. *Pop.* 128. 1 *Sid.* 268. *Cro. Car.* 45. *Moor* 637. 3 *Co. S.* 9 *Co.* 105. a. 3 *Lev.* 327. 4 *Mod.* 86.

A Copyhold was surrendered to the Use of the Copyholder's Last Will, who devised it to *J. S.* in Tail, &c. *J. S.* hath Issue, and surrenders to the Use of his Wife for Life; and it was adjudged, that since the Jury found it was not the Custom of the Manor to have an Estate Tail in the Copyhold, that *J. S.* had a Fee Conditional; and that by his having of Issue, he had performed the Condition; and the Surrender to the Use of his Wife was good.

But though by Custom, Time out of Mind, Copyholds may be intailed, yet it is no Proof of such Custom, that an Estate hath been granted to a Man and the Heirs of his Body; for that may be a Fee conditional; but it must be shewn that a Remainder hath been limited over and enjoyed, or that the Issue hath recovered after the Alienation of his Ancestor, or the like.

These Intails, like all others, may be dock'd; but the Manner of docking it differs according to the Custom of the Manor; the more common Way of Barring such Intails is by Recovery in the Lord's Courts, which is (b) always allowed where the Custom of Intailing prevails, to avoid the Danger of Perpetuity in such Copyholds.

er doth not of common Right bar the Intail of a Copyhold Estate, but that as to the Intailing of them, Custom is requisite; so without Custom the Intail cannot be cut off: The Reasons are, that because that, without an intended Recompence in Value, no Recovery shall bind, and the Surrendree comes in the *Post* by the Lord, and is not in the *Per* by the Party; and so no Warranty can be annexed of common Right; for no Estate less than a Freehold is capable, of common Right of having a Warranty annexed to it. *Moor* 358, 753. *Cro. Eliz.* 380, 907. 4 *Co.* 23. *Cro. Eliz.* 391. *Raynt.* 164. 1 *Lev.* 136.

Co. Lit. 60.

3 Co. S.

Heydon's

Case.

1 Sid. 314.

1 Rol. Abr.

506, 858.

2 Verm. 585.

705.

(a) My

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3 Co. S. b.

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1 Rol. Abr.

538.

Co. Lit. 60.

1 Sid. 314.

Moor 358.

(b) But a

Recovery

with Vouch-

*Co. Lit.* 60. *b.* Also, according to the Custom of some Manors, a Surrender to the Lord is equivalent to a Recovery at Common Law, and shall bar such Intails.

*Co. Copyb.* And in some Manors, a Forfeiture committed by Tenant in Tail, of the Copyhold, and the Lord's making three Proclamations, and seising the Copyhold, and re-granting it to the Copyholder, has been allowed a good Custom to bar the Intail. So it is if Tenant in Tail surrenders to the Purchaser and his Heirs, who commits a Forfeiture, and the Lord as before seises it, and makes Proclamations, this is a Bar of the Intail, and the Custom allowed good.

## 2. Of such Statutes as may be said to relate to Copyholds.

*3 Co. 7.* The general Rule laid down for the Exposition of Statutes, as to their extending or not extending to Copyhold Estates, is this, that where an Act of Parliament alters any Estate, Interest, Tenure or Custom, or Service of the Manor, or doth any Thing in Prejudice either to the Lord or Tenant, there the general Words of an Act of Parliament will not extend to Copyhold Estates; but when an Act is generally made for the publick Good, and no Prejudice accrues to the Lord, &c. there Copyholders are bound by them.

*Moor 410.* (a) Copyholds are within the Statute of Limitation; for that is an Act made for the Preservation of the publick Quiet, and no ways tending to the Prejudice of the Lord or Tenant.

*1 Leon. 4.* (a) But Debt for a Fine is not within the Statute of Limitations. *2 Keb. 556.*

(b) *Co. Copyb.* It seems (b) formerly to have been the better Opinion, that Grantees or Surrendrees of Reversions of Copyholds could not take Advantage of a Covenant broken, by 32 H. 8. because he comes in in the *Post*, and not in the *Per*; and the Lord would have a Tenant put upon him without his Admittance; but it (c) has been solemnly adjudged, that this being a beneficial Law, it shall extend to Copyholds.

*253.* (c) *4 Mod. 82 to 86.* adjudged between *Cope and Glover.* *3 Lev. 326* S. C. adjudged. *Skin. 297, 305.* S. C. adjudged. *1 Salk. 185.* S. C. adjudged.

*Co. Copyb. 152.* The 38 H. 8. cap. 28. of the Husband's Discontinuing of the Wife's Land, extends to Copyhold Estates.

*Supp. 68.* But whether the other Branch of it, or the 13 Elix. cap. concerning Leases made by Husband and Wife, Tenants in Tail, or Ecclesiastical Persons, extend to Copyhold, *vide Cro. Car. 44. Co. Copyb. 151. Co. Lit. 44. a. 6 Co. 57. 3 Lev. 327.* and *vide Title Leases.*

*2 Sid. 41, 73.* Copyholds are not within the 11 H. 7. cap. 20. which makes the Alienation of the Wife void of any Estate which she hath in Dower, for Life or in Tail, jointly with her Husband, &c. for thereby an Entry being given to the next Heir, he would come in to be Tenant, without the Admittance of the Lord.

*Co. Copyb.* The 27 H. 8. for executing Uses to the Possession, extends not to Copyholds, neither doth that Branch of the Act concerning Jointures extend to them; so that if a Jointure be made to a Woman of Copyhold Lands, that will be no Bar to her Dower.

*2 Inst. 325.* But yet the Statute of *Merton*, that gives Damages in a Writ of Dower, where the Husband died seised, extends to Copyholds, though the Word *seised* is properly applicable to Freeholds; but this is by Force of the Equity of the Statute.

The Statute of *Westm. 2. cap. 3.* in all its Branches extends to Copyhold Lands; for it is an Act made to redress Wrong, and no Way prejudicial to the Interest, either of the Lord or Tenant, either in the *Cui in vita* given to the Wife upon the Husband's Discontinuance, the Receipt of the Wife, &c. or *quod ei deforciat* to particular Tenants.

Co. Lit. 369. b.  
Co. Copyh. 152.  
4 Mod. 84.  
3 Lev. 327.

It is enacted by *31 H. 8. cap. 13.* that if any Abbot, &c. shall make any Lease of Lands, &c. in the which any Estate for Life, &c. then had its Being and Continuance, then every such Lease to be void. A Copyhold was let by Copy for Life, and then the Religious House granted a Lease of it to another for eighty Years; and the Question was, whether a Copyhold Estate for Life was within the Words of the Act; *in the which any Estate or Interest, &c.* and it was resolved that the Lease was void, and that the Copyholder had an Estate or Interest for Life.

3 Co. 7.  
Heydon's Case.  
1 Leon. 4.  
Moor 128.  
Cro. Car. 42.

The *32 H. 8. cap. 9.* against *Champerty*, extends to Copyholds, for the Words *if any bargain, buy or sell any Right or Title*; so that they are within the Words of the Act, being made to suppress Wrong, and within the Equity of it, neither Lord nor Tenant being prejudiced by it.

Co. Lit. 369.  
Co. Copyh. 152.  
4 Mod. 84.  
3 Lev. 327.

The *31 & 32 H. 8.* concerning Partitions, extends not to Copyholds, because the Act provides it shall be done by Writ of *Partition*; and Copyhold Lands are not impleadable at Common Law.

Cro. Car. 44.  
Co. Copyh. 151.  
4 Mod. 85.

The Statute of *Westm. 2. cap. 20.* which gives the *Elegit*, extends not to Copyhold Lands; for then the Lord would have a Tenant brought in upon him without his Admittance or Consent.

3 Co. 9.  
Co. Copyh. 149.

By *2 E. 6. cap. 8.* it is expressly provided that Copyholders shall have the like Traverse and Remedy where their Interest is not found by the Office, as Freeholders and others have; and so also upon *12 Eliz. cap. 8.*

Co. Copyh. 145.

By *1 E. 6. cap. 14.* it is expressly provided, that no Copyhold should come into the King's Hands by Dissolution of Monasteries; which Clause was put in for the Benefit of Lords of Manors.

Co. Copyh. 146.

The Forging of Court-Rolls is expressly within *5 Eliz. cap. 14.* as well as forging any other Charter, Deed or Writing sealed, whereby to defeat a Copyholder or Freeholder.

Co. Copyh. 146.

Copyholds are within the Statutes of Bankrupts; for the Statute of *13 Eliz.* expressly mentions them; and though other Statutes do not, yet they being made for further Remedy, are to be expounded by the former, especially since that hath taken Care that no Prejudice should happen to the Lord.

Cro. Car. 550,  
568.  
Co. Copyh. 146.  
But the Statute of H. 8. did not extend to them,  
14.  
4 Mod. 84, 85.

therefore it was necessary to make a subsequent Law to include them.

Copyholds are within the *35 Eliz. cap. 2.* against Recusancy, and forfeitable for the Recusant's Life, but the Forfeiture goes to the Lord, not to the King, by the express Words of the Statute; but it seems that Copyholds are not within the *29 Eliz.* or *3 Jac. 1.* in Respect of the Prejudice that would accrue to the Lord by the Loss of his Services.

Co. Copyh. 147.  
1 Leon. 97, 98.  
Owen 37.  
2 Inst. 737.  
Caruley 107.  
2 Hawk. P.C.

The *16 R. 2. cap. 5.* which makes it a Forfeiture of Lands, &c. to purchase Bulls of the Pope, extends not to Copyhold Lands for the Prejudice the Lord would sustain, if the King should have the Lands.

14.  
Co. Copyh. 149.

The Statute of Fines extends to Copyhold Lands, because it was made to avoid Controversies, and is no ways prejudicial to the Lord.

9 Co. 105. a.  
Co. Copyh. 153.  
but see

Copyholds are not within the *31 Eliz. cap. 7.* of Cottages.

5 Co. 125.  
1 Bulf. 50.

The *17 E. 2. cap. 10.* which giveth the Wardship of Ideots Lands to the King, he finding them convenient Maintenance out of the Profits thereof, extends not to Copyhold Lands, for the Prejudice that would thereby ensue to the Lord; but yet all Alienations made by an Ideot, of his Copyhold Lands, after Office found, shall be avoided by the King.

Co. Copyh. 152.  
4 Co. 126. b.

3 Lev. 395. A Copyholder is not within the Statute 12 Car. 2. cap. 24. to dispose  
 Clench and of the Custody of his Infant Heir; because of the Meanness of his  
 Cudmore. Estate, and the Prejudice that would accrue to the Lord of the Manor;  
 2 Lutw. 1181. and therefore the Lord, or those intitled by the Custom, shall have the  
 S. C. Custody of him.  
 Comb. 243. S. C.

### (D) Of such general Customs as may be said to relate to all Copyhold Estates.

1 Salk. 184. THERE are two Sorts of Customs; first, General, which extend to all Kinds of Manors, which is warranted by the Common Law, and of which the Courts take Notice; secondly, particular Customs, which must be pleaded.

13 Co. 68. By the general Custom, and of common Right, every Copyhold may  
 Godb. 172. take Hedge-Boot, House-Boot and Plough-Boot, upon his Copyhold;  
 2 Brownl. but yet this Power may be restrained by Custom; as that the Copyholder  
 329. shall not take it, unless by the Assignment of the Lord, or his Bailiff.

4 Co. 26. a. Every Copyholder may make a Lease for a Year, and such Lessee may  
 Cro. Eliz. 461. maintain an Ejectment; for as the Common Law warrants such Lease,  
 to it gives him a Remedy for the Recovery of it.

Cro. Jac. 526. A Copyholder may (a) Surrender to the Lord, by Attorney in Court;  
 Cro. Eliz. because he may do that *communi Jure*; and so the Common Law gives  
 443. cont. him Power to do it by Attorney, as an Incident to his Estate. So a Sur-  
 Cro. Car. 273. render to the Lord out of Court is *de communi Jure*, and therefore the  
 1 Leon. 36. Copyholder may, as it seems, do it by Attorney, and so it seems to the  
 Co. Copyh. 92. (b) Steward; but if the Surrender be by two customary Tenants, there  
 (a) Admit- (b) it cannot be done by Attorney, without a Special Custom.  
 tance by the Lord in

Court, or out of Court, seems to be *de communi Jure*; but *Quare* whether *de communi Jure* he is to admit by Attorney; and *vide* 9 Co. 75. 1 Leon. 36. cont. Co. Lit. 59. 3 Bulst. 80. and 2 Sid. 37, 61. That the Lord is not compellable to admit by another; because the Corporal Service of Fealty is due from every Copyholder. (b) That there is the same Reason that the Steward should take Surrenders out of Court, and also out of the Manor, as that the Lord should. 1 Salk. 184.

### (E) Of particular Customs that are good, and peculiar only to some Copyholds.

PARTICULAR Customs are to be construed strictly, but the Reasonableness of them is not altogether to be considered from the Rules and Maxims of the Common Law; for there is no Custom but what in some Point or other overthrows the Common Law; but from the Convenience of the Thing itself.

Mawch 161. A Custom that if a Copyholder do not repair, it shall be presented by  
 Moor 788. the Homage, the Tenant amerced, and that the Lord shall distrain upon the Copyholder or Under-Tenant, this is a good Custom; for the Under-Tenant is not a meer Stranger.

2 Brownl. 85. But a Custom that after the Death of Tenant for Life the Lord is  
 Noy 2. compellable to make a Grant for Life to his Son, and if no Son, to the  
 Cro. Jac. 368. Daughter, is a void Custom; because it obliges the Lord, who hath  
 Moor 842. the Interest to grant it to this or that particular Person, whether he  
 (c) And a will or no; (c) but a Custom for a Copyholder for Life to nominate his  
 Custom that Successor, is good.  
 holder may cut down Trees, is good. Noy 2.

Custom for the Steward to make By-Laws for the ordering the Common, is good; but an Order that the Tenant should not put in this or that Beast, is void; because it takes away his Inheritance; but a By-Law that he should not do it before such a Day, is good, being not Restrictive of his Inheritance, but only directive of it.

1 Leon. 190.  
March 28.

Custom that he that lives above ten Miles from the Manor, upon paying 8*d.* and 1*d.* to the Steward, shall be excused from Attendance upon the Court, is a good Custom, if it be averred that there are sufficient Tenants who live near the Manor.

1 Sid. 361.  
1 Mod. 77.  
2 Keb. 342,  
350, 351.

A Custom to devise Land, the Lessee paying the treble Value of the Rent, and if he died within the Term, that his Heir should have it, paying one Year's Rent; and that if he assigned, the Assignee should have it, paying a Year's Rent; this was held to be a good Custom.

Hut. 126,  
127, 101.

That a Copyholder shall not alien without a Licence, is a good Custom; so is a Custom that if a Copyholder make a Lease for one Year, and die, that it shall be void against his Heir; (a) but a Custom that the Copyholder shall hold the Land Half a year after the Term, is void.

Moor 8.  
pl. 27.  
Lit. Rep. 232.  
(a) A Custom that

the Executors shall hold a Year after the Copyholder's Death, is a good Custom. That a Copyholder may give a Warrant of Attorney to surrender after his Death, is a void Custom.

Cro. Jac. 36.—

2 Rol. Abr. 157.

That if a Copyholder will sell his Land, the next of Blood shall have the Refusal, or the next Neighbour to the *East*, is a good Custom.

Lex Custom.  
34.

If there be a Custom that a Copyholder shall not put in his Beasts to take the Common before the Lord hath put in his, this is a void and unreasonable Custom; because it is in the Power of the Lord to take away the Interest of his Commoners. (b) So a Custom that the Tenant shall pay a Fine upon the Marriage of his Daughter, is void; because against the Freedom of the Subject; but if a Man obliges himself to such a Thing by Tenure, it is good, being his own Contract.

Cro. Jac. 671.  
2 Brownl.  
277.  
Co. Copyh.  
70, 71.  
(b) If the Husband shall be Tenant by the

Courtesy, or the Woman in Dower, then to pay a Fine upon Marriage, is reasonable.

Co. Copyh.

73. 2 Rol. Abr. 264, 265.

A Custom may be void for the Uncertainty of it; as if a Feoffment be made by an Infant, it shall be good, if he can tell 12*d.* or that Tenants ought not to pay above two Years Rent for a Fine, but that they may pay so much or less.

Co. Copyh. 71.  
2 Rol. Abr.  
264.

My Lord *Coke* seems to be of Opinion, that by Special Custom, a Wife may devise Copyhold Lands to her Husband; but he says that this Custom hath been so much impugned, that he cannot justify the Validity of it.

Co. Copyh. 94.  
Vide Moor  
123. where it was debated, whether a Custom that

Feme Covert might devise Copyhold to her Husband, or any other, was good; and it seemed to be the Opinion of the Court that it was; but the Judgment went on a Fault in pleading; but

vide *Winch*

Copyholders by Custom may have *solam* and *separalem pasuram* in the Soil of the Lord, and exclude the Owner; but a Copyholder of Inheritance cannot, without Special Custom, dig for Mines, neither can the Lord dig in the Copyholder's Lands, for the great Prejudice he would do to the Copyholder's Estate; but the Copyholders may dig Marl to lay on the Copyhold Land, but cannot inclose where it was never inclosed before.

2 Saund 326.  
1 Sid. 152.  
1 Rol. Abr.  
888.  
*Winch* 8.  
Lit. Rep. 234.

(c) The Lord shall not have the Custody of Lunaticks Lands, unless there be a Custom for it; neither shall the King have it, for the Prejudice that might ensue to the Lord.

Hob. 215.  
Noy 27.  
(c) But vide  
Cro. Jac. 105.

Where it was resolved, that the Lord may have the Custody of one that was *mutus & furus*, and no Custom is laid; and the Reason given is, that otherwise the Lord would be prejudiced in his Rents; *ideo Quare.*

4 Co. 31. a. b. A Custom that one Copyholder may have Common, &c. in his Lord's Soil, is good; for all the other Copyholders might have forfeited their Estates.

2 Keb. 344.  
2 Rol. Abr. 450. and yet the Licence seems unnecessary here, since it may be done without it.

Custom, that upon Payment of ten Years Rent, the Lord should licence to let for Ninety-nine Years; and if he would not licence, the Tenant should lease without Licence, adjudged a good Custom.

1 Rol. Abr. 511. But if it has been shewn in pleading, that he could not grant otherwise; *Quare*.

Custom was that the Lord might *solummodo* grant Estates in Fee; this Word *solummodo* was expounded to mean that he had only granted Estates in Fee; and so it was held that he may Grant for a less Time.

Co. Lit. 59. b. That the Widows of Copyholders shall have Dower, or their (a) Free Bench, or a Moiety of the Lands, is a good Custom; as also that Husbands of Feme Copyholders shall be Tenants by the Courtesy; that if a Copyholder holds Lands in Fee, that his Wife surviving him should have it in Fee, is a good Custom; (b) also a Custom that she shall have it *durante viduitate*, is good.

*que Trust* of a Copyhold Estate, ought to have her Free Bench, as much as if the Husband had the legal Estate in him. 2 Vern. 585. Tenants in Dower, and by Courtesy, shall pay a Fine upon Admittance, especially if there be a Custom for it. Co. Copyb. 154. but *vide Lex Custom.* 156. where it is said, that in Case of a Widow's Estate, no Fine is due; and *vide post* of Fine Letter (1) and *Hut* 18. 1 Rol. Abr. 592. Noy 29. That the Widow is in before Admittance, in the same Manner as the Heir at Law is. (b) A Copyholder *durante viduitate* sows the Ground, and takes Husband, she loseth the Corn; but if she had let the Lands, her Lessee should have the Corn; so if she die, her Executors or Administrators shall have it. 5 Co. 115.

2 Leon. 208, 209. The Custom of a Manor was, that if a Man took a Customary Tenant to Wife, and out-lived her, he should be Tenant by the Curtesy. A Man took a Woman to Wife who had no Copyhold Land then, but some descended to her, during the Coverture; and it was adjudged that he should not be Tenant by the Curtesy, because he is out of the Custom.

Cro. Jac. 36. A Copyholder may dispose of his Lands, and bar his Wife of her *Free Bench*, unless there be a particular Custom that she shall avoid any Alienation, &c. and therefore where a Copyholder made a Lease of Lands which was warranted by Custom, it was held, that tho' by the Custom, the Wife was also intitled to her *Free Bench*, yet that the Lessee's Title being pursuant to the Custom, was as good as hers, and being prior could not be (c) avoided by her.

(c) But it seems after the Lease ended, she should be endowed; but *Quare* whether she ought to be endowed of the third Part of the Rent, during the Continuance of the Lease, because Customs are to be taken strictly. *Vide Head of Dower*, and that her Title doth not commence by the Marriage, as it doth in Dower at Common Law. *Carth.* 276.

1 Salk. 158. If a Copyholder in Fee, where by the Custom the Widow is intitled to her *Free Bench*, surrenders his Copyhold into the Hands of two Tenants, according to the Custom, to *J. S.* in Fee, and this Surrender is presented at the next Court; but after and before the second Court, the Surrenderor dies, and on the next Court after his Death *J. S.* and the Widow are admitted, the Title of the Surrendree shall prevail; for though the Husband died seised, yet it was of a defeasible Estate, of which Quality the Wife's Estate must partake, being thereout derived, and by the Admittance, which had relation to the Surrender, was actually defeated.

Benson and Scot.  
3 Lev. 385.  
S.C. ad judg'd.  
Skin. 406.  
S. C. ad judged.  
Carth. 275, 276. ad judged without Difficulty.

If the Lord of a Copyhold Manor, in which are several Copyhold-  
 ers for Life, (a) takes a Wife, and a Copyholder dies, and the Lord  
 after Coverture grants the Land again, according to the Custom of the  
 Manor, for Life, and dies, his Wife in a Writ of Dower shall not avoid  
 this Grant; for though the Grant was after her Title of Dower, yet the  
 Custom, which is the Life and Force of the Grant, was long before.  
 grants a Rent-charge. 2 Leon. 109. 8 Co. 63. but for this vide 1 Leon. 4. 16. 2 Leon. 152. 3 Leon. 59.  
 Godb. 130. Moor 94. 1 Rol. Abr. 684. but the Heir's Grant the Wife shall avoid. Moor 234.

If there be a Custom in a Manor, that the Lord shall enter and  
 enjoy the Lands, during the Nonage of the Infant, it is a good Custom;  
 for the Freehold of the Land is in the Lord, and he is Tenant to the  
*Precipe*; and an Estate at Will may cease for a Time, and revive again,  
 as well as it may descend by Custom.

## (F) Of granting Copyhold Lands: And herein,

### 1. What Persons may make good Grants.

(b) EVERY Lord of a Manor that hath a lawful Estate in the Ma-  
 nor, whatsoever that Estate be, whether in Fee, in Tail, for Life,  
 Years, or at Will, &c. may make voluntary Grants of Copyhold Lands  
 that come into their Hands; which Grants shall bind those that have the  
 Inheritance of the Manor; whatsoever Defects the Lord of the Manor  
 may be under, that made the Grant; (c) provided the antient Rent,  
 Custom and Services be reserved; for these Estates and Grants derive  
 not their Force and Effect from the Lord's Interest, but from the Cu-  
 stom of the Manor by which they have been (d) demised, and are de-  
 misable, Time out of Mind; so that to support such Grant, it is suffi-  
 cient if it be done *per dominum manerii pro tempore existente*.

Reason whereof is, that there being nothing but Custom to warrant the Grant by Copy,  
 ought to be strictly pursued, as to the Estate, Customs, Services and Tenure, or else it is not the  
 Estate that was demised before. Co. Copyh. 107, 108. Bro. Tenant by Copy 27.—Therefore he that  
 hath but a particular Estate only in the Manor, cannot grant a Copyhold by Parcels, or demise  
 Part, and retain the Residue himself. Cro. Eliz. 662. (d) It is one of the Pillars of a Copyhold  
 Estate, that it hath been demised, or demisable Time out of Mind. 4 Co. 24. b. Co. Lit. 58. b.  
 1 Leon. 56. 3 Leon. 107, 108.

If Baron and Feme being seised of a Copyhold Manor, in the Right of  
 the Feme, (e) grant a Copyhold, this shall bind the Feme, notwith-  
 standing her Coverture; for the Copyholder is in by Custom, without  
 regard to the Estate or Person of the Grantor.

the Name of both. Cro. Jac. 99.

So a Grant made by an (f) Infant, *Non compos mentis*, Bishop, Pre-  
 bend, (g) Parson, &c. shall bind for ever.

S. P. adjudged. (g) Grants by a Parson before Induction, are not good; so if after Induction and  
 Induction he reads not the Articles. Co. Copyh. 89.

So if the Queen be Tenant for Life of a Manor, and a Copyhold of  
 Inheritance Escheat, she may grant it by Copy, and such Grant by the  
 Custom of the Manor shall bind the King; for she was *Domina pro tem-  
 pore*.

*Co. Copyb.* 97. If there are two Jointenants of a Manor, and a Copyhold escheats, one may grant the whole; for he is *Dominus pro tempore*, being seised *per my & per tout*.

(a) *Owen* 115. Lessee for Years of a Manor grants Lands by Copy; this by (a) some Opinions has been held void, unless the Reversion happens before his Estate for Years ended; for by this Means he binds the (b) future Lord's Interest, and lets his own go at large; but (c) now by the better Opinion, this Grant is good; for the first Grounds of this Law, that the Lords for the Time being may grant Copyhold Estates, was, because Copyholders were only Tenants at Will; and so though the Lord, for the Time being, had but a particular Estate, and granted the Lands in Fee, yet that was no Prejudice, but rather an Advantage to the Lord that was to have the Manor afterwards; for if he had a Mind, he might put out the Tenant at his own Pleasure; but this Uncertainty of the Copyholders Estate being found inconvenient, it was afterwards adjudged that he should retain his Lands, and not be subject to the Pleasure of the Lord; but the other Part of the Law was left as before, *viz.* that Lords, for the Time being, might grant Lands in Fee, though they themselves had but a particular Estate; and this Custom being continued to this Day, it is that which warrants the Grants by Copy; for it is most certain those Estates, granted by Lords who have a particular Interest, cannot be derived from the Interest of the Lord; for if they were, they must determine when the Lord's Estate determines; for *nemo potest plus Juris, &c.*

1 *Roll. Abr.* 499. *Cro. Eliz.* 661. S. C. *Vide Godb.* 135. *Owen* 4.—Guardian in Soeage may grant Copyhold in Reversion, and it shall bind the Ward, though it comes not in Possession during his Infancy. *Godb.* 143. *Cro. Jac.* 55, 98. *Owen* 115. 1 *Roll. Abr.* 499. 2 *Roll. Abr.* 41. S. C. (c) 8 *Co.* 63. *Hetley* 54. *Moor* 95, 147. *Cro. Eliz.* 661.

*Co. Lit.* 58. b. If a Lord of a Manor devises by his Will in Writing, that his Executors shall grant Copies according to the Custom, for Payment of Debts, and dies, the Executor, though he hath no Estate in the Manor, may make Grants according to the Custom of the Manor.

4 *Co.* 24. a. If the King, by Letters Patents, grants the Stewardship of a Copyhold Manor, and after a Copyhold escheats, the Steward (b) *ex officio*, without any Special Warrant, may grant it again, and the King shall be bound by the Custom of the Manor.

4 *Co.* 50. ad-judged. But it was said, though by Law he might do it, yet it was his Duty, before he made any Grant, to inform the Treasurer, Chancellor and Barons of the Exchequer, or some of them, for their Direction. (d) Much more may the Steward of a common Person, *ex officio*, make such Grants. *Co. Copyb.* 124. for the Steward is in the Place of the Lord, and, without a Command to the contrary, may, &c. *Cro. Eliz.* 699.

4 *Co.* 30. ad-judged. *Cro. Eliz.* 699. S. C. ad-judged, but may take Presentments, or make Admittances, being Things of Necessity. *Cro. Eliz.* 699.

*Moor* 109. 1 *Leon.* 288. If A. and B. under the Seal of the Exchequer are appointed joint Stewards of all the Lands of a Fugitive, and the Lord Treasurer makes a Court, and grants Copies, though in Strictness he had no Power without B. yet these Grants are good, being made by one that had a Colour to keep Courts.

*Ley* 47, 48. Resolved by *Hobart* and *Tanfield*; If A. being Tenant for Life of a Manor, within which are several Copyhold Tenements grantable for one Life in Possession, and another in Reversion, grants the Stewardship thereof, by Deed, under his Hand but it was ordered the Steward should grant none, but with the Privity of the Committees, and Warrant from the Court; but there is a Note that this was in Discretion, and the Grant of the Steward good.

and Seal to *B.* for Life, with the Fee of 10*s.* per Ann. for the executing thereof, and after *A.* becomes a Lunatick, and being found so by Inquisition, is committed to, &c. yet *A.* by his Steward, may grant Copies.

*Ley* 48. 're-  
solved by  
*Hob.* and  
*Tanfield.*

But the Committees cannot grant Copies; for they themselves have no Estate in the Manor, nor are Lords thereof.

If a Man makes a Feoffment in Fee of a Manor, upon Condition, and the Feoffee grants Estates by Copy, and then the Condition is broken, yet the Grant by Copy shall stand good, though it be a Rule that he, who enters for a Condition broken, shall be in of the same Estate he was before, and shall avoid all mean Incumbrances; and it is the same, though the Grant were made (*a*) after Breach of the Condition; for the Feoffor may waive the Advantage of it, if he pleases; also a Grant by the Feoffee of an Infant, which by Law he may avoid, is good.

*Dyer* 344. *a.*  
4 *Co.* 24. *a.*  
*Co. Copyb.* 82,  
88.

(*a*) But a  
Grant made  
by Lessee  
for Years,

after Breach of a Condition, is void; for his Interest is *ipso facto* determined. *Co. Copyb.* 88.—A Grant made by a Feoffee on Condition to enclose the next Day, is good; for he is *Dem. nus pro tempore.* *Co. Copyb.* 88.

A Man seised of a Manor in Fee hath Issue a Daughter, and dies, his Wife *privement enseint* with a Son, the Daughter may grant by Copy; so Grants made after Alienation in Mortmain, and before Entry of the Lord, are good.

*Co. Copyb.* 88.  
89.

If a Lord of a Manor commits Felony, and is attainted or convicted by Verdict or Confession, yet after such Attainder, &c. he may make voluntary Grants of Copyholds.

*Co. Copyb.* 88:

But if any Person that hath a tortious or defeasible Estate of Inheritance, as a Disseisor, or the Feoffee of a Disseisor, or Tenant at Sufferance, make voluntary Grants upon Escheats or Forfeitures, they shall not bind him that hath the Right; for they are not *Domini* within the Meaning of the Custom; but Admittances upon Surrenders or Descents, made by such as have defeasible Titles, are good, and shall bind him that hath Right; for that they were compellable to do, and it was no more than the rightful Lord must have done.

*Co. Lit.* 58. *b.*  
4 *Co.* 24. *a.*  
1 *Co.* 140.  
*Poph.* 71.  
*Moor* 112,  
236.  
*pl.* 369.  
2 *Leon.* 45.  
*Owen* 27, 28.  
*Cro. Eliz.*  
699.

## 2. What Acts shall destroy the Power they had of making such Grants.

Although Lords of Manors, who have Copyholds come to them by Escheat or Forfeiture, (*b*) may re-grant them again according to the Custom of the Manor; (*c*) yet by their Acts, such Power may be destroyed; therefore (*d*) if Copyholds come into the Lord's Hands in Fee, and he make a Lease of them for Life, Years or Half a Year, or for any (*f*) certain Time, by Deed or without Deed, the Copyhold is destroyed; because during those Estates, it was not demised, nor demisable by Copy.

(*b*) 1 *Rel.*  
*Abr.* 498.  
*Co. Lit.* 58.  
*Cro. Eliz.* 699  
4 *Co.* 31. *a.*  
(*c*) 4 *Co.* 31. *a.*  
(*d*) 1 *Rel.*  
*Abr.* 498. 1  
4 *Co.* 31.  
(*e*) But if  
Tenant in

Tail, for Life, &c. makes such Lease, &c. this shall not destroy the Power of him in Reversion. 2 *Rel. Abr.* 271. 2 *Sid.* 35, 37. Vide *Cro. Car.* 521. cont. per Cur' arguendo. (*f*) *Secus* if he leases it at Will. 4 *Co.* 31. 3 *Leon.* 108.

So if the Lord makes a Feoffment thereof in Fee, upon Condition, and after enters for the Condition broke, yet it cannot be re-granted again by Copy.

4 *Co.* 31. *a.*

So if the Land so escheated, &c. is extended upon a Statute or Recognition made by the Lord, or the Wife of the Lord, in a Writ of Dower, hath it assigned to her, though these Interruptions are by Act of Law, yet it cannot again be granted by Copy.

4 *Co.* 31. in  
*Fren. b's Case.*

But if the Lord keeps them in his Hands, though never so long, yet may they be granted again by Copy.

4 *Co.* 31. *a.*  
*Co. Lit.* 58. *f.*  
*Cro. Eliz.* 699.

4 Co. 31. So if the Lord be disseised thereof, and the Disseisor dies seised, or if the Land be recovered against the Lord by a false Verdict, or erroneous Judgment, though it is not demised or demisable by Copy, till it is recovered by the Lord, or the Judgment reversed; yet after it is re-continued, it is grantable again by Copy, because the Interruption was tortious.

4 Co. 31. b. If a Copyholder takes a Lease for Years of the Manor, by which his Copyhold is extinct, yet he may re-grant it again, if he will; for it was always demised or demisable.

4 Co. 31. b. So if a Copyhold escheats, &c. and the Lord aliens the (a) Manor, (a) So if he his Alienee may re-grant the Land by Copy.

Leases the Manor, and the said Copyhold Land, by the Name of his Tenement, called H. for the Manor being demised, the Copyhold is inclosed as Parcel thereof; and the naming the Copyhold is but Surplusage. Cro. Car. 521.

### 3. What Things may be granted to be holden in Copyhold.

(b) A Rent-Service, Rent-charge or Common in Gros, cannot be granted otherwise than as they are Things that lie not in Tenure are not grantable by Copy, unless (b) appendant to some thing that doth lie in Tenure; and therefore Things Incorporeal, for which there can be no Distress, and which are not Parcel of the Manor, which consist only in Demesnes and Services, cannot be demisable by Copy; for of such incorporeal Things no Service is due; and therefore no Court necessary to be kept for Surrenders, Admittances, &c.

appendant to Things which lie in Tenure. Co. Copyh. 116. and therefore where my Lord Coke says that any Thing concerning Lands or Tenements may be granted, it must be understood of Things appendant to the Demesnes, or those Parcels which make up the Manor. Vide Co. Lit. 58. Tithes may be demised by Copy, because they are Parcel of the Manor, as a Rent-charge may. Per 1 Rol. Abr. 498. Cro. Eliz. 413. cited to have been adjudged; but Cro. Eliz. 814. S. C. and S. P. dubitatur; because not Parcel of the Manor; and therefore not grantable secundum consuetudinem manerii. 4 Co. 24. b.—A Mill may be granted by Copy. 4 Leon. 241. cited to have been adjudged.—So a Fair appendant to a Manor may be granted by Copy. 4 Co. 31. a. Co. Lit. 58.

(c) 1 Rol. (c) *Tonsura prati*, the (d) Herbage or Vesture of Land may be demisable by Copy.

(d) Co. Lit.

58. 4 Co. 31. a. so resolved.

4 Co. 30, 31. Things grantable by Copy must be Things of Perpetuity; otherwise Because it is it can never be shewn that there hath been a Custom to demise them by a Thing of Copy; yet Underwood, without the Soil, may be demised by Copy. Perpetuity,

to which the Custom may extend. Co. Lit. 58. b. S. P. Cro. Eliz. 413. and Moor 315. adjudged and affirmed upon a Writ of Error.—That a Man may grant, by Copy, twenty Loads of Wood to be taken by the Grantee, is good; for it is not necessary that the Thing granted have Continuance, but only that it be a Thing of Perpetuity. Co. Copyh. 118. but *Quare*.

Co. Lit. 58. b. A Customary Manor may be held by Copy of Court-Roll, *ad voluntat'*, &c. and such a Lord may grant Copies, but it must be of such Things as have been usually demised by him; for he cannot grant all his Demesnes by Copy, without they have been usually demised; for tho' they have been demised Time out of Mind, by the superior Lord by Copy, that will not warrant his Demise by Copy; because the Custom of the Manor must be, that Time out of Mind they have been granted *per Dominum manerii*.

Fac. 327. adjudged. 1 Bulst. 57. cited; but Cro. Fac. 260. dubitatur.—But he cannot hold a Court-Baron, for he can have no Freeholders; for a Copyhold Manor is not capable of an Escheat of a Freehold; for if it were, the Freehold, after the Escheat, must become Copyhold, which is repugnant and impossible. Yelv. 190. Cro. Fac. 259. 1 Bulst. 54, 55. These Cases which seem to contradict each other, and which *vide*, may perhaps be thus reconciled, that a Customary Court may be held by one that hath such a Manor, but not a Court-Baron; and my Lord Coke's Case seems to go no farther; and *Quare* whether such a Lord may not have Freehold Services.

4. Of the Operation of the Grant, and the Estate and Interest that passes thereby.

Grants of Copyholds regularly receive the same Exposition that Grants of Freehold Lands do at Common Law, therefore a Grant to one and his Heirs Males is a Fee-simple; so is a Grant to one & *sanguini suo hereditabili*, but a Grant to one & *sanguini suo in perpetuum* is but an Estate for Life.

(a) If Copyhold Lands have been usually granted in Fee, a Grant to one and the Heirs of his Body, or to one for (b) Life or Years, is within the Custom.

1 Leon. 56. S. P. *per Curiam*. Cro. Eliz. 373. S. P. adjudged. 1 Salk. 188. and 6 Mod. 63. S. P. agreed. (b) And after the Death of Tenant for Life the Lord may grant the same again in Fee, for the Grant for Life was not any Interruption of the Custom. 1 Leon. 56. *per Cur*.

So where Grants have been made by Copy for Life, a Grant *durante viduitate* is good, for that is a less Estate than during her Life, but not *vice versa*.

If a Copyhold be granted to three *habend' successive*, they are Jointenants, unless by (c) special Custom the Word *successive* makes the Estate several.

Chancery, That if a Copyhold is granted to three *successive*, and there is no Custom the first Taker had Power of disposing of the Whole, nor that the first Taker paid the Purchase Money, it shall not go to the Executor of the first Taker, but shall go in Succession.

If there be a Custom, that Copyholds may be granted for three Lives, a Copy may be granted to three for the Lives of two, within the Custom; for there is not any Inconvenience to the Lord, though it be for the Life of another; for there shall not be any Occupancy thereof, but the Lord shall have it, if the Tenant *per auter vie die*, living *Cestui que vies*, and this is not a greater Estate than for three Lives, which is less than the Custom warrants.

So if the Custom of a Manor be, That the Lands are demisable by Copy to two or three Persons for their Lives, and the Life of the Survivor, *Habendum successive sicut nominantur in Charta, & non aliter*, paying a Heriot on the Death of every Tenant dying seised, a Grant to A. and his Assigns for the Lives of B. and C. and of the said A. is good within the Custom; for there can be no Occupant against the Lord, neither will he be prejudiced by the Tenant's becoming a Bankrupt, for the Assignees have no other Right or Interest than the Bankrupt, and the Lord is intitled to his Heriot on the Death of the Tenant, notwithstanding the Assignment.

If by the Custom a Copyhold may be granted for three Lives, and it is granted to one (d) for his Life, Remainder to such Woman as he shall marry, and to the first Son of his Body; both these Remainders are void, but the Estate for his own Life is good.

Fee, or for Life, *solummodo ea Capienti extra manus Domini*, yet a Surrender may be to the Use of one for Life, Remainder in Tail, Remainder in Fee. Cro. Eliz. 373. adjudged; though it was objected, the Taking ought to be *immediate*, but the particular Estate and Remainders make but one Estate.

## (G) Of Surrenders, Presentments and Admittances: And herein,

## 1. Of the Necessity of a Surrender, and where the Copyholder shall be said to be in before Admittance.

*Co. Lit. 57. a.* Copyholders cannot regularly (*a*) transfer their Estates otherwise than by Surrender, the Reason whereof is, because they have only an Estate at Will, which is determined when they take upon them to grant it over, for that is a plain Declaration of their Intention to hold the Lands no longer; therefore a Surrender to the Lord is necessary, who is to grant another Estate at Will, and which now he is compellable to do to him, to whose Use the Surrender is made, seeing the Tenant hath a settled Estate and Interest in the Land, which his Heir shall inherit whether the Lord will or not.  
*Co. Lit. 57. b.*  
*4 Co. 21. a.* Copyholder cannot alien by Deed, yet he that hath a Right only to a Copyhold, may by Deed or Copy release it to one that is admitted Tenant *de facto*. *Co. Lit. 59. 4 Co. 25. S. P. adjudged. Hut. 65. S. P. said. Cro. Fac. 101. S. P. dubitatur.*—But he cannot release to one that ousts him by Wrong, for he gains no Customary Estate, upon which the Release of the Customary Right may enure. *4 Co. 25. b. 1 Leon. 102.* But *Q.* Whether such Release will not enure by way of Estoppel against the Copyholder himself. Release in Fee to one who was admitted for Years, will not enlarge his Estate; for no Man can come to the Fee of a Copyhold without Surrender and Admittance by the Lord. *Co. Copyh. 97, 98.*—But if a Copyholder surrenders upon Condition, he may after release the Condition by Deed. *Cro. Fac. 36.*

(*b*) *Co. Copyh. 97, 98.* Copyhold Lands cannot be (*b*) exchanged by Deed, but there must be a Surrender, and Admittance thereupon; but (*c*) if there be two Joint Copyholders, and one of them releases to the other, this is good without (*d*) any Surrender or Admittance, for the first Admittance was of them or either of them, and their Ability to Release was from the first Conveyance to the Lord and Admittance.  
 will pass the Copyholder's Interest, for the Custom of passing by Surrender is for his Benefit, which he may waive. *Hutt. 65. Winch 67. 1 Jones 41. S. C.*

*4 Co. 22. b.* Though regularly, Copyhold Estates can only be transferred by Surrender and Admittance, yet if the Copyholder dies, his (*e*) Heir may enter before Admittance and take the Profits; for perhaps there may not be a Court held in a great while afterwards; also such Heir may (*f*) Surrender to the Use of another before Admittance, but not to prejudice the Lord of his Fine.  
*23 b.*  
*1 Leon. 174.* And if he dies, his Heir may enter. *4 Co. 25. b.*—Tho' the Lord had admitted another. *Noy 172. adjudged.* (*f*) May take the Profits, bring Trespafs, have an Assise of *Mordancestov* before Admittance. *4 Co. 23. Lane 20. 1 And. 192. Cro. Eliz. 148. Moor 597. 1 Leon. 100.*—But is not compleat Heir, for he cannot maintain a Plaint in Nature of an Assise. *Co. Copyh. 112. Moor 272. cont'.*

*1 Lev. 63.* But if upon Proclamation the Heir does not come in to be admitted, per *Curr'*, upon a Trial at Heir come in to be admitted.  
 Bar. (*g*) But without Custom he cannot seise the Copyhold as forfeited. *1 Lev. 63. per Curr'.*

*Hob. 181.* If the Custom of a Manor be, That the Wife of every Copyholder for Life shall have her Free Bench *dum casta & sola vixerit*, after the Death of the Husband, the Law casts the Estate upon the Wife, so that she shall have the Estate before any Admittance, and may make a Lease for a Year, as another Copyholder may.  
*Cro. Fac. 573.*  
*2 Rol. Rep. 178.*  
*Noy 29.*  
*1 Rol. Abr. 502. S. C.*

So if the Custom of a Manor be *quod si aliquis vir habet uxorem seised in Fee secundum consuetudinem Manerii* of Customary Lands, that he shall hold *ad terminum vite sue post mortem uxoris per Legem Angliæ*, and a Copyhold Tenement descends to a Feme Covert, and the Husband enters, but before Admittance his Wife dies, yet he shall be Tenant by the Curtesy; for though the Lord before Admittance shall claim no Duty as Fealty, Homage, Relief, Rent, &c. yet his Delay shall not prejudice a third Person.

Moor 271.  
1 And 192.  
By the better Opinion of the Books.

If a Man surrenders a Copyhold to the Use of his Will, by which he devises it to his Wife for Life, and that after his Death, his Wife or her Executors should sell the Land; or if the Devise be, That she shall chuse two Attornies, and make Sale of the Land according to the best Advantage, by these Devises the Wife hath but a bare Authority, and there needs no Surrender to make the Sale; for upon the Nomination of the Vendee, he shall be in by the Will of the Devisor.

Godb. 46.  
Cro. Jac. 199

## 2. Where the want of a Surrender will be supplied in Equity.

Although Copyholds, by the strict Rule of the Common Law, can only be conveyed by Surrender, yet in Equity this Rule receives a Relaxation, and the want of a Surrender will be supplied in the following Instances.

1. In favour of Purchasers; as if *A.* contracts with *B.* for the Purchase of a Copyhold Estate, and pays the Purchase Money, and *B.* agrees to surrender the Premises at the next Court, but (*a*) dies before the next Court, or any Surrender made, Equity will supply the want of a Surrender.

2 Chan. Rep. 213.  
Abr. Eq. 122.  
(a) So if he had refused, for if a Man

covenants to Surrender, Equity will compel him to a specific Performance, and by Decree, not only bind the Person, but likewise the Lands. *Abr. Eq. 122.*—But if there are two Purchasers who have equal Equity, he who has the legal Estate or Interest shall prevail. *Vide 2 Vern. 565, 609.*

2. In Favour of Creditors; as where a Man devises Copyhold Lands for the Payment of his Debts, this shall be good without any Surrender.

*Abr. Eq. 124.* admitted in several Cases.

But if a Man seised of Freehold and Copyhold Land, devises (*b*) both for the Payment of Debts and Legacies, without surrendering the Copyhold to the Use of his Will, and the Freehold is sufficient for Payment of the Debts, Equity will not supply the want of a Surrender, and lay the Legacies on the Freehold, and the Debts on the Copyhold, as is done when there are Simple Contract Creditors, and Bond or Judgment Creditors, and Personal Assets not sufficient to pay both; nor will Equity supply the want of a Surrender for the Sake of Legatees, especially if they be Strangers, as they were in this Case.

*Abr. Eq. 123, 124.* Rafter and Stock decreed.

(b) Where a Man devised all his Real and Personal Estate for the Payment of his Debts, and my Lord

Chancery refused to supply the want of a Surrender, as to his Copyholds, because it did not sufficiently appear to have been his Intention to charge those. *Abr. Eq. 124.*—That Equity will not in Favour of a Wife supply the want of a Surrender for Payment of Debts, when the Heir at Law would be disinherited thereby. *Abr. Eq. 124.*

3. Equity will supply the want of a Surrender in Favour of younger Children, against an Heir at Law; but if the Case be so Circumstanced, that by that Means the younger Children would be in a better Condition than the Heir at Law, Equity will not interpose.

1 Vern. 132. adjudged, and that there were several Pre-

cedents of the kind. 2 Vern. 163. S. P.

As where a Man devised his Copyhold, being of the Nature of *Brugh English*, to his eldest Son, and devises Houses to his youngest; which Houses were soon afterwards burnt down, and never entred upon

2 Vern. 265. Cooper and Cooper, de- creed.

by

by the Heir in *Borough English*; and as this Case was Circumstanced, the Court would not supply the want of a Surrender, in Favour of the (a) eldest Son in-dest Son. (a) Such eldest Son in-dest Son. titled to the same Favour, that a younger Child is against an Heir at Common Law. 2 *Vern.* 163.

1 *Salk.* 187. Nor will Equity supply the want of a Surrender in Favour of a Grand-decreed by child, much less in Favour of any other collateral Relation.  
my Lord

*Somers*, That the want of a Surrender should be supplied in Favour of a Grandson, it depending on the same Law of Nature and Reason; but reversed in the House of Lords. *Preced. Chan.* 475. S. C. cited, and the Law and Practice now according to the Judgment of Reversal.

*Abr. Eq.* 123. Also in Case of a Natural Daughter, the Court of Chancery refused to supply the want of a Surrender; for though the Father might have great Affection for such Child, and might by the Law of Nature be obliged to provide for it, yet such a one was not to be considered as a Child in Law, nor will such Affection raise an Use at Law for such Child; for in a Civil Society, where the Solemnities of Marriage are established, it would be absurd in the Courts to allow Privileges to Children not born within those Rules.  
*Furaker and Robins.*

*Preced. Chan.* 322. agreed by Counsel on both Sides. 4. If Copyhold Lands are in Mortgage, the (b) Mortgagor may devise the Equity of Redemption without any Surrender, for he has no Estate in them whereof he can make any Surrender.

(b) *Cestui que Trust* of a Copyhold Estate, having an equitable Interest only, may devise it without Surrender. 2 *Vern.* 585, 680. S. P. *per Cur.*

*Vide Title Charitable Uses.*

5. In Case of a Devise to a Charitable Use, the Courts of Equity supply the want of a Surrender, and go upon the Word *appoint* in the Statute of *Charitable Uses*.

2 *Co.* 17.  
4 *Co.* 25.  
*Cro. Eliz.* 252,  
443.

6. In Case of Necessity, as where the King, or Lord of a Manor grants the Fee-simple of the Copyhold Estate to one in Fee, there the Copyholders cannot convey, because the Alienee hath no Court in which he can make Surrenders, &c. but lest this should turn to the Prejudice of the Copyholder, Chancery supplies the Defect, and makes good the Alienation.

### 3. What Persons may Surrender.

1 *Leon.* 95. All Persons who may make Grants or convey their Estates, may by Surrender pass Copyhold Lands; if an Infant surrenders Copyhold Lands, he may at his full Age disagree, and enter thereupon; for this is not a Conveyance of equal Solemnity with a Feoffment, which works a Discontinuance, and which notwithstanding, the Infant may avoid at his full Age.  
*Poph.* 39.  
*vide Head of Infants.*

*Cro. Eliz.* 717. A Feme Covert may surrender Lands, being solely examined by the Steward; and if there be a Custom for her to be examined before two Tenants out of the Manor, it is good.

*Co. Lit.* 59. b. If there are two Jointenants, and one of them surrenders his Moiety to the Use of his Last Will, and dies before the Surrender is presented, having made his Will, this is a Severance of the Jointure, for being presented it relates to the Time of the first Surrender.  
1 *Roll. Abr.* 501. S. C.

*Yelv.* 144. A Copyholder surrenders to the Use of another, who before Admittance surrenders to another who is admitted, no Interest is hereby vested in him, for the first Surrendree had (c) nothing in him to give over, and the Admittance of the second Surrendree did not amount to an Admittance of the First.  
1 *Brownl.* 143. S. C.

(c) But an Heir before Admittance may surrender to another, because he hath the legal Estate and Interest in him. 4 *Co.* 22. b. *Cro. Jac.* 36.

If there be Baron and Feme Copyholders, to them and the Heirs of the Baron, and the Baron dies, the Heir may surrender his Reversion into the Hands of two Tenants of the Manor (who by Custom have Power to take Surrenders) before Admittance, and (a) during the Life of the Feme, and this is a good Surrender; for the Reversion was cast upon him by Descent, before any Admittance.

be Tenant for Life of a Copyhold, the Remainder in Fee, he in Remainder may surrender his Estate, if there be no particular Custom to the contrary. 3 Leon. 239. 4 Leon. 9.—Tenant for Life, Remainder for Life to another, he in Remainder enters upon Tenant for Life, and surrenders, nothing passes, for he is a Disseisor, and hath no Customary Estate in him which can pass by Surrender. 1 Mod. 199.

#### 4. What Persons may accept such Surrenders and make Admittances.

A Copyholder may surrender to a Disseisor, Abator, Intruder, Tenant at Sufferance, or any others that have defeazible Titles, and their Admittance will be good, and shall (b) bind him who hath Right, for that such particular Tenants are compellable to do, and it was no more than the rightful Lord must have done.

3 Leon. 239. 4 Leon. 9. 2 Rol. Rep. 181. 1 Rol. Abr. 503. 4 Co. 240. b. 1 Vent. 360. (b) A. was Tenant for Life of a Copyhold, the Remainder to B. for Life; and B. surrendered to the Use of the Disseisor of the Manor *ut Dominus inde*, &c. 2 Mod. 287. *dubitatur*, Whether the Right of B. was extinct, because A. continuing always in Possession, the Disseisor had gained no Reversion in this Copyhold Tenement, and by Consequence was not capable of taking a Surrender thereof to his own Use. 1 Vent. 350. *adjornatur*. Vide *Skin.* 28. 2 *Show.* 153.

If Lessee for Life, Years, or at Will, a Guardian, &c. accept a Surrender, and their Interest determine, the next Lord shall be compelled to admit.

A Surrender to the Steward, to the Use of the Steward, is good, to give the Steward an Interest; for the Surrender is in Truth to the Lord, and not to the Steward.

#### 5. What Words or Acts amount to a Surrender.

(c) Any Words spoken in Court, expressing the Copyholder's Intention of Surrendring, and that he designs not to hold it any longer, will amount to a Surrender; as (d) if he says, that he is weary of his Copyhold, and requests his Lord to take it again, this is a (e) sufficient Surrender.

(e) My Lord Coke says, That the Word *Surrend'* is *Vocabulum artis*, and therefore where a Surrender is requisite, no other Words will supply the Want of it, as the Words, *give*, *grant*, or the like. *Co. Copyh.* 102. But *Q.*

But to say that he renounces his Copyhold is no Surrender, because he limits it to no Body; so if he says, that he is content to Surrender, yet it is no Surrender, for that only expresses his Inclination to do it, not that he actually doth it.

A. Lord of a Manor whereof B. was a Copyholder in Fee, and the Lord pretended that his Copyholder had forfeited, and thereupon entred into Communication with him about it, and it was agreed, That B. should pay 5 *l.* to the Lord; and that in Consideration thereof C. should enjoy the said Customary Lands (except a Wood) for his Life, and also of A. his Wife *durante Viduitate*, and that C. should have Election, whether he would have those Lands assured to him by Copy or by Bill, and he chose by Bill, which was accordingly done; the Court held this a good Surrender for Life only, and that the Lord had the Wood discharged

(a) Note; the charged of the Customary Interest, the (a) Communication amounting to a Surrender. Communication does not appear to have been in Court, and Q. Whether any Words spoken out of Court will amount to a Surrender.

3 *Bulst.* 80. Copyholder in Fee comes into Court, and there accepts a Copy to *Shephard* and himself for Life, then to his Wife for Life, then to his Son for Life; *Adams.* this is tantamount to a Surrender to these Uses; but he hath his old Reversion in him, for there is no Ground to make a Surrender of that by *1 Rol. Abr.* 501. S. C. And there Construction, because he hath made no Disposition of it. *And there* said, That it was no Surrender, for that a Copyhold cannot be surrendered by a Surrender in Law, but only by an actual Surrender. — But in other Places in *Rol.* as *1 Rol. Rep.* 265. *1 Rol. Abr.* 171, 172. the S. C. it is as in *Bulst.* held to be a Surrender, and the Reversion still in the Copyholder.

*Raym.* 402. If *A.* being seised in Fee of a Copyhold Manor, grants certain Customary Lands, Parcel thereof to *B. habend'* to *B. C.* and *D.* for their *adjudged and* Lives successively, as they are named in the Grant at the Will of the *affirmed up-* Lord, according to the Custom of the Manor, and *B.* is admitted, and *on a Writ of* within the Manor there is a Custom, That the first Person in such Copy *Error.* named may surrender all the Lands, and thereby determine and destroy the Title and Estate of the other Persons therein named; and *A.* and *B.* covenant to levy a Fine of the Manor, and of the Customary Lands by Name, to the Use of a Stranger in Fee, and the Fine is levied accordingly, yet this does not amount to a Surrender within the Custom, so as to bar the Estate of *B.* and *C.* for the Custom extends only to the Copyhold Estate, and that cannot (b) pass by the (c) Fine.

(b) But the Right to it may be extinguished by Fine. *Carter* 24. (c) If the Copyholder joins with his Lord in a Feoffment of the Manor, his Copyhold is thereby extinct. *Godb.* 11. *Vide post,* Letter (K).

## 6. What Acts amount to an Admittance.

3 *Bulst.* 219. Any Thing that expresses the Lord's Consent to a Surrender, amounts to an Admittance, for if his Consent to take the Surrendree as his Tenant appears, it does not seem material whether it be done by a *Dominus concessit & admissus est,* or by other Acts which amount to as much.

*1 Rol. Abr.* 505. *Freswel* and *Welch.* Note; This Case is differently reported in several Books; in 3 *Bulst.* 215, 237. S. C. Acceptance of Rent from the Hands of the Tenants, into whose Hands the Surrender was made, doth not amount to an Admittance of *Cestui que use,* for the Lord may take the Rent of them without designing any Thing thereby to a third Person; but had it been shewn that the Lord had accepted the Rent as of his Copyholder, then it had been a good Admittance. *Cro. Jac.* 403. S. C. Reports it, That Acceptance of Rent of *Cestui que use* is no Admittance; but by *Godb.* 268. S. C. that it is an Admittance, the Lord knowing of the Surrender; *secus* if he accepts it as a Duty generally. In *Bridg.* 49, 52. S. C. it does not appear the Lord had Notice of the Surrender when he accepted the Rent. *Vide 2 Sid.* 61. S. P. *per Twissden arguend'* admitted, and *Style* 146. S. P. *per Rol. Ch. Just.*

3 *Bulst.* 239. So if a Fine be (d) accepted of one as of a Copyholder, this amounts to an Admittance. *arguendo.* (d) *Secus* if the Steward had only assessed the Fine. 3 *Bulst.* 239. *arguendo.*

*Yelo.* 144, 145. *Wilson* and *Weddial,* adjudged. But if a Copyholder in Fee surrenders to the Use of *B.* in Fee, and *B.* surrenders to the Use of *C.* for Life, who is admitted, the Admittance of *C.* shall not by Implication be taken to be an Admittance of *B.* *1 Brownl.* 143. S. C. But *vide 1 Rol. Abr.* 505. *Cro. Eliz.* 504. *cont'*, and 3 *Bulst.* 237. S. P. *dubitatur.*

for the Admittance ought to be of a Tenant certainly known by the Steward, and entred on a Roll by it self.

If a Copyholder, according to the Custom of the Manor, surrenders into the Hands of two Customary Tenants to the Use of *J. S.* and his Heirs, and this is presented at the next Court, and by the Steward entred in the Rolls of the Court, in these Words, *viz. ad hanc Curiam Compertum est per Homagium, that the Copyholder sursum reddidit, &c. ad usum J. S. & Heredum suorum,* and the Steward afterwards delivers a Copy thereof to *J. S.* yet this does not amount to an Admittance; for here is no Act done by which it appears the Lord hath consented that *J. S.* should be admitted, or that he should have the Land according to the Surrender.

*Bridg. 81, 82. adjudged. Popb. 127. S. C. adjudged. 3 Bulst. 237. adjournatur. And after ended by Mediation of Friends.*

If a Woman that hath Right to her Free Bench, comes into Court and prays to be admitted, and is (a) denied, (supposing nothing vests in her before Admittance) the Law will supply the Admittance.

(a) *Hob. 181. Noy 29. If the Steward refuses to ad-*

mit, but the Surrendree enters, and occupies the Land, in an Ejectment brought by the Lord, he may well plead Not guilty. *Yelv. 16.*

*Lord, he may*

7. Of the Construction to be made when the Surrender, Presentment, and Admittance differ.

If *A.* Surrenders for Life, and the Admittance is in Fee, the Estate of the Copyholder is according to the Surrender, not according to the Admittance; for the Lord hath only a Customary Power to make Admittances according to the Surrender; and so far as he executes that Power the Admittance is good; but where he goes beyond that Power, he acts without a Warrant, and then his Acts are void.

*Co. Copyb. 110. 4 Co. 28. b.*

So if the Surrender be absolute, and the Admittance conditional, the Admittance is good, and the Condition void; for when the Lord acts according to his Power in one Thing, but beyond it in another, for what he acts according to his Power he hath a Warrant; but for what he acts beyond it he hath no Warrant, and so it is void.

*Co. Copyb. 110.*

If a conditional Surrender be presented, and the Steward in entering thereof omits the Condition, (b) upon sufficient Proof thereof the Surrender shall not be avoided, but the Roll shall be amended.

*4 Co. 25. 1 Rol. Abr. 501.*

Misentry of the Date of the Court shall not prejudice the Copyholder, but he may give in Evidence the Truth of the Matter, and shall not be bound by the Rolls. *1 Leon. 290.*

(b) So the

If the Surrender be to the Use of *J. S.* and the Lord admits *J. N.* this is void; and he afterwards may admit *J. S.* so if he admits *J. S.* and a Stranger, *J. S.* takes all, for the Stranger's Admittance is void.

*Co. Copyb. 110.*

If a Surrender be made, and there is a wrong Presentment of this Surrender, if the Admittance is according to the Surrender, it is (c) good.

*Lex Custom. 137. 4 Co. 29.*

*Cro. Jac. 403.* (c) For an Admittance upon a Surrender without any Presentment at all, is good, and a void Presentment is as none. *Co. Copyb. 105.*

8. Of the Time of making the Surrender, Presentment and Admittance, and where they shall be effectual, though any of the Parties dies before they are completed.

By the general Custom of Manors every Surrender ought to be presented on the next Court-Day after it is made, but by Special Custom it may be good if done on the second or third Court-Day; the Reason hereof is to prevent Disputes, and for the Security of Purchasers, who may be otherwise defeated, if it were admitted to have an old Surrender trumped up, and presented at any Time.

*Co. Copyb. 105. Style 275.*

If

If a Copyholder in Fee surrenders out of Court, and dies before it is presented in Court, yet the Surrender being presented after his Death, according to the Custom, is good.

4 Co. 29.  
Cro. Jac. 403. S. P.  
3 Bulst. 214.  
S. P. adjudged. 1 Rol. Abr. 501. S. P.

So if the Customary Tenants, by whose Hands the Surrender was, die, yet if the Surrender be presented upon good Proof thereof, it will be sufficient.

Co. Lit. 62.  
Cro. Jac. 403.  
3 Bulst. 214.  
adjudged,  
the Custom being found generally, that it must be presented at the next Court, without saying by whom. 4 Co. 29. b.

So if he to whose Use the Surrender was, die before Admittance, yet his (a) Heir shall be admitted; for upon Admittance the Estate is in Cestui que use from the Surrender, by Relation.

4 Co. 25. a.  
29. b.  
(a) So if Tenant for Life dies, he in Remainder shall be admitted. 2 Sid. 38, 61. 4 Co. 25. a. 29. b. Dyer 192.

## (H) Of the Operation of the Surrender in passing the Estate: And herein,

### 1. Of the Persons to Take, and what shall be sufficient Certainty in the Description of them.

Surrenders have the same Operation and Effect in passing Copyhold Estates, as Grants have at Common Law, and must regularly be directed by the Rules and Maxims of the Common Law, in the transferring thereof.

Co. Copyb. 97.  
Cro. Jac. 376.

If a Copyholder surrenders to the Use of the right Heirs of J. S. he (b) If a Man being alive, the Surrender is void; for it cannot take Effect in Pre-surrenders to *sent* as he would have it. the Use of his own right Heirs, whether the Lord shall not hold it till his Death; Q. and vide Co. Copyb. 97. Lit. Rep. 17, 18.—If a Surrender be made to the Use of B. and his Heirs, to the Use of such Person as A. should name by his Will. Q. Whether such Person can Take. 2 Bulst. 274.

1 Leon. 101.  
(b) If a Man being alive, the Surrender is void; for it cannot take Effect in Pre-surrenders to *sent* as he would have it. the Use of his own right Heirs, whether the Lord shall not hold it till his Death; Q. and vide Co. Copyb. 97. Lit. Rep. 17, 18.—If a Surrender be made to the Use of B. and his Heirs, to the Use of such Person as A. should name by his Will. Q. Whether such Person can Take. 2 Bulst. 274.

If B. a Copyholder, surrenders into the Hands of the Lord, by the Hands of Tenants, according to the Custom, &c. without saying to whose Use the Surrender shall be, and at the next Court B. is admitted, *Habend'* to him and his Wife in Tail, the Remainder to the right Heirs of B. the subsequent Admittance explains the general Surrender, and the Wife shall take by the Surrender, though not named in the Premises, but in the *Habendum* only; though it was agreed it was otherways in Feoffments and Grants at Common Law.

Popb. 125.  
adjudged.  
Cro. Jac.  
434. S. C.  
2 Rol. Abr.  
67. S. C.

A Man may surrender Copyhold Lands immediately to the Use of an Infant *in Ventre sa mere*, for a Surrender is a Thing Executory, and nothing vests before Admittance; and therefore if there be a Person to Take at the Time of the Admittance it is sufficient, and not like a Grant at Common Law, which putting the Estate out of the Grantor, must be void, if there be no Body to Take.

Co. Copyb. 9.  
1 Rol. Rep.  
109, 138,  
253. Vide  
Moor 637.  
cont.

A Copyhold is granted to the Father and his Son, he having but one Son, this Grant is good for the apparent Certainty of it; but if the Father has several Sons, or if a Surrender be to the Use of a Man's Cousin whether such Uncertainty may be helped by any Averment.

Cro. Jac. 374.  
Co. Copyb. 95.  
vide; And  
whether such  
Uncertainty may be helped by any Averment.

or Friend, or to the Use of *J. S.* or *J. N.* all these Surrenders are void for Incertainty.

If a Surrender be made to the Lord, without expressing any Use, it shall be to the Use of the Lord; for it cannot be imagined that the Surrender was made to no End or Purpose whatsoever. *Co. Copyb. 97.*

2. What shall be said to pass by the Surrender.

In this likewise the same Rules obtain as in the Exposition of Grants; for a Man may, with the same Certainty in a Surrender, describe whatever he intends to pass, as he may in any other Conveyance.

A Man seised of Copyhold Lands, devised Part thereof to his Wife; for Life, the Remainder to his Brother and his Heirs; and afterwards, in the Presence of three Persons of the Court, said to them, I have made my Will as I will have it, and here I surrender all my Copyhold Lands into your Hands accordingly; in this Case, only those mentioned in his Will shall pass; for he had respect to that in making his Surrender, and he said, he surrendered all his Copyhold Lands accordingly; which shewed his Intent was to pass those Lands that were devised by the Will only. *Leon 18.*

*A.* covenants with *B.* to assure him all his Copyhold Lands, and after he surrenders divers Parcels by Name, and some by Buttals and Boundings; at the next Court the Surrender is presented and inrolled, but with this Addition, by the Name of all his Copyhold Lands, there no more shall pass than what was (*a*) named in the Surrender. *Dyer 257.*

(a) A Surrender of a

House *cum Pertinentiis* will pass only the House, Orchards, Yards, and not the Lands, for Copyhold and Freehold, as to this, must be construed alike. *Cro. Jac. 526.* adjudged. *Kitchin 81.* *Co. Copyb. 93.*

3. What Estate or Interest passes by the Surrender.

A Copyholder having a Fee-simple, according to the Custom of the Manor, may make what Disposition of it he pleases, and may surrender it absolutely, or for any limited Time. *4 Co. 21. b.*  
*1 Rol. Abr. 828.*

But such Disposition is not to receive the same favourable Interpretation that Wills and Devises do at Common Law; for a Man may as well order a Surrender in his Life-time, according to the Rules of Law, as he may any Deed to pass a Freehold Estate. *2 Rol. Rep. 109, 138, 253.*  
*Co. Copyb. 97.*

Therefore if a Copyholder in Fee surrenders to the Use of *A.* and *B.* and the longer Liver of them; and that for want of Issue of *A.* the Lands should remain to the youngest Son of *J. S.* in this Case *A.* has but an Estate for Life, for an Estate-Tail in Copyhold Lands shall not pass by Implication. *Cro. Car. 366.*  
*1 Brownl. 127.*  
*Noy 152.* adjudged.

So if a Copyholder surrenders, (*b*) *habend' a tempore mortis* of the Copyholder, to the Use of another and his Heirs, this is meerly void; for a Copyholder in Fee can no more surrender, *habend'* after his Death, than a Tenant in Fee can convey his Lands, *habend'* after his Death; for then he should leave a particular Estate in himself, which is (*c*) against the Rules of Law. *Cro. Jac. 376.*  
*Sympson and Southern,* adjudged.  
*1 Bulst. 272, 273.* S. C.  
*1 Rol. Rep. 109, 137, 253.*

S. C. adjudged. *Godb. 264.* S. C. adjudged, That a Surrender can no more commence at a Day to come, than a Livery. (*b*) So if he surrenders *Post mortem suam in manus Domini ad usum*, &c. *4 Leon. 8.* *Cro. Eliz. 29.* *1 Rol. Rep. 254.* *1 Bulst. 274.* *Godb. 451.* (*c*) For this *vide 1 Rol. Abr. 828.*

If the Limitation of the Use be (*d*) general, then *Cestui que use* taketh but an Estate for Life, for Copyhold Estates, as a necessary Consequence upon the Custom, shall be directed by the Rules of Law, unless within the Manor there be a Special Custom to the contrary; as that *Sibi & suis*, or *sibi & assignatis*, or such like Words, shall create a Fee. *4 Co. 29. b.*  
*(d)* The Surrender was to the Use of a Stranger for ever, and the Lord admitted the Surrendree, *habend'* to him and his Heirs, and what Estate he had. *Godb. 137. dubitatur.*

If

<sup>1</sup> Sand. 149. If *A.* be Tenant for Life, the Remainder to *B.* in Fee of Copyhold  
<sup>1</sup> Sid. 360. Lands, and *B.* surrenders to the Use of *A.* for his Life, the Remainder  
<sup>2</sup> Keb. 341. to *C.* this shall enure as an immediate Settlement upon *C.* and not by way  
 S. C. adjudg- of Remainder; for though it is void as to *A.* and his Estate is not in-  
 ed. creased thereby, yet being in the Nature of a Limitation of an Use, the  
 Interest vests in *C.* immediately.

#### 4. Of the Power and Authority of the Lord and Steward, and therein of the Difference of their Acts.

Every Lord of a Copyhold Manor has, as (*a*) incident to such Ma-  
 (*a*) If there be an Honour con- sidering of the several Ma-  
 nours, and there are several Copyholders belonging to the several Manors, though there is but one  
 Court held for them, yet they are *Quasi* several and distinct Courts. *Cro. Car.* 366. <sup>1</sup> *Jones* 342.  
 S. C. (*b*) Not by Action on the Case, but by *Subpoena* in Chancery. *Cro. Fac.* 368. <sup>2</sup> *Bulst.* 336.  
 (*c*) A Copyholder surrenders to the Use of *A.* in Trust, that he shall hold the Land until he hath  
 levied a certain Sum of Money, and that afterwards he shall Surrender to the Use of *B.* the Money  
 is levied, *A.* refuses to Surrender, *B.* exhibits a Bill to the Lord of the Manor against *A.* who upon  
 hearing the Cause, decrees against *A.* That he shall Surrender; *A.* refuses, the Lord may seize and  
 admit *B.* for he is Chancellor in his own Court. <sup>1</sup> *Leon.* 2. (*d*) But where he is a Party Interested  
 himself. <sup>1</sup> *Salk.* 185, 186.

<sup>4</sup> *Co.* 26. *b.* The Lord himself may make Admittances or Grants at any Place  
*Co. Lit.* 59. (*e*) out of the Manor, for he is not confined any more than any other  
<sup>a.</sup> *b.* (*e*) But Person, to grant an Estate at Will where he pleases.  
 a Copyholder  
 cannot Surrender to the Lord into the Hands of Tenants, &c. out of Court, without a particular  
 Custom. *Co. Lit.* 59.

<sup>4</sup> *Co.* 26. *b.* But there being only Custom which enables the Steward to make such  
<sup>27.</sup> *a.* Admittances or Grants, that which he doth he must do (*f*) upon the  
 (*f*) But of this there are Diversities of Opinions. Manor, (*g*) unless there be a Custom to keep a Court out of the Ma-  
 nor, which will enable him, as well as the Custom to do it upon the  
 of Opinions. Manor.  
 By *Co. Copyb.*  
 and <sup>4</sup> *Co.* 26, 27. <sup>1</sup> *Rol. Abr.* 527. The Steward cannot make any Grants or Admittances at a Court  
 held off the Manor. By *Cro. Eliz.* 103. If the Lord grants the Freehold of the Copyhold Lands, the  
 Grantee may hold a Court where he will to make Admittances and Grants. By *Co. Copyb.* 121. <sup>1</sup> *Leon.*  
 289. <sup>1</sup> *Rol. Abr.* 505. The Steward may make Admittances at a Court holden off the Manor. By  
*Cro. Fac.* 526. Surrenders to the Steward out of Court, adjudged good; and by <sup>1</sup> *Salk.* 184. There is  
 as much Reason that the Steward should take Surrenders out of the Manor as the Lord; *per Cur.*  
 (*g*) As if a Lord being seized of two or three Manors, hath Time out of Mind, within one of his  
 Manors, kept Courts for all his said Manors, &c. *Co. Lit.* 58. *Cro. Car.* 367.

<sup>4</sup> *Co.* 30. *b.* A Steward retained by Parol is a good Steward to (*b*) all Intents and  
*Cro. Fac.* 536. Purposes, either to take Surrenders or make Admittances upon vo-  
*Godb.* 142. luntary Grants; but if the Retainer be (*i*) general, the Lord may dis-  
<sup>1</sup> *Leon.* 227. (*b*) Things of charge him at Pleasure.  
 Necessity

done by a Steward, though he acts by a counterfeit Authority, or one that is voidable, are good; as  
 Admittances upon Descent or Surrender; for if in Shew and Appearance he is Steward, it is suffici-  
 ent, for he acts only as Custom's Instrument. *Co. Copyb.* 124. But voluntary Grants by such a Steward  
 are not good; so if a Lord command his Steward not to grant such Lands by Copy, and he doth, it  
 is void; so if in his Grants he diminishes the antient Rents and Services. *Co. Copyb.* 125.—Also if  
 one, who has no manner of Pretence or Colour for keeping Courts, assumes the Steward's Place,  
 whatever he doth will be void, especially if a Precept be not given to the Bailiff of the Manor to  
 give him Warning. *Co. Copyb.* 125, 126. (*i*) But a general Retainer by Patent is for Life. <sup>4</sup> *Co.* 30.

*Co. Copyb.* 129. A Steward cannot *de Communi Jure* make an Under-Steward, unless he  
<sup>Noy</sup> 2, 29. have Power by his Patent, or be an Infant, that hath the Office by (*k*)  
 (*k*) The  
 Grant of a Stewardship to an Infant in Reversion, *exercend' per se vel per sufficient' deputat' suum*, held  
 good. *Cro. Car.* 556.

Descent, or a Person of that Quality, that it will be a Disgrace to him to hold the Courts; as if he be an Earl, &c.

A Lord of a Manor makes a Steward *ad exequend' per se vel sufficient' Deputat' suum*, who makes *A.* his Deputy *hac vice* to take a Surrender of Baron and Feme, to the Use of the Baron and Feme for their Lives, Remainder over in Fee, & *ulterius ad faciend' & exequend' quantum in me est*; it was held, that the Deputation *(a)* *pro hac vice* was good, and that by Force of the Words & *ulterius*, &c. that the Lord was to grant the Copyhold to the Baron and Feme for Life, with Remainder over, notwithstanding the Conditional Surrender to the Deputy.

*Cro. Eliz. 48. 1 Leon. 289. S. C. ill reported.*

*(a)* A Copyholder being in Ireland, the Steward of a Man

made a Commission to one to receive a Surrender from him there; and it was held a good Surrender. *4 Leon. 111.*—If one cannot come into Court to Surrender in Person, the Lord may appoint a Special Steward to go to him and take the Surrender. *1 Leon. 36.*

## (I) Of Fines payable by Copyholders: And therein,

### 1. Where a Fine shall be said to be due, and by whom, and to whom payable.

A Fine may be due by Custom on every Change of the Tenant, whether by Act of God or the Party, and on every Change of the Lord, by Act of God *(b)* only.

*Co. Lit. 59. b. 1 Rol. Abr. 562.*

Custom to have a Fine on the Change of the Lord of the Manor, by Alienation or Demise, is against Law; for by this Means the Tenant might be oppressed by a Multitude of Fines. *Co. Lit. 56. b.*

If a Copyholder in Fee surrenders to the Use of one for Life, and Tenant for Life dies, he may enter without any new Admittance, or paying any Fine, for he has his old Estate in him.

*1 Rol. Abr. 505. 9 Co. 107. Co. Copyh. 157.*

If a Copyholder in Fee surrenders to the Use of one for Life, the Remainder to another for Life, the Remainder to another in Fee, by this *(c)* one Fine is due, for the particular Estates and Remainders are but one Estate.

*1 Rol. Abr. 505. Moor 358, 465. Cro. Eliz. 504.*

S. C. *3 Lev. 308.* S. P. adjudged. *(c)* Unless there be a particular Custom to the contrary; but because after the Death of the particular Tenant the Remainder Man had prayed to be, and was admitted; it was at first doubted whether he had not waived the Benefit of the Admittance of the particular Tenant, and whether therefore he should not pay a Fine. *1 Mod. 103, 120. 4 Co. 22. b. 3 Keb. 29.*

Tenant for Life, and he in Remainder join in a Grant of their Copyhold, but one Fine is due; so if a Surrender be made, and after a Recovery is had by Plaintiff, in Nature of a Writ of Entry in the Post, for the better Assurance, &c. but one Fine is due.

*3 Leon. 9.*

Tenant in *(d)* Dower, or by the Curtesy, of Copyhold Lands, where the Custom allows of such Estates, shall pay a Fine.

*Co. Copyh. 154, 155. (d) In Case of a*

Widow's Estate, it is said to be resolved and agreed in *Lex Customar. 156.* That no Fine is due; but *Q.* of this; for though the Estate be adjudged in the Woman, yet that is no Argument she shall pay no Fine, for the Estate is in the Heir by Descent, and yet he shall pay a Fine.

If there be a Custom for a Copyholder's Lands to be extended, the Extendor, upon his Admittance, shall pay a Fine.

*Co. Copyh. 154, 155.*

If there are two Jointenants of Copyhold Lands, and one dies, the Survivor shall have all without Admittance or paying a Fine.

*Co. Copyh. 158.*

## 2. At what Time payable.

*1 Rol. Abr.* No Fine is due, either upon a (a) Descent or Surrender, till Admittance, for that is the Cause of the Fine; and therefore, if (b) after the  
*506.* Tenant deny to pay, it is a Forfeiture.  
*4 Co. 28. a.*  
*Hob. 135.*  
*Co. Copyb. 160.* (a) And therefore if the Heir waives the Possession, and refuses to be admitted, he shall pay no Fine. *1 Sid. 58.* If the Heir, as he may, surrenders before Admittance, *Q.* Whether the Lord be obliged to admit the Surrender before the Heir has paid his Fine, and if he does, what Remedy the Lord has afterwards for such Fine. *Vide 4 Co. 22. b. 23. b. 1 Leon. 174.* (b) If the Fine be uncertain, the Tenant is not bound to pay it presently, because he could not tell what it would be; but he must pay it in convenient Time, or else the Lord may appoint a Day for him to pay it in; but a Fine certain he must pay presently upon Admittance. *4 Co. 28. a. 13 Co. 2. Co. Copyb. 160.*— But by *Cro. Eliz. 779. Moor 622.* When a Fine is certain, the Heir ought to tender it upon his Prayer to be admitted.

*4 Co. 22.* Although the Admittance of Tenant for Life, is an Admittance of him  
*1 Mod. 120.* in Remainder to vest the Estate in him; yet the Lord, where by Custom he is intitled to a Fine from such Remainder Man, shall not have it before the Death of Tenant for Life, for then the Remainder Man becomes his Tenant.

## 3. Of the Certainty and Reasonableness of the Fine.

*Co. Lit. 59. b.* Fines (c) uncertain must be (d) reasonable, and (e) their Reasonableness shall be discussed (f) by the Justices, (g) upon the true Circumstances  
*60. a. (c)* A few Instances of the Case, for (b) if the Fine is unreasonable, the Copyholder is not bound to pay it.  
 Fines shall not destroy the Custom for Fines certain. *Godb. 265.* For there are scarce any Copyholds on the Rolls of which it does not appear, that sometimes more, and sometimes less has been paid. *Lit. Rep. 252. Vide 2 Bulst 52.* (d) What shall be adjudged a reasonable Fine or not, *vide 13 Co. 3. 1 Rol. Rep. 75. Cro. Car. 196. Cro. Jac. 671.* And where Lords shall be restrained in Equity from demanding arbitrary and unreasonable Fines. *2 Chan. Rep. 134. 2 Vern. 367. Abr. Eq. 120.* (e) The Lord is not bound to aver or shew that the Fine assessed is reasonable; but it is on the Copyholder's Part to shew the Circumstances of the Case, to make it appear to the Court to be unreasonable. *Hob. 135.* (f) For this *vide 1 Rol. Abr. 523. 2 Rol. Abr. 578.* (g) Appearing upon Demurrer, or upon Evidence to a Jury, upon Confession or Proof of the yearly Value of the Land. *4 Co. 27. b. S. P.*

*13 Co. 3.* Two Years Value for a Fine for an Admittance upon a Surrender, was  
*Vide 2 Bulst. 32.* adjudged to be unreasonable; but in Cases where Copyholds are only for Life, and come into the Lord's Hands, there the Interest passes from the Lord, and so *Arbitrio Domini res aestimari debet*; but in Case of a Surrender he is only an Instrument.

*Cantb. 12. adjudged between Parvins and Titus.* A Custom to pay on Admittance *tantam denariorum summam, quantum terre vel tenementa valebant tempore talis admissionis, & non amplius*, is a good and reasonable Custom, although objected; that the Value of Land is uncertain, and it would be in the Power of the Tenant to make the Fine of a very low Value, by not cultivating the Land.

*2 Show. 507. Comb. 43. 3 Lev. 255. 3 Mod. 132. S. C.* Where a Copyholder hath several Parcels of Land by several Tenures, the Lord ought to assess and demand his Fine severally for both; for the Fine for one may be reasonable, and for another unreasonable; and if such a Copyholder surrender to the Use of another, and he is admitted *tenend' per antiqua servitia*, the Fine must be severally assessed.

*4 Co. 28. a. Hubard and Hammond. Cro. Eliz. 779. Moor 622.* S. C. Resolved by the Name of Dalton and Hammond.

(K) Of the Extinguishment of the Copyhold:  
And therein,

1: Where the Whole shall be extinguished or suspended.

**I**F a Copyholder in Fee (a) accepts a Lease for Years of the (b) same Land, from the Lord, this determines his Copyhold Estate. 2 Co. 16 b. Godb. 11, 101. Moor 184.

and *vide* 2 Leon. 72. Lev. 70. Latch 213. Cro. Jac. 84. 3 Bulst. 81. 1 Brownl. 32. 4 Co. 31. (a) So if the Lord Leases the Copyhold to another, and the Copyholder accepts an Assignment from the Lessee, his Copyhold is extinct. 2 Co. 17. 1 Leon. 170. 1 And. 191. Goulsf. 34. 1 Rol. Abr. 510. S. C. (b) But if he takes a Lease for Years of the Manor, that is only a Suspension of his Copyhold during the Term. *Per* Cro. Jac. 84. Sav. 70. But *per* Cro. Eliz. 7. Moor 185. It is extinguished.—But the Lessee may regrant the Copyhold again to whom he pleases. 4 Co. 31. b.—If the Copyholder joins with his Lord in a Feoffment of the Manor, his Copyhold is thereby extinct. Godb. 11.

If a Copyholder accepts to hold of his Lord by Bill under the Lord's Hand, this determines his Copyhold; so if he accepts an Estate for Life by Parol, if Livery be made; otherwise not, for else nothing but an Estate at Will passes, which cannot merge as Estate at Will. 1 And. 199. Latch 213.

If a Copyholder releases to his Lord, this extinguishes the Copyhold; so if the Lord sell the Freehold of the Inheritance of the Copyhold to another, and then the Copyholder (c) releases to the Purchaser, this extinguishes the Copyhold Interest. Hutt. 81. 1 Keb. 808. 1 Leon. 102. Cro. Eliz. 21. (c) For rho

a Release cannot in its own Nature pass away a Possession, yet it may amount to a Signification of the Tenant's Mind to hold the Land no longer; and the Rule is, That any Thing amounting to a Determination of the Copyholder's Will to hold no longer, extinguishes his Copyhold. *Vide* the Authorities *supra*.

If A. is Tenant in Tail of a Copyhold, and it is found, that by the Custom it cannot be barred by Seizure of the Lord, & *non aliter nec alio modo*, and A. accepts a Feoffment of his Copyhold Lands, the Copyhold is suspended but not destroyed, *quoad* his Issue; but if A. afterwards levies a Fine of the Land, though the Copyhold Interest cannot pass, yet it may be barred and extinguished by the Fine. Carter 6, 22, 23. Taylor and Shaw, adjudged. If one seized of a Manor in Right of his Wife,

lets Lands by Indenture for Years, this doth not destroy the Custom as to the Feme; for after the Death of her Husband she may demise it by Copy again. Cro. Eliz. 459.—A Copyholder intermarries with the Feme Seignores, this is no Extinguishment, but only a Suspension. Sav. 66. Co. Copyh. 172.—So if the Copyholder hath the Manor in Execution. Co. Copyh. 172.

If a Copyholder bargains and sells his Copyhold to the Lessee for Years of the Manor, his Copyhold is thereby extinguished. Hutt. 65. Winch S. C. adjudged.

1 Jones 41. S. C. adjudged; for that in respect of the Lord his Estate may be determined by any Act that shews it to be the Will of the Tenant to hold no longer by Copy.

If a Copyhold is in the Hand of a Subject, who after becomes King, the Copyhold is extinct; for it is below the Majesty of a King to perform such servile Services; yet after his Decease, the next that hath Right shall be admitted, and the Tenure revived. 2 Sid. 82. 4 Co. 24. Cro. Eliz. 252. adjudged, & vide 2 Leon. 203. 4 Co. 26. b. Cro. Eliz. 103.

The Severance of the Freehold, and Inheritance of the Land held by Copy of the Manor, does not (d) extinguish or determine the Copyhold Estate, for the Custom hath established his Estate, so that the Copyholder cannot after alien otherwise than by Decree in Chancery; by which it is said, The Interest in the Land is not bound, but the Person only. 4 Co. 25. a. Cro. Eliz. 252. 2 Co. 17. (d) But such Copyholder

Lord cannot oust him so long as he pays and performs his Customs and Services.

4 Co. 26. b. If a Lord of a Manor, having (a) many antient Copyholds in a adjudged. Town, grants the Inheritance of all those Copyholds to another, the *Vide Cro. Eliz.* Grantee may keep a Court for the Customary Tenants, and accept Surrenders, and make Admittances and Grants; for though it is not a Manor in Law, for want of Freeholders, yet as to the Copyhold Tenants, which it appears he had the Grantee hath such a Manor that he may keep Courts. Copyholds in other Places. (a) Diversity where the Inheritance of many, and where of one single Copyhold only is granted. 4 Co. 27. a.

## 2. Where Part only, or what is incident to it, shall be extinguished.

*Sav.* 66. If a Copyholder hath had Time out of Mind, &c. a Way over another's Copyhold, and he Purchases the Inheritance of his own Copyhold, yet the Way remains.

8 Co. 63. If the King is seised of a Manor, Parcel of the Duchy, in which by *Moor* 811. the Custom Copyholders may take Fire-wood, &c. growing upon their S. C. adjudged. Copyholds, to be spent in their Houses, and for Fences, &c. and by *1 Brownl.* 231. S. C. ad- Lease under the Duchy Seal demises the Manor, *exceptis omnibus* judged; because the *Boscis, subboscis, arboribus & Maerem*, &c. for twenty-one Years, and after the Assignee of the Lessee makes a voluntary Grant of a Copyhold for Life, according to the Custom of the Manor, this Grantee shall have the Estovers; for the Estate of the Copyholder is not derived out of the Estate of the Lord, for he is but an Instrument to make the Grant; but by the Custom of the Manor it is established and made firm to the Grantee. So if Copyholders for Life, according to the Custom, have used to have Common in the Waste of the Lord, or Estovers in his Woods, or other Profit appender in any Parcel of the Manor, and the Lord aliens

his Wastes or Woods, &c. to another in Fee, and after grants a Copyhold Messuage, &c. for Life, such Grantee shall have Common, Estovers, &c. notwithstanding the Severance; for the Title of the Copyholder is Paramount, and the Custom unites the Common, which are but as Accessories, or Incidents, so long as the Messuage, &c. being the Principal, is maintained by the Custom.

If by Custom all the Copyholders for Life have Common in the *Cro. Jac.* 253. (b) Waste of the Lord, and the Lord grants and confirms to one of *Marsham* them and his Heirs, all his Copyhold Messuage and Land *cum Pertinentiis*, he shall not have Common; for by the Custom that was annexed to *and Humber,* his Customary Estate, which being destroyed by his own Act in making *adjudged.* it a Freehold, his Common is destroyed also, and cannot continue without (c) special Words. *Yelv.* 189, 190. *Noy* 126. *1 Bulst.* 2. *1 Brownl.* 220.

2 *Brownl.* 209. S. C. adjudged. *Moor* 667. S. P. adjudged; though the Lord granted the Messuage, &c. and all Common thereto appertaining, for the Common appertained to the Customary Estate, which is determined. 2 *Brownl.* 211. cited *Cro. Jac.* 253. cited. (b) Otherwise if they have Common in the Soil of a Stranger. 2 *Sid.* 84. per *Glin Hob.* 253. *dubitatur.* (c) *Viz.* all Commons before used. *1 Bulst.* 2. *Vide* 2 *Vern.* 250. Where it was decreed, That the Copyholder should enjoy the Common before, though it was extinct at Law; and *vide* Title *Common.*

## (L) Of Forfeiture: And herein,

## 1. Of Forfeiture for Non-attendance at Court, and not doing Service.

IF a Copyholder, being (a) duly summoned, refuses to appear in Court, it is a (b) Forfeiture of his Copyhold; for unless the Copyholders attend there can be no Court held.

general Warning within the Parish is sufficient; but now by the better Opinion, a general Notice is not sufficient, but there must be a Personal Summons, to make a Forfeiture. *Mo.* 350. 3 *Bullf. So.* 1 *Bullf.* 268. *Cro. Eliz.* 505. *Noy* 58. *Style* 251. (b) The Forfeiture is a Determination of the Will, and the Estate is immediately in the Lord, as in his Reversion, and he may grant it to another before Seisure. 1 *Lev.* 26. adjudged. 1 *Jones* 249.—Where there may be Relief in Equity against a Forfeiture. *Vide Abr. Eq.* 121. 1 *Chan. Ca.* 95. *Skin.* 142. *Pre.ed. Chan.* 586 to 574. 2 *Vern.* 537, 664.

But if a Copyholder is in Debt, and is afraid to be arrested, or is a Bankrupt and keeps his House, it is a good (c) Excuse for his not coming.

*Co. Copyb.* 159.  
(c) So is  
Weakness, or  
a great Office. *Co. Copyb.* 159.

Also if the Lord comes to the Copyholder, and requires him to do his (d) Services, and the Copyholder answers, If they are due he will do them, but it shall be tried at Law first, whether they are due by Law; this is no Forfeiture, being no wilful Refusal

1 *Rot. Abr.*  
506.  
1 *Rot. Rep.*  
429.  
3 *Bullf. So.*  
268.

4 *Co.* 21. b. (d) For the Non performance of Services the Lord may either distrain or seise the Land. *Noy* 135.

So if the Copyholder says, If it be a Court he will appear at it, (e) if not, he will not; this is no Forfeiture.

*Style* 241.  
(e) But if  
there were

no Controversies about the Court, but that is only used as a Shift, then it seems a Forfeiture; and *vide* 1 *Leon.* 104. That continual Default at Court amounts to a wilful Refusal.

If the Jury or Homage refuse to present the Articles according to their Oath, this is a Forfeiture of the Copyholds.

*Dyer* 211.  
1 *Rot. Abr.*  
506. Where

it is necessary that the Cause of Forfeiture should be found by the Homage. *Vide* 3 *Leon.* 108. *Godb.* 47. *Palm.* 417. *Lat.b* 227. 2 *Vent.* 38.

## 2. Of Forfeiture for Non-payment of Rent.

If a Copyholder be to pay a certain Rent yearly by his Copy to his Lord, and the Lord comes upon the Land and demands his Rent at the Day, and the Copyholder being present (f) refuses to pay it, this is a Forfeiture.

(f) Non-  
payment at  
the Day is

no Forfeiture without a Refusal to pay. *Moor* 622. *Lit. Rep.* 268. — And Note, That for Non-payment of Rent, Fines, &c. where a Value may be set on them, and a Compensation made the Lord for any Laches in Point of Time, &c. Equity will relieve. *Vide Pre.ed. Chan.* 568, 569.

My Lord Coke says, That (g) if the Lord demand his Rent of the Copyholder, and he says, that he wants Money, and intreats the Lord to forbear till he be provided, that this is a Forfeiture, and that (h) if

*Co. Copyb.* 162.  
(g) But this  
Case does  
not seem to

be Law, is contradicted by a solemn Resolution; for his Designing to pay, signifies the Continuance of his Will, and cannot any way amount to a wilful Refusal. 1 *Rot. Abr.* 506. *Moor* 623. *Lat.b* 122. *Cro. Eliz.* 505. But if he appoints him to pay it at a Day after, at a certain Place within the Manor, and he neglects, this is a Forfeiture. *Lat.b* 122. cited. *N. Dyer* 211. in *Margine.* (h) This likewise seems not to be Law, being only a Denial at Law, which cannot amount to a wilful Refusal, for which, *vide Hob.* 135. *Noy* 58. *Lat.l.* 14, 122. 1 *Rot. Abr.* 506 *Cro. Eliz.* 505, 350.

the

the Lord makes a continual Demand upon the Land, and the Copyholder is not there, this is a Forfeiture; but if he demand once, and no Body is there, this is no Forfeiture.

*Lit. Rep.* 268. A Widow had Copyhold Lands, and divers Persons came for the Rent, whom she put off with Delays; at last comes a young Gentleman and demands it; she answered, That she did not know him, but if he would Dance before her, if she liked his Dancing she would pay him; this Denial was adjudged no Forfeiture, not being wilful.

### 3. Forfeiture in the Copyholder's taking upon him to dispose of the Copyhold, and make Leases.

*Co. Lit.* 59. a. If a Copyholder takes upon him to convey his Copyhold Estate to a Stranger; it is a Determination of his Will, and consequently a Forfeiture; for thereby he would introduce a Tenant on his Lord without his Admittance, and also destroy the Evidence of its being Copyhold.

But if a Man makes a (a) Charter of Feoffment of his Copyhold Estate, or a Lease for Life, but makes (b) no Livery, it is no Forfeiture, because nothing passes till then.

*Co. Lit.* 59. a. (a) If a Man bargains and sells his Copyhold, it is said to be a Forfeiture, though the Deed be not inrolled; for this would determine an Estate at Will. *1 Rol. Abr.* 507. (b) That if he makes a Letter of Attorney to give Livery, it is a Forfeiture. *1 Rol. Abr.* 507.

*Co. Copyb.* 163. My Lord Coke says, That if Tenant for Life of a Copyhold suffer a Recovery by Plaintiff in the Lord's Court, as a Copyholder of Inheritance, this is a Forfeiture.

*Custom.* 206. it was otherwise adjudged in the Case of *Bird and Kirk*, and *1 Mod.* 199, 200. adjudged no Forfeiture; for the Lord is Party to it, and can take no Advantage of it.

*Moor* 184. If a Copyholder makes a Lease for Years not warranted by the Custom, and without the Lord's License, this is a Forfeiture, but yet it is no Disseisin; for such a Lease is good against every Body but the Lord.

*Cro. Eliz.* 498. Also a Lease for Years by Parol to commence *in futuro*, is a Forfeiture, because of the unlawful Contract made to the Lord's Disherison.

*1 Rol. Abr.* 507. A Lease, that will amount to a Forfeiture, ought to have a certain Beginning and certain End, or else the Lease is void, and carries but an Estate at Will at most, which is no Forfeiture.

*1 Bulst.* 189. If a Copyholder for Life makes a Lease for a Year, and then makes another Lease to the same Person for another Year, to commence one Day after the first Year, and then surrender his Copyhold to the Lord; this second Lease not being warranted by the Custom is a Forfeiture; for the Land is charged with a double Interest, the one *in Presenti*, and the other *in Futuro*.

But if *A.* makes a Lease of his Copyhold to one for a Year, and then (c) covenants that the Lessee shall enjoy it *de Anno in Annum*, this is no Forfeiture, being only a Covenant and not a Lease.

By the better Opinion of the Book; but the Judgment was given principally on another Point. (c) For though these Words by Construction may make a Lease where the Lands may be let; as in *Cro. Car.* 207. *Cro. Jac.* 92. Yet it would be an injurious Construction, to make Words, which only import a Covenant, a Lease, and so a Forfeiture. *2 Keb.* 267. And this seems to be Law, though it has only the Authority of *Keb.*

#### 4. Of Forfeiture in committing Waste; and therein of the Lord's or Tenant's Interest in the Trees.

If a Copyholder (a) erects a new (b) House upon the Land without Licence, it is no Forfeiture; because it is for the Melioration of the State of the Lands; but then this House must be subject to all the Customs of Copyhold Land, and therefore if he pulls it down again it is a Forfeiture.

plowed Land to Hop Ground or a Piscary, is a Forfeiture. *Cro. Eliz.* 5. 498.—Whether a Copyholder in Fee may dig for Mines. *1 Sid.* 152. *Q. & vide Winch* 8. *Vide Title Waste.* (b) *Secus* if he erects a Mill. *Latch* 123. *N. Dyer* 211. *1 Bulst.* 50, 51. adjudged.

Waste (c) voluntary or permissive, is a Forfeiture of Copyhold Lands, unless there be a Custom to cut Trees, &c.

is a Forfeiture by the Common Law, but negligent Waste is not, without a Custom. *Noy* 51.—By *Owen* 18. it is adjudged, That permissive Waste, without any Special Custom, is a Forfeiture.—But this must be understood of Waste in letting the Houses decay, &c. for if a Stranger, or the Copyholder's Lessee commit Waste in cutting down Trees, it is no Forfeiture, for every Forfeiture ought to be the wilful Act of the Copyholder, so as it may amount to a Determination of his Will. *4 Co.* 27. *a. Lit. Rep.* 267, 268. *1 Rol. Abr.* 508. But *Moor* 49. *Dalf.* 49. *cont.*

By the Common Law, every Copyholder may take House-boot, Hedge-boot, Fire-boot, and Plough-boot on the Copyhold Lands, though this Power may be restrained by Custom, as that a Copyholder shall not take it unless by the Assignment of the Lord, or his Bailiff.

But *Cro. Eliz.* 5 *cont.*, but said, that a Custom to take is good; but *vide* *2 Salk.* 638. The Case in *Croke* denied to be Law.

The Lord of the Manor may cut down the Timber Trees growing upon the Copyhold Lands, provided he leave (d) sufficient for House-boot, &c. also by Custom, where a Copyholder of (e) Inheritance may take the Shrowds of Trees, by Custom he may cut them down; for otherwise the Timber may stand and rot, and no Body be the better for it.

Life, alledged that his House was in Decay, and that there was not sufficient, &c. and on Demurrer it was adjudged in *B. R.* that the Copyholder had an Interest in Trees, that the Fruit, Acorns, &c. belonged to him; and Judgment accordingly; but reversed in the House of Lords; for as the Tenant could not cut down the Timber, if the Lord could not, it must rot. *2 Salk.* 638. And *vide* *8 Co.* 64. That if a Copyholder be intitled to Shrowds of the Trees by Custom, if the Lord takes the Body, an Action on the Case lies against him. (e) But a Custom that every Copyhold Tenant may cut down Trees at their Will and Pleasure, is unreasonable. *Vide Winch* *1 Cro. Jac.* 30. *Cro. Car.* 220. *1 Bulst.* 50. *Noy* 2. *1 Rol. Abr.* 650, 560.

Where a Copyholder may take Trees for Reparation, the Loppings and Top belong to him, and though he cannot repair with them, he may sell to help to defray the Charges.

If a Copyholder cut down Trees for Repairs; and employs some, and keeps the rest ready to be employed in Reparations, this is no Forfeiture; for he could not, perhaps, precisely know what would do.

*S. C.* adjudged, though employed five Years after cut down, and after an Entry for a Forfeiture.

But if a Copyholder cuts Trees to repair his House, and after does not employ them accordingly, but suffers them, after the Cutting, to be putrified and rotten; this is a Forfeiture.

## 5. Forfeiture by Inclosure.

*Lit. Rep.* 267. *Chan. Preced.* 57. Inclosing Copyhold Lands one from another, and also defacing Land-Marks, are Forfeitures; for by these Means the Evidence of their being Copyhold will be destroyed.

But if *A.* is seised in Fee of fifteen Acres, by Copy of Court-Roll, and there is a Custom within the Manor, that the Lord hath had a Fold-course within the Manor for 500 Ews, in the Field in which the fifteen Acres lie, from *Michaelmas* to *Lady-day*, and that no Copyholder might inclose without the Licence of the Lord; and that if any inclosed without Licence, then a reasonable Fine should be assessed by the Lord, or his Steward, if the Lord would accept thereof; and if not, that then the Copyholder so inclosing, should be punished at every Court till he opened the Inclosure; and *B.* incloses the fifteen Acres, with an Hedge and Fence of Quickset three Foot deep and six Foot broad, and leaves four Spaces of nine Foot broad in the said fifteen Acres; this is no Forfeiture, because a Prejudice only to the Lord's Fold-course; and that which makes a Forfeiture ought to be so to the Copyhold Tenement, and this is no Inclosure, because all is not inclosed; and Forfeitures, which are odious in Law, shall be taken strictly.

*Hutt.* 102. adjudged. *Hettl.* 5. S. C. *adjournatur.* *Lit. Rep.* 267. S. C. adjudged; because by the Custom, the Copyholder may be amerced till, &c. so that the Lord had another Remedy: But it was resolved, that notwithstanding the Gaps, this was an Inclosure against the Custom. *Lit. Rep.* 267.

## 6. Forfeiture for Treason and Felony.

If a Copyholder commits Treason or (a) Felony, it is a Forfeiture of his Copyhold to the Lord, without any particular Custom; otherwise a Copyholder becoming a Traitor or Felon, would have no Punishment in his Posterity.

(a) If convicted of Manslaughter, and allowed his Clergy, does not forfeit. 2 *Keb.* 451. Nor for Outlawry, unless it be for a Capital Crime. *Lit. Rep.* 234. *Hettl.* 127. and *vide* 1 *Leon.* 99.

By an Attainder of Treason or Felony, of common Right the Copyhold is forfeited, (b) but not by a Conviction only; but (c) by Custom it may be forfeited for Treason or Felony, even without a Conviction.

1 *Lev.* 263. 2 *Keb.* 251. 1 *Bullst.* 13. 2 *Brownl.* 217, to 220. *Godb.* 267. 2 *Vent.* 38. 2 *Jones* 189. 5 *Co.* 117. 1 *Lev.* 34.

If a Copyhold is granted to *A.* for Life, and after, according to the Custom, the Reversion is granted to *B.* for Life *immediate post mortem*, *forisfacturam sive aliam determinationem Stat' Prædict' A.* and *A.* is attainted of Felony, by this his Estate is determined; for being in the Eye of the Law but an Estate at Will, his Will is determined by the Attainder, for by the Attainder he cannot hold an Estate, and *B.* may take Advantage thereof without any Entry made by the Lord.

1 *Lev.* 94. *Strode* and *Denison*, adjudged upon a Writ of Error, and the first Judgment affirmed accordingly. *Skin.* 8, 9. S. C. *adjournatur.*

## 7. In what Cases a Forfeiture of Part, Shall be a Forfeiture of the Whole.

Where a Copyhold is held by one Tenure, it is said, that a Forfeiture of any Part, is a Forfeiture of the Whole, for there is a Condition in Law annexed to the whole Estate.

4 *Co.* 27. a.

Therefore if such a Copyholder commits Waste in cutting down a single Tree, this is a (a) Forfeiture of his whole Copyhold; for by the cutting of the Tree which is to be employed in repairing the Houses, &c. the whole Copyhold is impaired.

1 *Roll. Abr.*  
509. (a) But  
Q. For tho'  
committing  
Waste in

Part of the House may be a Forfeiture of the whole House, yet it seems unreasonable, that committing Waste in one Acre, should be a Forfeiture of the Whole; but *vide Title Waste*.

Also it is said, That if a Copyholder makes a Feoffment of an Acre of Land, Parcel of his Tenement, that this is a Forfeiture of the Whole.

4 *Co.* 27. a.  
but *vide* 1 *Roll.*  
*Abr.* 509.

*cont.*, and that if a Copyholder by Licence lets for Years, and the Lessee makes a Feoffment, he only forfeits his Lease. *Hob.* 177.

But if a Copyholder hold three several Acres by three several Copies, and commits Waste in one Acre, he shall forfeit that Acre only; though they are all in one Hand, yet every Acre is severally held, and to every Acre there is a several Condition in Law tacitly annexed.

4 *Co.* 27. *Taverner* and  
*Cromwel.*

So if such Copyholder, that holds three Acres by three several Copies, surrenders to the Use of *A.* and his Heirs, and the Lord admits *A. tenend' per antiqua servitia inde prius debita & de Jure consueta*, and after *A.* commits Waste in one Acre, he shall forfeit that Acre only, for the *Tenend'* continues the several Tenures, though the Parcels are now all put in one Copy.

4 *Co.* 28.

So if several Copyholds escheat to the Lord, and he grants them again *tenend' per antiqua servitia* to one, and he commits a Forfeiture in Part, this extends not to the Whole.

4 *Co.* 28. b.  
*per Curiam.*  
3 *Leon.* 109.  
S. C. and

S. P. *per Cur'*, *Cro. Eliz.* 353. S. C. and S. P. adjudged; there being to each Parcel a several *Habendum* and *Reddendum*.

## 8. Who shall be affected by a Forfeiture, or take Advantage thereof.

If there be Tenant for Life, the Remainder in Fee of a Copyhold, and the Tenant for Life commits a Forfeiture, (b) this shall not bind the Remainder.

1 *Roll. Abr.*  
509.  
*Cro. Eliz.* 598,  
880.

*Noy* 42. *Vide Moor* 49. and *Dals.* 49. *cont.* (b) But by special Custom it may bind the Remainder.

But though this shall not affect the Remainder Man, yet if there be a Copyholder for Life, the Remainder to another for Life, or in Fee, and the first Copyholder commits a Forfeiture, he in Remainder shall not (c) enter, but the Lord shall hold it during the Life of the first Copyholder, for Copyhold Estates are not like those at Common Law, where in such Case the Estate for Life being ended, he in Remainder might enter immediately.

9 *Co.* 107.  
1 *Roll. Abr.*  
568.

(c) But if  
there be a  
Copyholder  
for Life, and  
the Lord

makes a Lease to commence after the End, Forfeiture, or Determination of the Estate for Life, the Copyholder commits a Forfeiture, the Lord will not enter, the Lessee may.

2 *Leon.* 73. 9 *Co.* 107.

If a Surrender be made to the Use of *A.* for Life, the Remainder to *B.* in Fee, and *A.* suffers three Proclamations to pass, and makes no Claim, yet shall not *B.* forfeit his Remainder, for the Custom shall be taken strictly.

*Cro. Eliz.* 879.

If a Copyholder Leases for Years by Licence of the Lord, and after the Lessee makes a Feoffment, this shall forfeit (d) only his Estate, and not the Estate of the Copyholder.

1 *Roll. Abr.*  
509.  
*Vide Hob.* 177.  
*Palm.* 384.

2 *Roll. Rep.* 372. (d) If a Copyholder makes a Lease for a Year, and another Lease in Reversion not warranted by any Custom, though this second Lease be a Forfeiture, yet the first Lease is good.

1 *Roll. Abr.* 508. *Cro. Cur.* 234.

*Co. Copyh.* 135. If a Copyholder Tenant in Tail commits a Forfeiture, his Issue is bound by it. *Vide* 1 *Sid.*

514. Lessee for Years shall take Advantage of a Forfeiture committed by a  
2 *Sand.* 422. Copyholder of the Manor, for he is *Dominus pro tempore*.  
1 *Rol. Abr.*

509. If there be a Lord of a Manor, in which there are Copyholders Tenants of the Manor, and the Lord grants to a Stranger the Freehold of a Copyhold in Fee; though by this the Tenement is divided from the  
1 *Brownl.* 132. Manor, and not demisable by Copy again, yet the (a) Grantee of the  
*Cro. Eliz.* 499. Copyhold in Fee; though by this the Tenement is divided from the  
1 *Rol. Abr.* Manor, and not demisable by Copy again, yet the (a) Grantee of the  
509. (a) So if the Freehold shall take Advantage of a (b) Forfeiture committed (c) after  
Grantee makes a by the Copyholder, for he ought to pay his Rent to the Grantee.

Lease for Years of the Freehold, the Lessee shall take Advantage of a Forfeiture committed after.  
1 *Rol. Abr.* 510. *Cro. Eliz.* 499. *Moor* 393. *Owen* 63. — After the Lease made, and before the Commencement of it. *Moor* 393. (b) Such Forfeitures as accrue by reason of the Court, are discharged, but not Forfeitures at Common Law; as Waste, &c. *Moor* 393. *Owen* 63. 4 *Co.* 24. b. 25. a. (c) But not of a Forfeiture committed before the Grant, for the Grant of the Freehold made by the Lord before Entry, implies an Assent that the Copyholder shall continue his Estate, and so is in Nature of a Confirmation. *Owen* 63. & *vide Latch* 227. *Palm.* 416. — The Copyholder commits Treason, and the Lord aliens the Manor; and after the Copyholder is arraigned by Act of Parliament, whether the Alienee shall take Advantage of the Forfeiture, 2 *Vent.* 38, 39. *dubitatur*.

If a Copyholder commits a Forfeiture, and the Lord of the Manor dies before Entry or Seizure for the Forfeiture, he in Reversion or Remainder shall not take Advantage of the Forfeiture committed before his  
*Cro. Jac.* 301. Time.  
1 *Bulst.* 190.  
S. C.  
1 *Mod.* 200.

S. P. resolved *per Cur.* The succeeding Lord shall not take Advantage of Waste done in the Time of the preceding Lord; but if there be Lord and two Coparceners Copyholders, and one makes a Feoffment in Fee of her Part, and then the Lord makes a Lease of the Manor; though the Lessee can take no Advantage of the Forfeiture, yet the Heir of the Lessor may. *Palm.* 446. *Latch* 227. adjudged. *Q.* The Diversity between a Feoffment and other Forfeitures; and *Q.* If the Lessor outlives the Lease, whether he may take Advantage of the Forfeiture.

1 *Salk. East-* If a Copyhold Manor descends on two Coparceners, and a Copyholder court and commits Waste, and makes a Lease, which are agreed to be Forfeitures, and after one of the Sisters dies, the surviving Coparcener shall not take  
*Weeks*, adjudged by Advantage of the Forfeiture; for the Election to take Advantage of the  
*Treyby*, Ch. J. Forfeiture must be made by them both, which cannot be after the Death  
*Nevil* and of one of them.  
*Blencow cont'*

*Powel*; who held also, That where there are two Coparceners, and one will take Advantage of a Forfeiture, and the other not, there must be an Apportionment. *Vide* Title *Coparceners*.

### 9. What Person shall be excused from a Forfeiture.

*Cro. Eliz.* 499. There were several Cases, in which Feme Coverts and Infant Copyholders were obliged, on Pain of forfeiting their Copyholds, to observe  
*Moor* 393. the Customs of the Manor.  
1 *Rol. Abr.*

509. As if the Husband denied to pay Rent, or do Suit, this was held a Forfeiture for ever; for the Lord must have his Services.

1 *Rol. Abr.* So if the Husband commits (d) Waste, and dies, this shall bind the  
509. Wife.  
*Palm.* 284.

2 *Rol. Rep.* 372. (d) *Secus* if he made a Lease, unless she did any Thing to confirm it after his Death. *Cro. Car.* 7. *Palmer* 383. 2 *Rol. Rep.* 344, 361, 372. *Godb.* 345. 1 *Rol. Abr.* 509. *Cro. Eliz.* 149.

But for this Also in Copyhold Manors, where the Custom is, that the Heir shall  
*vide* 8 *Co.* 100. come in and be admitted, and if he doth not, Proclamation shall be made  
*Style* 387. for him to come in, and so on in the two next Courts, otherwise that the  
*Cro. Jac.* 101, Lord should seize as forfeited; it was held, That a Feme Covert was bound;  
226. and by some Opinions, the Lord, after such Proclamations, might seize  
1 *Leon.* 100. the Copyhold of an Infant Heir till he came in and was admitted, and  
4 *Leon.* 30, 31. might receive the mesne Profits without being answerable for them.  
*Caith.* 40 to  
45. *Comb.* 118.

But now by 9 *Geo. 1. cap. 29.* it is enacted, "That no Infant or Feme Covert shall forfeit any Copyhold, Messuages, &c. for their Neglect or Refusal to come to any Court or Courts, to be kept for any Manor, whereof such Messuages, &c. are Parcel, and to be admitted thereto; nor for the Omission or Denial to pay any Fine or Fines imposed or set upon their or any of their Admittances to any such Copyhold, Messuages, &c." But *vide* the Statute, and the Remedies therein appointed for the Lord for his Fines, &c.

### 10. Where the Forfeiture shall be said to be dispensed with.

If the Tenant appears not in Court after Personal Warning, and the Lord (a) amerces him, (b) this is a Dispensation with the Forfeiture. 1 *Brownl.* 149. (a) Altho' it is not estreated or levied. 1 *Leon.* 104. (b) Acceptance of Rent after a Lease made, is a Dispensation; so is the Accepting of any Services. 1 *Keb.* 15.—If the Lord does not enter before the Tenant repairs, the Forfeiture is purged; also it hath been adjudged, that employing Trees in Repairs five Years after they were cut down, was a Purgation of the Forfeiture. 2 *Sid.* 8.

But if a Copyholder makes a Lease for Years, and after surrenders to the Use of the Lord, and he (c) not having Notice of the Lease accepts the Surrender; this is no Dispensation with the Forfeiture. *Cro. Car.* 233. 1 *Jones* 249. adjudged. 1 *Rot. Abr.*

510. S. C. (c) But the Lord shall be presumed to have Notice of the Failure of Suit of Court, Non-payment of Rent, &c. 2 *Vent.* 38.

If he that is *Dominus pro tempore* of the Manor, admits one to a Copyhold, he thereby dispenses with all precedent Forfeitures, not only as to himself, but also as to him in Reversion, (d) for such new Grant and Admittance amounts to an Entry for the Forfeiture and a (e) new Grant. 1 *Lev.* 26. adjudged. 1 *Keb.* 25. S. C. adjudged. (d) *Win. b.* 67. *Cro. Jac.* 101.

(e) If a Copyholder commits a Forfeiture, and then he that hath Right Releases to him; this is a Dispensation with the Forfeiture, for now he hath, as it were, another Estate, of which he hath committed no Forfeiture. *Moor* 393. *Latch* 227.

But the Lord by Wrong or Disseisin, cannot by such Admittance purge the Forfeiture as to the rightful Lord. 1 *Lev.* 26. per *Curiam.*

## (M) Copyholds, Where and how to be sued for and recovered.

IN all Real Actions, or that concern the Realty, a Copyholder cannot (f) implead or be impleaded any where but in the Lord's Court, for there being a Court for that Purpose, and the Lord Judge thereof, it is his Duty and Interest to determine the Controversies of his Tenants, and therefore not cognizable at Common Law. *Co. Lit.* 60. a. 4 *Co.* 21. b. *Moor* 68. (f) Shall make their Plaintiff in the

Lord's Court, and make Protestation to follow it in Nature of one of the King's Writs, as Formedon, Assise, &c. *Co. Lit.* 60. a. *Co. Copyb.* 142, 143.

But Actions (g) merely Personal, the Copyholder may sue at Common Law. *Co. Copyb.* 143. (g) If Lessee for Years of

a Copyholder cuts down the Trees, the Copyholder shall sue in the Lord's Court to punish this Offence. *Co. Copyb.* 143. Where a Copyholder may have Case against the Lord or a Stranger, for an injury done the Common belonging to his Copyhold. *Vide* 1 *Rot. Abr.* 106. 2 *Leon.* 201, 202. 2 *Brownl.* 146.

*Cro. Eliz.* 524. The Lord of the Manor (*a*) may implead or be impleaded, and avow for the Rent or Services of his Copyholder, in any Court of *Westminster*, for he hath an Estate at Common Law in the Rent, and it is due to him, on the same Grounds in Law as the Rent of Freehold Lands is. *1 Rol. Abr.* 374. (*a*) For otherwise he would be Judge and Party. *1 Salk.* 186.

*Co. Lit.* 60. *a.* If upon a Plaint in the Lord's Court an erroneous Judgment be given, *4 Co.* 21. *b.* no Writ of false Judgment lies, in respect of the Benefits of the Estate, *Moor* 68. being in the Eye of the Law but an Estate at Will, (*b*) but he shall have *F. N. B.* 12. a Petition to (*c*) the Lord in Nature of a Writ of false Judgment, and (*b*) Or such a Judgment therein assign Errors, and have Remedy according to Law. may be reversed by Bill in Chancery. *Lane* 98. *1 Rol. Abr.* 373.— But a Bill exhibited in Chancery to compel the Lord to receive a Petition for reversing a common Recovery, was dismissed. *1 Vern.* 367. And the Dismission affirmed in the House of Lords; for common Recoveries not being Adversary Suits, but common Assurances, Equity ought rather to supply Defects, than assist in annulling them. *Shew. P. C.* 67. (*c*) Where the King is Lord, he may be relieved by Bill or Petition to the King in the Exchequer-Chamber. *1 Rol. Abr.* 539. *Lane* 98.

*1 Leon.* 2. If a Copyholder surrenders to the Use of *B.* upon Trust, that he shall hold the Land until he hath levied certain Money, and that after he shall surrender to the Use of *C.* the Money is levied, and *B.* is required to make a Surrender to the Use of *C.* and refuses, and *C.* exhibits his Bill to the Lord of the Manor, against *B.* if *B.* refuses, the Lord may seize,

(*d*) And may admit *C.* to the Copyhold; for in such Cases he is (*d*) Chancellor in do Right according to his own Court. Conscience. *Owen* 63. *Dals.* 70. *1 Rol. Abr.* 539. *4 Co.* 30. *b.*—So if a Surrender be made to the Use of another, without expressing what Estate he shall have, a Custom, that the Lord may grant it in Fee to him for whose Use the Surrender was made, is good; for he is Chancellor in his own Court, and therefore reasonable that he should determine a Thing left thus uncertain. *Cro. Eliz.* 392.

*4 Co.* 26. A (*e*) Lessee of a Copyholder for a Year shall maintain an Ejectment, (*e*) Otherwise of a for the Common Law warrants his Term, and therefore gives him Remedy in Case he be ousted; so may Lessee by (*f*) Licence, also where *Grantec* for Years of a by Custom a Copyholder may make a Lease, such Lessee may maintain Copyhold. an Ejectment.

*Cro. Eliz.* 225. *2 Leon.* 328.— But if the Lord commits the Custody of the Body and Lands of an Infant according to Custom, till, &c. and the Committee is ejected, he may have an *Ejectione Custodia.* *1 Leon.* 328. *Cro. Eliz.* 224. (*f*) For by the Licence, the Lord gives up his Power of Judging or Determining about the Lease: But *Q.* Whether a Lease without Licence, and not warranted by the Custom, being good against all Persons except the Lord, the Lessee may maintain an Ejectment; and *vide Cro. Eliz.* 462, 676. *Moor* 569. *pl.* 776. *Owen* 18. *Style* 380. *Hettl.* 127. By which it seems he may; but *Cro. Eliz.* 395, 469. *Moor* 50. *1 Brownl.* 40. *cont.*

*4 Co.* 30. *b.* If the Wife of a Copyholder in Fee, by special Custom recovers *Moor* 410. Dower by Plaint in the Court of the Manor, and 50 *l.* Damages, an S. C. by three Action of Debt will not lie at Common Law for the Damages. Judges against one; and at another Day it was held by three Judges, that the Action lay, because the Court-Baron could not award Execution for so great Damages, though they were well assessed there. *Cro. Eliz.* 426. S. C. *adjournatur.* *1 Rol. Abr.* 600.

## Coroners.

**C**ORONERS are so (a) called, because they deal principally (a) *4 Inst. 471.* with Pleas of the Crown, and are very (b) antient Officers at *2 Inst. 31.* (c) Common Law; who, in former Days, were the principal (b) *2 Inst. 3.* (d) Conservators of the Peace within their Counties: There *S. P. C. 48.—* still ought to be a certain Number of them in every County, in some *49.* more, in others less, according as the Usage hath been. (c) By the Common Law, the

Chief Justice of the King's Bench is the Sovereign Coroner of *England. 4 Co. 57. 2 Sid. 101.*—And the Judges of this Court are Sovereign Coroners. *4 Inst. 73. (d) And may now bind any Person to the Peace who makes an Affray in his Presence. 2 Hawk. P. C. 33. F. N. B. 397. 4 Inst. 271. 2 Inst. 175.*

- (A) Of the Qualifications, and Manner of chusing and appointing a Coroner.
- (B) In what Places he hath Jurisdiction.
- (C) Of his Authority and Duty in taking Inquisitions.
- (D) Of traversing and quashing such Inquisitions.
- (E) Of his Power as to Bills of Appeal, Appeals of Approvers, and the Abjuration of a felon.
- (F) Where the Act of one Coroner shall be as effectual as if done by them all.
- (G) Of the fees that he may lawfully take.
- (H) Of discharging him, and for what Misdemeanors punished.

### (A) Of the Qualifications, and Manner of chusing and appointing a Coroner.

**B**Y *Westm. 1. made 3 Ed. 1.* it is enacted, “ That through all Shires (e) In anti-ent Time  
 “ sufficient Men shall be chosen to be Coroners, of the most loyal none under  
 “ and wise (e) Knights, which know, will, and may best attend upon such this Degree  
 “ Offices, and which lawfully shall attach and present Pleas of the were chosen.  
 “ Crown. *2 Inst. 32, 176. The*

Statute of *Merton*, made before this Act, supposes them to have been Knights. *23 Ass. pl. 7.*—And in the Writ *De Coronatore exonerando*, his not being a Knight is mentioned as a sufficient Cause for the Discharge of a Coroner. *Register 177. F. N. B. 164. 4 Inst. 271.* But as the chief Intent of this Statute was to prevent the chusing of Persons of mean Ability, it seems the Design of it is sufficiently answered, by chusing Men of Substance and Credit; and as the constant Usage for several Ages past has been accordingly, it seems to be no Objection at this Day, that the Person chosen is not a Knight. *2 Leon. 160. 2 Hawk. P. C. 42, 43.*

“ By the *14 E. 3. cap. 10.* it is enacted, “ That no Coroner be  
 “ chosen unless he have Land in Fee sufficient in the same County,  
 “ whereof he may answer to all manner of People.

“ By

(a) But none but Freeholders have Votes. *F. N. B. 164.* S. P. C. 19. *2 Hawk. P. C. 43.* For none but such are Suitors to the County-Court. *2 Inst. 99. 2 Rol. Abr. 121.* (b) Such Franchise may be claimed by the King by Prescription; but it is a Privilege of so high a Nature, that no one can well intitle himself to it otherwise than by Grant from the Crown. *Co. Lit. 114. a. 2 Hawk. P. C. 44.*

*2 Hawk. P. C. 43.* Although they are chosen by the County, yet it must be pursuant to the King's Writ issuing out of, and returnable into Chancery; but as their Authority proceeds from the Election, it does not determine by the Demise of the King: Hence also, if they prove insufficient to answer the Fines and Duties incumbent on them, the County, as their Superior, shall answer for them.

*2 Inst. 174.* The Writ for the Election of a Coroner first recites the Death or Discharge of one or more former Coroners, and then commands the Sheriff to cause one other, or more, as the Case is, to be chosen in a full County-Court, by the Assent of the County, according to the Form of the Statute in that Case made and provided; who having taken his (c) Oath in the usual Manner, may do all Things which belong to the Office of a Coroner, &c. and then it concludes with commanding the Sheriff to (d) certify to the Court the Name of the Person chosen.

(c) Shall be administered to him by the Sheriff. *2 Hawk. P. C. 43.* (d) See the Form of such Certificate in *Rast. Ent. 153.*

## (B) In what Places he hath Jurisdiction.

*3 Inst. 113. 5 Co. 107. 2 Hawk. P. C. 45.* A Coroner hath no Jurisdiction of Offences committed on the (e) open Seas, between the High and Low-water Mark when the Tide is in; but he hath an Authority over Offences committed in such Places when the Tide is out.

(e) By some it is laid down as a Rule, That he may inquire of a Felony committed on the Arms of the Sea, where a Man may see from the one Side to the other. *Owen 124. Moor 892. H. P. C. 171. S. P. C. 51.* And by others, his Power is confined to such Parts of the Sea, where a Man standing on the one Side, may see what is done on the other. *Fitz. Coron. 399. 4 Inst. 140. 2 Rol. Abr. 169. Vide Title Jurisdiction of the Admiralty Court.*

*2 Inst. 550. 2 Hawk. P. C. 45.* At Common Law, the Coroner of the County could not intermeddle with Offences done within the Verge of the King's Court; nor the Coroner of the Hostel or King's House, with those committed in the County without the Verge; which proving inconvenient, by reason of the Removal of the King's Court before an Inquest could be taken,

By the Statute of *Articuli super Chartas, cap. 3.* it is ordained, "That from thenceforth in Cases of the Death of Men, whereof the Coroner's Office is to make View and Inquest, it shall be commanded to the Coroner of the County, That he, with the Coroner of the King's House, shall do as belongeth to his Office, and inrol it, &c."

*4 Co. 46. Wyat and Wigges. 2 Inst. 550. 2 Hawk. P. C. 45.* If an Indictment, taken before the Coroner of the County and the Coroner of the King's House, does not appear, on the Face of it, to have been of an Offence within the Verge, it is insufficient; for it shall not be said to be good, as taken before the Coroner of the County; and void as taken before the other; for it was taken intirely before them both, and perhaps the Coroner of the House was the principal Actor, and the Jury mostly swayed by his Directions.

If the same Person be Coroner of the County, and also of the King's House, an Indictment of Death within the Verge, taken before him as Coroner both of the County and of the King's House, is good. 4 Co. 46. a.  
3 Inst. 134.  
2 Leon 160.  
S. C. but no

Resolution. 2 Hawk. P. C. S. C. agreed, because the Mischief is remedied as well when both Offices are in the same Person, as when they are in divers.

By the 33 H. 8. cap. 12. it is enacted, " That all Inquisitions upon the View of Persons slain within any of the King's Palaces or Houses, or any other House or Houses, at such Time as his Majesty shall happen to be there demurrant or abiding in his Royal Person, shall be taken by the Coroner for the Time being of the King's Household, without any adjoining or assisting of another Coroner of any Shire within this Realm, by the Oath of twelve or more of the Yeomen, Officers of the King's Household, returned by the two Clerks Controllers, the Clerks of the Check, and the Clerks Marshals, or one of them for the Time being of the said Household; to whom the said Coroner of the same Household shall direct his Precept, which Coroner shall be from Time to Time appointed by the Lord Great Master, or Lord Steward for the Time being; and that the said Coroner shall certify under his Seal, and the Seals of such Persons as shall be sworn before him, all such Inquisitions before the said Lord Master, or Lord Steward.

### (C) Of his Authority and Duty in taking Inquisitions.

BY the 4 E. 1. commonly called the Statute *De Officio Coronatoris*, it is enacted, " That the Coroner, upon Information, shall go to the Places where any be slain, or suddenly dead, or wounded, and shall forthwith command four of the next Towns, or five or six, to appear before him in such a Place; and when they are come thither, the Coroner, upon the Oath of them, shall inquire in this Manner, that is to wit, If they know where the Person was slain, whether it were in any House, Field, Bed, Tavern, or Company, and who were there; likewise it is to be inquired who were culpable, either of the Act, and who were present, either Men or Women, and of what Age soever they be (if they can speak, or have any Discretion) and how many soever be found culpable by Inquisition, in any the Manners afore said, they shall be taken and delivered to the Sheriff, and shall be committed to the Gaol; and such as be founden and be not culpable, shall be attached until the coming of the Justices, and their Names shall be written in the Coroner's Rolls: If it Fortune any such Man to be slain, which is found in the Fields, or in the Woods; First, It is to be inquired, whether he were slain in the same Place or not; and if he were brought and laid there, they shall do as much as they can to follow their Steps that brought the Body thither, whether he were brought upon a Horse or in a Cart; it shall be inquired also, if the dead Person were known, or else a Stranger, and where he lay the Night before; and if any be found culpable of the Murder, the Coroner shall immediately go into his House, and shall inquire what Goods he hath, and what Corn he hath in his Grange, and if he be a Freeman, they shall inquire how much Land he hath, and what it is worth yearly; and further, what Corn he hath upon the Ground; and when they have thus inquired upon every Thing, they shall cause

“ all the Land, Corn and Goods to be valued in like Manner, as if they  
 “ should be sold incontinently ; and thereupon they shall be delivered to  
 “ the whole Township, which shall be answerable before the Justices  
 “ for all ; and likewise of his Freehold, how much it is worth yearly,  
 “ over and above the Service due to the Lord of the Fee, and the Land  
 “ shall remain in the King’s Hands until the Lords of the Fee have made  
 “ Fine for it ; and immediately upon these Things being inquired, the  
 “ Bodies of such Persons being dead or slain, shall be buried ; in like  
 “ Manner, it is to be inquired of them that be drowned or suddenly  
 “ dead, and after such Bodies are to be seen, whether they were so  
 “ drowned or slain, or strangled, by the Sign of a Cord tied strait about  
 “ their Necks, or about any of their Members, or upon any other Hurt  
 “ found upon their Bodies ; whereupon they shall proceed in the Form  
 “ aforesaid ; and if they were not slain, then ought the Coroner to at-  
 “ tach the Finders, and all other in Company.

“ Also all Wounds ought to be viewed, the Length, Breadth and  
 “ Deepness, and with what Weapons, and in what Part of the Body  
 “ the Wound or Hurt is, and how many be culpable, and how many  
 “ Wounds there be, and who gave the Wound ; all which Things must  
 “ be inrolled in the Roll of the Coroners ; also Horses, Boats, Carts,  
 “ &c. whereby any are slain, that properly are called Deodands, shall  
 “ be valued and delivered unto the Towns, as before is said.

In the Construction of this Statute, the following Points seem to be  
 agreed on ;

*2 Hawk. P. C.* That the Statute being wholly Directory, and in Affirmance of the  
*47.* Common Law, the Coroner is not thereby restrained from any Branch  
*Fitz. Coron.* of his Power, nor excused from any Part of his Duty not mentioned in  
*421.* it, which was incident to his Office before ; and therefore though the  
*3 Inst. 52. 91.* Statute mentions only Inquiries of the Death of Persons slain, drowned  
*Bro. Coron.* or suddenly dead, yet the Coroner ought also to inquire of the Death  
*168. S. P. C.* of those who die in Prison.  
*51.*

An Inquisition of Death, by the Oaths of lawful Men of the County,  
 is (a) sufficient, without saying that they were of the next Towns ; so  
 (b) that it appear at what Place, and by what Jurors, by Name, it  
 was taken, and that such Jurors were sworn.

*(a) 1 Sid.*  
*204.*  
*1 Keb. 727,*  
*744. cont.*  
*Latch 166.*  
*Poph. 210. Co. Ent. 354. (b) Cro. Eliz. 31. 2 Hawk. P. C. 47.*

It is clearly (c) agreed, that the Inquest shall be taken on the View  
 of the dead Body, although the Statute be silent in this Matter ; and  
 that an Inquest otherwise taken by the (d) Coroner, is void.

*(c) Fitz. Coron.*  
*107. S. P. C.*  
*51.*  
*2 Lev. 141.*  
*Lat. h 166. Noy 87. 2 Hawk. P. C. 48. (d) Therefore where the Body cannot be found, or is so*  
 putrified that a View would be of no Service, the Coroner, without a special Commission, cannot  
 take the Inquest ; but in such Cases it shall be taken by Justices of Peace, or other Justices, autho-  
 rised by the Testimony of Witnesses. *H. P. C. 170. 1 Vent. 352. 2 Hawk. P. C. 48.*

If a dead Body, whereon an Inquest ought to be taken, be interred,  
 or suffered to putrify, before the Coroner hath viewed it, the Gaoler or  
 Township shall be amerced.

*Fitz. Coron.*  
*329, 339,*  
*421.*  
*H. P. C. 170.*  
*S. P. C. 51. 1 Keb. 278.*

Also it hath been (c) resolved, that a Coroner may lawfully, within  
 (f) convenient Time after the Death, take up a dead Body out of the  
 Grave, in order to view it, not only for the Taking of an Inquest, where  
 none hath been taken before, but also for the taking of a good one,  
 where an insufficient one hath been taken before.

*(e) 21 E. 4.*  
*70. b.*  
*2 R. 3 pl. 5.*  
*S. P. C. 51.*  
*H. P. C. 170.*  
*Bro. Coron.*  
*167.*  
 (f) As the Space of fourteen Days. *2 Hawk. P. C. 48.* and in *Cartb. 72.* where the Coroner, after  
 an Inquisition that was quashed for Insufficiency took a second *super visum Corporis*, a Year after the  
 Body had been buried, and the Court refused to quash it, for *factum valet quod fieri non debet* ; and  
 note, that this seems to be a Matter Discretionary in the Court into which the Inquisition is return’d.

It is not necessary that the Inquisition be taken in the very same (a) Place where the Body was viewed; and it hath been resolved, that an Inquisition taken at *D.* on the View of the Body lying dead at *L.* may be good.

Coroner cannot by Way of Punishment, for not finding according to the Evidence, adjourn the Jury to Places at a great Distance from where the Fact was committed; but an Adjournment to the Assise is proper and well enough. *Comb.* 386. *per Holt*, Ch. Just.

A Coroner cannot inquire of any Accessories after the Fact; and therefore it hath been resolved that an Indictment of *J. S.* before a Coroner, for having received and comforted one who had been Guilty of a Murder, is void.

But he may make Inquiry of the Accessories before the Fact; and also may inquire whether any so Guilty have fled for the same; for which they forfeit all their Goods and Chattels.

A Coroner may, and ought to inquire of all the Circumstances of the Party's Death, and also of all Things which occasioned it; and (b) therefore it is said, that if it be found by his Inquest, that the Person deceased was killed by a Fall from a Bridge into a River, and that the Bridge was out of Repair, by the Default of the Inhabitants of such a Town, and that those Inhabitants are bound to repair it, the Township shall be amerced.

According to (c) some Opinions, a Coroner *ex officio* hath no Power to take any Indictment, except of the Death of a Man.

But by others, he ought to inquire of the Breakers of Houses of a Prison.—And by the said Statute, a Coroner ought to inquire of Treasure that is found, who were the Finders, and likewise who is suspected thereof; and that it may be well perceived, where one liveth Riotously, haunting Taverns, and hath done so of long Time; hereupon he may be attached for this Suspicion, by four or six, or more Pledges, if he may be found.—Also it is said that a Coroner may inquire of Royal Fishes, as Sturgeons, Whales.

## (D) Of Traversing and Quashing such Inquisitions.

THE Law gives such high Credit to an Inquisition of Death, found before a Coroner, that (d) antiently the Judges would not receive a Verdict, acquitting a Person of the Death of a Man found against him by the Coroner's Inquest, unless the Jury finding such Acquittal, had also found what other Person did the Fact, or by what other Means the Party came to his Death; because it appeared by the Coroner's View, on Record, that a Person was killed.

Also it has been formerly held, that if a Person were slain, and upon the Coroner's Inquest *super visum corporis*, it were found that *J. S.* fled, though *J. S.* were afterwards acquitted both of the Felony and Flight, yet he forfeited his Goods; for the Coroner's Inquest is so solemn, that it is not traversable; also when the Goods are once lawfully vested in the King, by that Inquest the Property of them cannot be divested.

But by 2 Hawk. P. C. 54. This Opinion is harsh and unreasonable, that a Man shall be liable to forfeit all his Goods, which may perhaps be all that he is worth, by an Inquest taken in his Absence, without either hearing him or giving him an Opportunity of defending himself.

*Vide 2 Hawk. P. C. 55. and the Authorities there cited.* The Coroner's Record of an Abjuration, or of the Confession of Breaking Prison, or of the Confession of a Felony by an Approver, eltops the Party, not only from traversing the Confession, but also from alledging that it was taken from him by *Durefs*, &c. And it is said, that if the Party plead that he is not the same Person, he shall be concluded by the Coroner's Recording that he is the same Person; yet in these Cases, it seems, that the Judge may in Discretion, to inform his Conscience, take an Inquiry from the People living next the Place, of the whole Circumstances of the Matter.

*S. P. C. 24. 2 Hawk. P. C. 53.* If it be found by a Coroner's Inquest, that a Murder was committed in such a Town, and that the Murderer escaped untaken, the Township cannot traverse such Escape, because it makes them only liable to an Amercement, & *de minimis non curat lex*.

*Ero. Coron. 151. 2 Lev. 141, 152. 2 Keb. 859. 2 Jones 198. 1 Vent. 278. 3 Keb. 564, 566, 604, 800. Skin. 45. 2 Hawk. P. C. 54.* Also it is strongly holden in some Books, that an Inquest of Self-Murder, found before a Coroner, cannot be traversed; but the contrary Opinion being also holden by Books of as great Authority, and seeming also to be more agreeable to the general Tenor of the Law, in other Cases, it seems to be the better Opinion, that such Inquest being moved into the King's Bench by *Certiorari*, may be there traversed by the Executor or Administrator of the Person deceased; or in Case the Coroner's Inquest find him to have been a Lunatick, by the King or the Lord of the Manor.

(a) If a Coroner appear to have been corrupt in taking an Inquest, it seems that a *Melius inquirend'* shall go to special Commissioners, who shall proceed not on View, but upon Testimony, and the Coroner shall have nothing to do with such Inquest; but (b) where his Inquest is quashed for want of Form only, he shall take a new one in like Manner, as if he had taken none before.

*3 Mod. 82. 1 Salk. 190. 2 Keb. 859. 1 Vent. 181, 352. 3 Mod. 80, 100, 258. cont. 2 Jones 198. (b) 2 Rol. Abr. 32. pl. 5. 21 E. 4. 70. b. 1 Salk. 190.*

### (E) Of his Power, as to Bills of Appeal, Appeals of Approver, and the Abjuration of a Felon.

*2 Hawk. P. C. 50, 51.* BY the Common Law, the Coroner might, without the Concurrence of any other, receive an Appeal of Felony or Mayhem, on the Plaintiff's finding sufficient Pledges to the Sheriff for the Prosecution; but it being provided by *Westm. 1. cap. 10.* that the Sheriff shall have Counter-Rolls with the Coroner, it seems that no Appeal, since that Statute, is well commenced before the Coroner, unless the Sheriff be present to take a Counter-Roll of the Proceedings; yet the Coroner seems still to be the only Judge.

*H. P. C. 171. S. P. C. 52. 2 Hawk. P. C. 51.* A Coroner cannot receive a Bill of Appeal of an Offence done out of the County, because there can be no Trial thereof by the County; but he may receive the Appeal of an Approver, or take the Abjuration of one who confesses a Felony done in any County; because after such Confessions there is no need of any Trial.

*2 Hawk. P. C. 51. and several Authorities there cited.* A Coroner may certainly award Process, till the Exigent on a Bill of Appeal before him, and such Process shall be awarded by him only, and not by him and the Sheriff jointly, and he may proceed thereon till Outlawry; but since *Magna Charta*, by which it is enacted, *cap. 17. That no Sheriff, Constable, Coroner, or other Bailiff of the King, shall hold Pleas of the Crown*, he cannot proceed to the Trial of the Appellee.

An Appeal before the Coroner may be removed into the King's Bench or Chancery, by *Certiorari*, directed to the Coroners and Sheriff, <sup>2</sup> *Inst.* 176. but not by one directed to the Sheriff only.

The Coroner may receive the Appeal of an Approver, for an Offence in the same or in a different County; and if the Appellee be in the same County, he may award Process against him to the Sheriff, till it come to the Exigent; but if the Appellee be in a foreign County, the Coroner cannot award Process against him, but must leave it to the Justices of Gaol-Delivery, or others before whom the Appeal is afterwards recorded.

A Coroner may take the Confession and Abjuration of a Felon; and alio the Confession of any Felony by an Approver. And as to Abjuration, it is to be observed, that at the Common Law, if a Person accused of any Felony, (except Sacrilege) whether in the same or any other County, for which he was liable to Judgment of Death, and not charged with Treason, had fled to any Church or Church-yard, and within forty Days confessed himself Guilty before the Coroner, and declared all the particular Circumstances of the Offence, and thereupon taken the Oath in that Case provided, (the Substance whereof was, that he abjured the Realm, and would depart as soon as possible, at the Port which should be assigned him, and never return without Leave from the King, &c.) he saved his Life, if he observed the Terms of the Oath, by going with all convenient Speed, the nearest Way to the Port assigned, &c. but he was Attainted of the Felony by such Abjuration, without more, and consequently forfeited his Lands, Goods, &c. And now by <sup>21</sup> *Fac.* 1. *cap.* 28. it is enacted, *That no Sanctuary, or Privilege of Sanctuary, shall be admitted or allowed in any Case.*

(F) Where the Act of one Coroner Will be as effectual as if done by them all.

(a) **W**Here-ever Coroners are authorised to act as Judges, as in the Taking of an Inquisition of Death, or receiving an Appeal of Felony, &c. the Act of any one of them who first proceeds in the Matter, is of the same Force as if all had joined in it; but it is said, that after such Proceeding by one of them, the Act of any other will be void; also it is certain that (b) where Coroners are impowered only to act ministerially, as in the Execution of a Process directed to them, upon the Default or Incapacity of the Sheriff, all their Acts will be void, wherein they do not all join.

(a) *S. P. C.*

53. a.

14 *H.* 4 34.

(b) 39 *H.* 6. i

40. b.

*Comb.* 435.

& *Quere.*

(G) Of Fees that he may lawfully take.

**B**y *Westm.* 1. *cap.* it is enacted, That no Coroner demand or take any Thing of any Man to do his Office, upon Pain of great Forfeiture to the King.

But it is enacted by 3 *H.* 7. *cap.* 1. " That a Coroner have for his Fee, upon every Inquisition taken upon the View of a Body slain, 13 s. 4 d. of the Goods and Chattels of the Slayer and Murderer, if he have any Goods; and if he have no Goods, of such Amercements,

*Vide* 2 *Inst.*

176 That

this Sta-

ture was

made in Af-

firmance of

the Common

Law.

“ as shall fortune any Township to be amerced for the Escape of the  
 “ Murderer, &c.

But the Coroners endeavouring to extend this Statute to Persons slain  
 by Misadventure, it was enacted by 1 H. 8. cap. 7. “ That upon a  
 “ Request made to a Coroner to come and inquire upon the View of  
 “ any Person slain, drowned, or otherwise dead by Misfortune, the said  
 “ Coroner shall diligently do his Office, without taking any Thing  
 “ therefore, upon Pain to every Coroner that will not endeavour himself  
 “ to do his Office, (as afore is said) or that taketh any thing for doing his  
 “ Office upon every Person dead by Misadventure, for every Time Forty  
 “ Shillings.

### (H) Of discharging him, and for what Mis- demeanors punished.

E. N. B. 163.  
 S. P. C. 48.  
 8 Co. 41.  
 2 Inst. 32.

(a) Vide  
 Godb. 105.  
 That by  
 choosing an-  
 other, the  
 Power and  
 Authority of

IF any Coroner be so far engaged in any other publick Business in the  
 County, that he cannot have Leisure enough to attend the Office of  
 a Coroner, or if he be chosen Verderor of a Forest, or if he have not  
 sufficient Lands in the same County whereon to live according to his  
 State and Degree; or if he be disabled, either by old Age or any in-  
 veterate Disease, as the Palsy, or the like, to execute his Office as he  
 ought; and, as some say, if he follow any common Trade, he (a) may  
 be discharged by the Writ *De Coronatore exonerando*, which being direc-  
 ted to the Sheriff, after a Recital of the particular Cause of the Discharge  
 of such Coroner, commands him to cause another to be chosen in his  
 room.

the first, *ipso facto*, ceases.

Register 177.  
 b. 178. a.  
 E. N. B. 164.  
 S. P. C. 49.

S. P. C. 51.  
 Salk. 377.  
 1 P. C. 170.  
 (c) That if

But if any Writ of this Kind be grounded on an untrue Suggestion,  
 the Coroner may procure a Commission from the Chancery, to inquire  
 of the Truth of it, and to return the Inquiry before the King into  
 Chancery; and if upon such Commission the Suggestion be disproved,  
 the King may make a *Supersedeas* to the Sheriff, that he do not remove  
 such Coroner, or if he have removed him, that he suffer him to execute  
 the Office as he did before.

If a Coroner be remifs in coming to do his Office, when he is sent  
 for, &c. he shall be (b) amerced by Virtue of the above-mentioned Sta-  
 tute *De Coronatoribus*.

(c) That if  
 he returns a Wrong Presentment, an Information will be granted against him. *Comb.* 386.

Also by the 3 H. 7. cap. 1. “ if any Coroner be remifs, and make  
 “ not Inquisitions upon the View of the Body slain or murdered, he  
 “ shall forfeit for every Default, one hundred Shillings.

And by the 1 H. 8. cap. 7. *it is enacted*, “ That if any Coroner  
 “ shall not endeavour himself to do his Office upon any Person dead  
 “ by Misadventure, he shall forfeit forty Shillings.

Also by the 3 H. 7. cap. 1. *it is enacted*, “ That if any Coroner do  
 “ not certify his Inquisition, he shall forfeit one hundred Shillings.

## Corporations.

(A) Of the Nature and different Kinds of Corporations.

(B) By whom, and in what Manner created.

(C) Of the Names of Corporations : And herein,

1. Of the Name in its Creation.
2. How far the Name may be varied from in Grants by or to a Corporation.
3. How far it may be varied from in Pleading and Judicial Proceedings.

(D) What Things are incident to a Corporation.

(E) How Corporations differ from natural Persons : And herein,

1. Of Grants made by and to them.
2. How they are to sue and be sued.
3. What they may do without Deed.
4. What Things they may take in Succession.
5. Where they shall be liable in their natural Capacities.

(F) Of the Dissolution of Corporations.

### (A) Of the Nature and different Kinds of Corporations.

Corporations are of several Natures, all of them instituted for the better Government of a People combined together, and living under a regular System of Laws.

Of Corporations some are Sole, and some are Aggregate ; a Sole Corporation consists of one Person only as the (a) King ; so a Clergyman, by being made (b) a Bishop, Prebend, Parson or Vicar, is (c) said to be a Sole Corporation.

10 Co. 29. b.  
31. b.  
1 Rol. Abr. 512.  
the Com-  
mon Law, and has thereby several Privileges and Prerogatives distinct from a Common Person, which *vide Tit. Prerogative.* (b) These are founded by the King, and are under Ecclesiastical Government, yet the Common Law takes Notice of them, though not originally.—(c) If he holds his Possessions singly, he is a Corporation Sole ; but yet if with others he makes a Chapter, he is thereby Member of a Corporation Aggregate, so the same Person by being Ineumbent of the same Preferment, may be both a Corporation Sole, and a Member of a Corporation Aggregate. *Comp. Incumb. 372.*

A Corporation Aggregate is an (d) Artificial Body of Men, composed of divers constituent Members *ad instar Corporis humani*, the Ligaments

4 Mod. 54.  
Cart. 217.  
1 Show. 280.  
(d) And is  
said to be invisible and immortal, and can only be created by Act of Parliament or the King's Charter ; for though some Corporations are said to be by Prescription, yet such Prescription always sup-  
poses

poses an original Grant from the Crown, which being lost or worn out by Time, yet having run out into a Prescription, still continues to unite them. 45 E. 3. 2. 3. Co. Lit. 130. 2 Bulf. 233. Vide in the Argument of *Quo warranto* against the City of London, 115. Kelw. 138.

Alfo Corporations are said to be Ecclesiastical or Lay; of Ecclesiastical Corporations some were called (a) *regular*, as Abbots, Priors, &c. (a) Those other *secular*, as Bishops, Deans, &c. lived under certain Rules, and had vowed true Obedience, wilful Poverty and perpetual Chastity; but are now dissolved. Co. Lit. 93.

Of Lay Corporations some are said to be for general Government; as those of Mayor and Commonalty, &c. some for a particular Purpose, as for the Advancement of (b) Learning, (c) Charity, or some (d) particular Trade or Branch of Business: These receive their Sanction from the Crown, and must be by the King's Licence; though a private Person may be Founder, and may give them Laws to which they must square themselves in their future Conduct.

(b) Which by the Civil Law are called Colleges or Universities, yet are considered as Lay Corporations. Carth. 92. (c) Such are Hospitals. (d) As *Trinity-House* for regulating Navigation, *South-Sea Company*, &c. Vide Tit. *Mandamus*.

## (B) By Whom, and in What Manner created.

(e) The Pope THE King, by Virtue of his Prerogative, is the (e) only Person that could not have founded or incorporated a College, &c. here, but it ought to have been done by the King himself. 4 Co. 107. b. (f) 5 Co. 26. a. *Cawdry's Case*. (g) 49 E. 3. 4. 49 Aff. 9. Bro. *Prescription* 12. 10 Co. 33. b.

10 Co. 33. b. But also the King may give Power to a common Person to name the Corporation, and the Persons it is to consist of; but when he hath so done, this Corporation does not take its Essence from the common Person, but from the King.

Vide 2 Inst. 720. this Statute expounded.

(b) By the Common Law, he that gives the first Possessions to the Corporation, is the Founder. 38 Aff. 22. 50 Aff. 6. Bro. *Corody* 12. 1 Co. 33. b.—But if the King and a common Person give Possessions to a Corporation at one and the same Time, the King shall be the Founder only by his Prerogative. 5 Aff. 6.

10 Co. 30. Style 198. (i) As *confituimus* the Men of such a Town a Corporation, viz. Mayor, &c. 2 Rol. Abr. 197.

10 Co. 27. b. 31. a. b. The King may grant to the Commonalty of D. that they shall be incorporated by the Name of Mayor, &c. and that they may chuse a Mayor, &c. and this is a good Corporation, though the Election of a Mayor is in (k) *futuro*; for there is a Diversity between a Power, Liberty, and

(k) By a special Act of Parliament, it was enacted that there may be built one meet House, &c. that the same may be called, &c. and

berty, Franchise, or other Thing newly created, which may take Effect and the *in futuro*, and an Estate or Interest which none can take without a pre- Lord, &c. sent Capacity. may be Governors, &c. and the said Governors, &c. shall for ever hereafter be incorporated, &c. if that no Hospital was incorporated by this Act, because all the Words are *de futuro*. 1 Co. 25, 24.

A Patent procured by some few Persons only, shall not (a) bind the rest, nor (b) can the Inhabitants of a Town be incorporated without the Assent of the major Part of them. (a) 1 Rol. Rep. 226. (b) 2 Brownl. 100.

As it is the King's Charter that creates Corporations, so such Charter (c) may mould and frame them as it shall think fit. 3 Mod. 13. (c) Of ancient Time, the Inhabitants of a Town were incorporated when the King granted to them to have *Guilham Mercatoriam*. Reg. 219. 10 Co. 30.

If the King grants Lands to the Men or Inhabitants of *D. hereditibus* & *successoribus suis*, rendering (d) Rent, (e) for any thing touching these Lands, (g) this is a Corporation, but not to other Purposes. 21 E. 4. 56. 7 E. 4. 3. 2 H. 7. 13. (d) If the

King grants *Homibus de Islington* to be discharged of Toll, this is a good Corporation to this Intent, but not to purchase. 21 E. 4. 59.—Where the King in giving Lands to the Inhabitants of a Town, on Supposition that they were incorporated, shall be said to be deceived in his Grant, and the Grant void. 1 Rol. Abr. 513. Co. Lit. 3. a. Lan. 21.—But by the Forest Law, a Grant of a Privilege within a Forest, to all the Inhabitants, being Freeholders within this Forest, is good. 4 Inst. 297. (e) By this they have Capacity to take, but not to grant the Lands to another. Cro. Eliz. 35. (f) Where a Charter made to Aliens may incorporate them *quoad* the King, and not *quoad* others. 1 Rol. Rep. 148, 296. (g) But if the King releases the Rent, the Corporation is *ipso facto* dissolved. Dyer 100. pl. 70.

One Corporation may be made out of another; but it must be by the King's Charter; therefore where the Mayor and Commonalty of *London* prescribed to make another Corporation in the City, though their Customs are confirmed, yet it was held not to be good, without the King's Charter. 10 Co. 32. 49 E. 3. 4. 49 Aff. 8. Moor 584. 1 Sid. 291. 2 Keb. 52, 63, 88. 1 Salk. 192.

## (C) Of the Names of Corporations: And herein,

### 1. Of the Name in its Creation.

THE Names of Corporations are given of Necessity; for the Name is, as it were, the very Being of the Constitution; for though it is the Will of the King that erects them, yet the Name is the Knot of their Combination, without which they could not perform their Corporate Acts; for it is no Body to plead and be impleaded, to take and give, until it hath (a) got a Name. 5 E. 4. 201. 1 Leon. 307. Dyer 106. 11 Co. 21. Perk. 8. 27 H. 6. 3. Hob. 32. Lit. 201.

11 Co. 20. Owen 35. Dals. 78. (b) 2 Berdl. 2. 10 Co. 28. 2 Inst. 666. that the Name of a Corporation is as the Name of Baptism, which cannot be changed.

The Names of Corporations are usually taken, first, from the Persons of which they consist; secondly, from the Use and Design of their Being; thirdly, from the Names of the Patrons that first procured their Institution; fourthly, from the Place they reside; fifthly, from the Names of Saints.

But though a Corporation must have a Name, yet that must be understood to be either expressed in the Patent, or implied in the Nature of the Thing; as if the King should incorporate the Inhabitants of *Dale* with 1 Salk. 192. Per Holt, Ch. Just.

with Power to chuse a Mayor annually, though no Name be given, yet it is a good Corporation, by the Name of Mayor and Commonalty. So the City of *Norwich* is incorporated to be a Mayor and Sheriffs, by the Charter of *Henry* the Fourth, and are called Mayor, Sheriff and Commonalty.

21 E. 4. 59.  
Fitz. Grant  
30. S. C.  
(a) So a

Debt to the

Corporati-  
on remains,

though their Name is changed by a new Charter. 3 Lev. 238. (b) And all other Fran-  
chises and Privileges. 4 Co. 87. b.

1 Jones 261.  
College of  
Physicians  
and Butler.

So a Corporation may be incorporated by one Name, and Power gi-  
ven them to sue and purchase Lands by another Name.

Lit. Rep. 168, 212, 350. Cro. Car. 256. S. C.

5 Mod. 327.  
College of  
Physicians v.  
Dr. Salmon.  
2 Salk. 451.  
S. C.

The College of Physicians were incorporated by the Name of the  
President, College or Commonalty of the Faculty of Physick, and after-  
wards in the Patent it was granted that the President of the College  
should sue and be sued in Behalf of the College. The College brought  
an Action against *Dr. Salmon*, upon the Statute for Practising without Li-  
cence, under the Seal of the College, and declared by the Name of the  
President and College, or by the Name of the President of the College;  
and the Court allowed to sue by either, and so were the Precedents;  
for though it was a rare Instance that the Corporation should be incor-  
porated by one Name, and have Leave to sue by another Name; yet  
when it is so, it is very natural and proper.

## 2. How far the Name of the Corporation may be varied from in Grants, by or to a Corporation.

10 Co. 125.  
Gouldf. 122.

Although the Names of Corporations are not meely arbitrary Sounds,  
yet if there be enough said to shew that there is such an artificial Being,  
and to distinguish it from all others, the Body Politick is well named,  
though the Words and Syllables are varied from; and this the rather  
in Grants, which are to have a favourable Construction.

10 Co. 125.  
(c) So if the  
Grant be  
made by  
Præpositus &  
Socii, where

it should be

So if the Name be expressed by Words (a) Synonymous, it is sufficient;  
as if a College be instituted by the Name of *Guardianus & Scholares do-  
mus sive Collegii Scholarium de Merton*, and they make a Lease by the  
Name of *Custos & Scholares*, it is good.

11 Co. 20.—So if *J. S. Abbot of B.* makes a Lease, by the Name  
of *J. S. Clericus de B.* 11 Co. 21.

10 Co. 125.  
The Case of  
the Mayor  
and Burges-  
ses of Lynn  
Regis.

Hob. 124.

If there be a Corporation founded by the Name of Mayor and *Bur-  
genses Burgi Dom' Regis de Linn Regis*, and an Obligation is made to  
them by the Name of Mayor and *Burgenses de Linn Regis*, without  
saying *Burgi Dom' Regis*, it is well enough; for the Parties are suffici-  
ently expressed; and all Boroughs are founded by the King.

If a House be founded by the Name of *Minister Dei pauperis domus*,  
and a Lease be made by the Name of *Minister pauperis domus Dei*, this  
is well enough; for the same Design is specified by both Names.

10 Co. 125.

But if a House be founded by the Name of *Guardianus & Scholares  
domus sive Collegii Scholarium de Merton*; and a Lease be made by them,  
by the Name of *Guardianus & Scholares domus sive Collegii de Merton*, it  
is a material Variance of the Name, since they have not expressed the  
Design of the House, which is a substantial Part of the Name.

But if a College be instituted by the Name of *Aula Scholarum Reginae*,<sup>11 Co. 20.</sup> to be governed by a Provost, and they are confirmed by the King, by *Arras's Case*. the Name of *Præpositus & Scholares Aulae Reginae*, and they make a Grant of an Advowson by that Name, this is good; for that College would never have a Name according to the Words of the first Charter, for then it would be a sole Corporation, which is contrary to the general Convenience of such a Body; for the Name would be *Præpositus Scholarum Aulae Reginae*, which cannot be intended, and the Word *Scholares* is not required, as in the former Case; and the Placing it where it is confirms the Establishment, and this Confirmation of the King, and common Appellation, are good Interpreters of the original Intent of the Name.

Edward the Fourth incorporated the Deans and Canons of *Windsor*, by the Name of the *King's Free Chapel of St. George the Martyr*; and in the Time of *Philip and Mary*, made a Lease by the Name of *The Dean and Canons of the King's and Queen's Free Chapel*, &c. this was held a material Mistake of the Name; for it takes its Name from the Founder that is here mistaken, and the Name of a different Person substituted in his room.<sup>1 Co. 124.</sup>

If a Corporation be founded by the Name of the Dean and Chapter of the Cathedral Church in *Oxford*, and they make a Lease by the Name of the Dean and Chapter of the Cathedral Church in the University of *Oxford*, this is well enough; for the (a) Place of the Situation is well and sufficiently shewn.<sup>Popb. 57.</sup>

named of such a Place as will distinguish its Situation from others. *Vide 10 Co. 29. b. 32. b. 2 Brownl. 244. 1 And. 196. 1 Rol. Abr. 513.*

If the Prior of *St. Michael of Coventry* makes a Lease by the Name of the Dean of *Coventry*, this is good; so (b) if they had granted an Annuity or Corody, and the Name of the Saint had been omitted.<sup>10 Co. 124.</sup>

of *St. George the Martyr*, and in a Lease they omit the Word *Martyr*, it is well enough; for the Name of Dedication is but an empty Sound, and no otherwise requisite than to distinguish the Corporation from all others.<sup>(a) A Corporation must be instituted in Honour Popb. 59.</sup>

If there be an immaterial Addition, this doth not hurt; for, as if the President of Scholars of *Corpus Christi College in Oxford*, make a Lease by the Name of President and Scholars of *Corpus Christi College in Com' Oxon*, this is good; for *utile per inutile non vitiatur*.<sup>Cro. Eliz. 816.</sup>

In Devises, if the Name of the Corporation be mistaken, yet if there be Words sufficient to shew that the Testator could only mean and intend such a one, it will be sufficient; as a Devise to *George*, Bishop of *Norwich*, when his Name is *John*, &c.<sup>1 Leon. 307. Dyer 106. 11 Co. 21. Perk. 8. Owen 35. Dalif. 78.</sup>

But if a Devise be to the Abbot of *St. Peter*, where it is really the Abbot of *St. Paul*, the Devise is void; for here the Saint's Name is the only Specification of the Party in the Devise which is mistaken.<sup>Hob. 33. 19 H. 8. 8.</sup>

### 3. How far the Name may be varied from in Pleading and Judicial Proceedings.

There is a Difference between Writs, Declarations, &c. and Obligations and Leases, &c. for if the Name of a Corporation be mistaken in a Writ, a new Writ may be purchased of common Right; but if it were fatal if mistaken in Obligations and Leases, the Benefit of them would be wholly lost; and therefore one ought to be supported, though not the other; as (c) where *John*, Abbot of *N.* granted Common of Pasture to *J. S.* by the Name of *William Abbot of N.* this was held good; but if this Name had been thus mistaken in a Writ, it had been fatal.<sup>6 Co. 65.</sup>

*Guardianorum naupiar' de Rederiffe*, and an Action brought by the Name of *Præsidi Guardini*, & So ii, and held ill. *2 Bulst. 233. Tipling and Pexal*, & *11 Co. 21.*—In pleading a Lease by a Dean and Chapter, the Name of the Dean must be shewed. *Co. Lit. 3. a.*

There

*Hob.* 211. There is also a Difference between an antient Corporation and a Corporation newly created; for an antient Corporation, by Use, may have special Names differing in Substance, but otherwise of a Corporation created within Memory; for this regularly can only have the Name by which it is instituted.

*Noy* 54.  
*2 Brocwnl* 292.  
*Latib* 229.  
*11 Co.* 94.  
*Dyer* 279.  
*3 Mod.* 6.  
*10 Co.* 87.  
*Chancellor of Oxford's*  
*Cafe.*  
If the Advowson of Popish Recufants Convict be given to the Chancellor and Scholars of the University of *Oxford*, and they bring their Action by the Name of the Chancellor, Masters and Scholars of the University of *Oxford*, this is well brought; for a Corporation by Act of Parliament may take by another Name than that by which it was instituted; for in Acts of Parliament, the Subject and Design of the Legislature must be respected; and those, that have the Power wholly to change the Name of Things, have certainly Power to alter it in any Act of theirs; and all inferior Jurisdictions are bound to support the Sense of the Law, and not to destroy it, if it hath any Meaning.

*2 Inst.* 666.  
*Yelv.* 34, 49.  
A Parson must be impleaded by Christian and Surname, and not *John*, Parson of *D. &c.* but in other sole Corporations, the Christian Name only is sufficient; as *John*, Bishop of *Canterbury*, *Thomas*, Abbot of *D. &c.*

*2 Inst.* 666.  
*Skin.* 2.  
But where the Corporation is Aggregate of many capable Persons, as Mayor and Commonalty, Dean and Chapter, &c. none of them in Pleading, are named by their proper Christian and Surnames; and the Reason is, because in the first place, the Death of the Individual is a good Plea in Abatement, for a new Successor comes in his Place, that was not Party to the former Writ; but Bodies Aggregate are immortal and invariable; and therefore the Parties to the first Writ are always the same.

*Cro. Eliz.* 232.  
*1 Leon.* 153.  
*1 And.* 272.  
*S. C.*  
(a) But if a Parson

If a Writ is brought by the (a) Warden and College of *All Souls*, for Lands, &c. *quod clamant esse jus & hereditatem suam*, this is well enough, though it is not said *Jure Collegii*; for they have no other Capacity.  
pleads he was seised, he must say *Jure Ecclesiæ*, for that he hath two Capacities; *secus* of an Abbot, Dean and Chapter, &c. *1 Leon.* 153. *per Anderson*.—So in Case of a Bishop, it must be shewed *quo Jure* *2 Lev.* 68. *1 Vent.* 223.—Where it cannot be alledged that a Man was seised *Jure Presbyteratus*, but ought to be *Jure Cantaria*, *vide Cro. Car.* 215.—If a Dean and Chapter, being Parsons imparsoned of the Church of *D.* demand the whole Church, &c. they shall say they were seised *Jure Ecclesiæ de D.* *Plow.* 503.

*Cro. Car.* 414.  
*Healing and the Mayor of London.*  
If the Corporation be named by their Name, and afterwards mistaken; as if Judgment be given in an Action of Debt, that the Mayor or Commonalty and Citizens should recover the Debt and 6l. Costs *eisdem Major' Communitat' Civibus*, this will be Error.

## (D) What Things are incident to a Corporation.

*3 Mod.* 13.  
*1 Rol. Abr.* 513.  
(b) That when a Corporation is duly created, all other Incidents are tacitly annexed. *10 Co.* 30. *b.* that it is incident to sue and be sued, to purchase and sell; but *vide Tit. Mortmain*, and *10 Co.* 30. *1 Rol. Abr.* 515. *Hob.* 211.

A Corporation is a Creature of the Charter that constitutes and gives it Being, and prescribes Bounds and Limits to its Operations, beyond which it cannot regularly proceed, yet there are some Things (b) incident to a Corporation, and which it may do without any express Provision in the Act of Incorporating.

As if the King creates a Corporation, and does not give any express Power in the Letters Patent to make Laws, yet this Power is incident to the Corporation, and included in their Incorporation; for a Body Politick cannot be governed without Laws, but these By-Laws ought always to be subject to the Laws of the Realm, as subordinate thereto.

10 Co. 31.  
Hob. 211.  
Moor 584.  
5 Mod. 439.  
(a) That every By-Law, by which the

Benefit of the Corporation is advanced, is a good By Law, for that very Reason, that being the true Touch-stone of all By-Laws. *Carth. 482. per Holt, vide Tit. By Laws.*

Antient Corporations have, as incident to them, a Power of electing Members; but in newly erected Corporations, the Charter that gives them Being, must provide for their Continuance and Succession.

(b) 12 Co. 120.  
3 Mod. 14.  
(b) If the King creates a Corpora-

tion of a Mayor and eight Aldermen, with a Clause in the Patent, *Quod super Mortem vel remotionem alicujus Aldermanni liceat majori & ceteris Aldermannis infra octo dies proximo post mortem vel remotionem, &c.* to elect another Alderman into his Place, though no Election be within eight Days after the Death of an Alderman, yet they may elect an Alderman at any Time after. *1 Rol. Abr. 513, 514. and now vide the 11 Geo. 1. cap. 4. and for the Manner of electing 9 Ann. 3 Bulst. 71. 1 Salk. 190. and Tit. Officers.*

If a Corporation be created of a Mayor and eight Alderman, with a Clause in the Patent, that if any of the Aldermen die, or be removed, that it shall be lawful for the Mayor, and the Rest of the Aldermen, within eight Days after the Death or Removal, to elect another in his Place, though it is not limited that they, or the greater Number of them may elect, yet the greater Number may elect.

1 Rol. Abr. 515.  
Goob. 439.  
& vide the Statute 33 H. 8. cap. 27.

And if in the above Case the Mayor, at the Time of the Death of an Alderman, be absent from London, till after the eight Days, and the Aldermen, within eight Days, come to the Deputy, and require him to make an Assembly of them to elect another within the eight Days, and he refuses, and thereupon the greater Part of the Aldermen assemble themselves without the Mayor or his Deputy, and elect an Alderman, this is a void Election; for the Mayor ought to be present at it, by the Words of the Grant.

(c) But for this vide 3 Mod. 15.

and how it is now remedied, where the Mayor, or other Officer, who ought to preside, accidentally absents himself, by the *11 Geo. 1.*

Also where a Charter impowers a Corporation to chuse Officers, it impliedly obliges the Persons chosen, to undergo and to stand to the Nomination; for by accepting of any Letters Patent there is an Obligation on the Parties accepting, to perform all Things thereby required, as to undergo all Charges, Offices, &c.

Corporations have also divers Franchises, &c. as Felons Goods, Waifs, Estrays, Treasure Trove, Deodands, Courts and Cognisance of Pleas, Return of Writs, Fairs, Markets, Exemptions from serving in Offices or on a Jury, Exemptions from Payment of Toll, the Assise of Bread and Beer, a Pillory and Tumbrel, the Office of a Justice of Peace, Coroner, Clerk of the Market, &c. but these must be mentioned in the Charter; and granted by express Words.

14 H. 8. 5.  
19 H. 6. 52.  
39 E. 3. 35.  
1 Lev. 159.  
1 Keb. 847.  
Raym. 113.

And if there be Letters Patent, which grant to the Body Politick an Exemption from Tolls or Privileges of Fairs, (d) Commons, &c. all the particular Members shall take Advantage of these Grants.

5 Mod. 440.  
6 Mod. 52.  
(d) But a Corporation

of a Town cannot prescribe for Common for the Freeholders of the Town. *2 Keb. 27.*

## (E) How Corporations differ from natural Persons: And herein,

## 1. Of Grants made by and to them.

45 E. 3. 2. 3. **A**lthough a Corporation Aggregate is said to be invisible, immortal, and to exist only in Supposition and Intendment of Law, yet such Corporations are not capable of a Protection and parting with their Possessions. *profector' or moratur'*; because the Corporation itself is invisible, and resteth only in Consideration of Law. *Co. Lit. 130. 2 Bulst. 233.*—It hath not been known that a Corporation hath been bound in a Recognisance or Statute-Merchant. *Moor 68. pl. 182.*—They cannot do Homage or Fealty, because they must be done in Person. *Co. Lit. 66. b. 4 Co. 11. a. 10 Co. 32. b.* (b) But they cannot retain without a due Licence in *Mortmain. Co. Lit. 99. vide Tit. Mortmain.*

21 E. 4. 12. **B**ut a Dean without the Chapter, a Mayor without his Commonalty, *Moor 51.* the Master of a College or Hospital without his Fellows, cannot purchase or grant, or make any Contract that will bind the Corporation.

*Vide Tit. Remainder.* If a Remainder be limited to such a Corporation as the King shall next erect, this is no good Remainder, though a Corporation be erected before the particular Estate determine; for tho' a Remainder limited to the eldest Son of *J. S.* in such a Manner, be good, yet this Body of Men is only capable of taking when they are *in esse.*

*Co. Lit. 9.* (b) So if Lands are given to the King by Deed inrolled, without the Word *Successors* or *Heirs*, a Fee-simple passeth. *Co. Lit. 9.*

21 E. 4. 76. **I**f a Lease be made to a Corporation Aggregate for the Life of the *1 Rel. Abr. 843.* Lessor, this a good Estate for Life, because the Life of the Lessor, which is wearing and will determine, is the Measure of its Continuance; but if a Lease be made to a Corporation Aggregate for their own Lives, this is no Estate for Life, but a Fee-simple; for the Lease being made to them as a Body Politick, which has a continued Succession, and never dies, a Lease made to them, during their Lives, is equal to a Grant made to them while they continue a Body Politick, which, by Reason of the perpetual Succession of its Members, is in Law looked upon to be for ever.

*1 Co. 122, 126.* **A** Corporation cannot be seized to the (c) Use of another; and therefore it is said, that if one by Licence, without a valuable Consideration, make a Feoffment, levieth a Fine, or suffers a Recovery, or the like, to a Corporation, to the Use of *J. S.* that the Corporation shall have it to their own Use. *(c) Whether they may be an Executor, vide 1 Rel. Abr. 915.*

*1 Leon. 30.* **I**f *A.* grants to the Mayor and Burgeses of *D.* the Moiety of a Yard-Land, in the Waste of——, without describing in what Part it should be, or how it is bounded, the Corporation cannot make their Election by Attorney, but are first to resolve on having the Land, and then they may make a special Warrant of Attorney, reciting the Grant to them, and in which Part of the said Waste their Grant should take Effect, and according to such Direction the Attorney is to enter.

## 2. How they are to sue and be sued.

Corporations Aggregate must sue and defend by (a) Attorney; and therefore the (b) proper Process against them is a *Distringas*.  
 Co. Lit. 66. (a) They cannot be  
 effoigned. *Dalf.* 121. pl. 154.—cannot be outlawed. 10 Co. 32. b.—No Attachment lies against a Corporation. *Rdym.* 152.—(b) Where on such Process the Court will order the Sheriff to return good Issues. 1 *Salk.* 191.

After Service of a Writ of Execution of a Decree against a Corporation, the next Process is a *Distringas*, and after that a *Sequestration*, which being once awarded, they can never after come and pray to enter their Appearance, as they might have done on the *Distringas*, which issues for that very Purpose to compel them to appear; but the Appearing being past, the Process must go, because the Appearance being only in Favour of Liberty, can be of no Service to a Corporation, which cannot be committed.  
 2 *Vern.* 396. *Preced. Chan.* 128.

A Corporation Aggregate cannot distrain in their own Persons, but by their Bailiff, and therefore no (c) Replevin lies against them by the Name of their Corporation.  
 1 *Brownl.* 175. (c) Cannot be declared

against, as in *Custodia Marefchalli.* 6 *Mod.* 183.

## 3. What a Corporation may do without Deed.

Aggregate Corporations, consisting of a constant Succession of various Persons, can regularly do no Act without Writing; therefore Gifts (d) by and (e) to them (f) must be by Deed.  
 Co. Lit. 94. b. 6 Co. 38. b. *Cro. Car.* 170. 2 *Sand.* 305.

*Raym.* 194. (d) They cannot attorn without Deed. 6 Co. 38. b. (e) A Gift to a Dean and Chapter, or other Corporation Aggregate, must be by Deed. Co. Lit. 94. b.—But an Abbot, Bishop, Parson, &c. or other sole Body Politick might have been enfeoffed without Deed. Co. Lit. 94. b.—(f) Where if pleaded, the Thing is done, it must be intended by Deed. *Cro. Jac.* 411. 2 *Sand.* 305.

A Corporation Aggregate cannot, without Deed, command their Bailiff to enter into certain Lands of their Lease for Years, for a Condition broken.  
 1 *Rel. Abr.* 514. *Cro. Eliz.* 815.

2 *Rel. Abr.* 699. S. C. & vide *Cro. Jac.* 411. *Cro. Car.* 269.

But a Corporation may employ one in ordinary Services without Deed, as a Butler, Cook, &c. but not to appear for them in an Assise, or any other Act which concerns their Interest or Title.  
 1 *Vent.* 47. 1 *Mod.* 18.

So a Man may avow the Taking Cattle Damage-feasant, as Bailiff to a Corporation, without having any Precept in Writing.  
 3 *Lev.* 107.

Also a Corporation Aggregate may appoint a Bailiff to distrain without Deed or Warrant, as well as a Cook or Butler; for it neither vests or divests any Sort of Interest in or out of the Corporation.  
 1 *Salk.* 191.

So if the Sheriff makes a Warrant to a Corporation that hath Return of Writs to arrest a Man, they may by Parol make a Bailiff to execute it.  
*Moor* 552.

If a Lease for Years be made to a Corporation Aggregate of many, they cannot make an (g) actual Surrender thereof, but by Deed under their Seal.  
 10 Co. 68. (g) But if they accept a new Lease

thereof, this is a Surrender in Law, of their first Lease. 10 Co. 68. b.

If the Church-wardens of S. are incorporated, &c. and the King Leases, &c. to them for twenty-one Years, and, in Consideration of a Surrender thereof, leases to them for fifty Years, they may with their own  
 10 Co. 68.

(a) A Dean own Hands, and without Writing, (a) deliver the first Letters Patent and Chapter into Chancery to be cancelled.

in their Chapter-House, acknowledged a Deed of Grant of their Lands to the King, without making an Attorney. *Moor* 676. held clearly by *Egerton*, Lord Keeper, that it might be done as well as to put their Common Seal to a Deed, without Attorney; but *vide* 1 *Leon*. 184. 1 *Rol. Rep.* 82.

*Carth.* 390. In *Ejection*, the Plaintiff declared upon a Demise made to him by Patrick ver. the Aldermen and Burgesses of ———, without setting forth that it was Balls. by Deed, or under the Seal of the Corporation, and on a Writ of *Error*, it was held well enough; and that this being a fictitious Action to try the Title, the Demise need not (b) now be set out to have been by (b) Where in an Eject- Deed. ment for

Tithes, the Demise not being by Deed, the Judgment was arrested. *Cro. Jac.* 613. *Swadling* and *Piers*.

1 *Salk.* 192. If a *Mandamus* be directed to the Mayor and Commonalty of *T.* the *Et vide* Return may be made in the Name of the Corporation, without the Common Seal, or the Hand of the Mayor set to it; for though a Corporation cannot do an Act *in pais*, without their Common Seal, yet they may do an Act upon Record, by which they are estopped to say it is not their Act. *Skin.* 154.

#### 4. What Things they may take in Succession.

*Co. Lit.* 46. b. A Corporation Aggregate may take any Chattel, as Bonds, Leases, 1 *Rol. Abr.* 515. *Et c.* in its Political Capacity, which shall go in Succession, because it is always in Being.

*Co. Lit.* 46. b. But (c) regularly, no Chattel shall go in Succession, in Case of a *Hob.* 64. sole Corporation. *Dyer* 48.

*Co. Lit.* 9. a. (c) But a Sole Corporation by Custom may be enabled by the same Custom to take a Chattel in Succession, as the Chamberlain of *London*, whose Successor by Custom may have Execution of a Bond, or Recognisance acknowledged to his Predecessor for Orphanage-Money. 4 *Co.* 65. *Cro. Eliz.* 464, 682.

*Co. Lit.* 46. b. Therefore if (d) a Lease for Years be made to a Bishop and his (d) The Or- Successors, and the Bishop dies, this shall not go to his Successors, but naments of to his Executors. the Chapel

of the Predecessor belong to the succeeding Bishop, and are merely in Succession, though other Chattels, in Case of a Sole Corporation, belong to the Executors of the Deceased, and go not in Succession. 12 *Co.* 105. — So the antient Jewels of the Crown shall go to the Successor, and are not devisable by Testament. *Co. Lit.* 18. b. — But may be disposed of by Patent. *Cro. Car.* 344.

(e) 19 *H.* 6. 44. If a (e) Master of an House, that hath a Covent and Common Seal, 1 *Rol. Abr.* 515. where recovers in an Annuity, and after Arrearages incur, and after he dies, the succeeding Master shall have the Arrearages, and not the Executor of the Predecessor, because the Executor could not make a Testament. Abbot shall recover Damages in a Writ of Entry, though it is otherwise in Case of a Bishop, and other sole secular Bodies Politick. 2 *Inst.* 286.

19 *H.* 6. 44. But if a Parson recovers an Annuity, and after Arrearages incur, and 1 *Rol. Abr.* 515. after the Parson dies, the Executor of the Parson shall have the Arrearages, and not the Successor, because he could make a Testament.

1 *Rol. Abr.* 515. *Atkins* and *Gardner.* By the Charter granted to the College of Physicians, and confirmed *Cro. Jac.* 159. in Parliament, the Offenders in practising Physick in *London*, without Admission by the College of Physicians, shall forfeit 5*l.* for every Month, *N. y.* 121. *unum dimidium Regi Et alterum dimidium dicto Præsidenti Et Collegio*; on this Charter it was held, that if the President of the College recovers in 1 *Brownl.* 93. Debt against an Offender, and dies, the Successor shall have a *Scire facias* to execute it, and not the Executor; for the Predecessor recovered S. C. it as due to him and the College.

## 5. Where they shall be liable in their natural Capacities.

If a Corporation Aggregate disseise to the Use of another, they are *Vide Tit. Disseisin.* Disseisors in their natural Capacity, and the Persons who committed the Wrong shall be charged therewith, and not the Corporation, which consisting of a constant Succession of various Persons, and as a Corporation, can regularly do no Act without Writing.

If a Mayor, or any other Member of a Corporation, procure a false Return to be made to a *Mandamus*, they may be proceeded against in their private Capacities. *1 Salk. 192.*

If the Master and Wardens of the Company of Woodmongers enter into Bond thus, *viz. Noverint, &c. Magistrum & Guardianos, &c. teneri, &c.* and the Common Seal is thereto, and it is signed as usual, by the Principal of the Company, and endorsed *Sigillat' & deliberat' in presentia, &c.* and the Corporation is dissolved after, yet they shall not be charged in their natural Capacity. *1 Lev. 237.* — Where a Corporation granted an Annuity, and was afterwards dissolved.

*Vide Owen 73. 2 And. 107.* (a) Where in Equity the private Members of a Company were made liable to the Company's Debts, where the Company had no Goods. *2 Vern. 396.*

## (F) Of the Dissolution of Corporations.

(b) IF all the Members of an Aggregate Corporation die, the Body Politick is dissolved; but if the King makes a Corporation consisting of twelve Men, to continue always in Succession, and when any of them die, the others may chuse another in his Place; (c) if three or four of them die, (d) yet all Acts done by the rest shall be sufficient. *(b) 1 Rel. Abr. 514. (c) 10 Co. 30. b. 1 Rel. Abr. 514. S. P. — If any*

Corporation Aggregate, as Mayor and Commonalty, or Dean and Chapter, make a Feoffment and Letter of Attorney to deliver Seisin, this Authority does not determine by the Death of the Mayor or Dean, but the Attorney may well execute the Power after their Death, because the Letter of Attorney is an Authority from the Body Aggregate, which subsists after the Death of the Mayor or Dean; but if the Dean or Mayor be named by their own private Name, and die before Livery, or be removed, Livery after seems not good. *Co. Lit. 52. b. 2 Rel. Abr. 12. 14 H. 8. 3. 11 H. 7. 19.* (d) But if the Body Politick wanteth its Head, nothing can be done during the Vacation; as in Case of a Dean and Chapter, Mayor and Commonalty, when there is no Dean or Mayor. *Co. Lit. 264. & vide Moor 52. Dalif 55.* — Therefore the Master of a College cannot devise Lands to the House of which he is Head. *Dalif. 31. 4 Leon. 223.*

Also a Corporation may be dissolved by Misuser or Abuser; for as all Franchises flow from the Bounty of the Crown, so there is a tacit or implied Condition annexed to such Grants, which if broken forfeits the whole Franchise. *2 Inst. 222. 20 E. 4. 5. But for this vide the Arguments in the great*

Case of the *Quo warranto* against the City of London, which was brought against the whole Corporation. 1. For that the Common Council had petitioned the King, upon a Prorogation of Parliament, that it might meet on the Day on which it was prorogued, and had charged the Prorogation as that which occasioned a Delay of Justice. 2. That the Corporation had imposed new Taxes on their Wharfs and Markets, which was an Invasion of the Liberty of the Subject, and contrary to Law; and the Judgment in that Case was that the Franchise should be seized into the King's Hands; but *vide 2 W. & M.* by which this Judgment is declared to be void and illegal; and *vide* the Case of *John Smith*, *1 Show 280. 4 Mod. 52.* who being chosen an Alderman of the City of London, after the said Judgment (which was never recorded) the Question was, whether he was duly elected, so as to be obliged to take the Oaths prescribed by *1 W. & M.* and it was resolved, that though a Corporation might be forfeited, yet that the Proceedings and Judgment in the *Quo warranto*, against the City, did not dissolve the Body Politick, or make their subsequent Acts void; and consequently that Sir *John's* not taking the Oaths pursuant to the *1 W. & M.* was a sufficient Cause to remove him from the Place of Alderman.

- Carth.* 483. If the Members of a Corporation refuse or neglect to chuse such Officers, as they are obliged to chuse by their Charter, this is a Forfeiture, and consequently a Dissolution of the Corporation.  
but *vide*  
11 *Geo.* 1.
- 1 *Salk.* 191. A Corporation may be dissolved by surrendring the Charter, but a Surrender of an old Charter is void, for want of Inrolment.
- Co. Lit.* 102. *b.* If a Prior and Covent, *concurrentibus his quæ in jure requiruntur*, are translated to an Abbot and Covent, or to a Dean and Chapter, though the Name is changed, yet the Body is not dissolved.
- 3 *Co.* 75. *b.* Though a Dean and Chapter had surrendred (*a*) all their Possessions to the King, yet their Corporation continued, and they remained a Chapter of the Bishop to assist him in Spiritual Matters, &c. for all their Possessions were from the Bishop, and a Prebend, though he hath no Possession, hath *Stallum in choro & vocem in Capitulo*.  
(*a*) But there cannot be a Guardian of a Chapel, when the Chapel and all the Possessions thereof are aliened. 3 *Co.* 75. *a.* 10 *Co.* 32. for there cannot be a Guardian of Nothing.
- Co. Lit.* 13. *a.* If Lands are given to a Corporation, which is (*b*) afterwards dissolved, the Donor shall have the Lands again; for the Law annexes such a Condition in every Grant to a Body Politick.  
1 *Rol. Abr.* 816.  
(*b*) A Debt due to a Corporation still remains, though their Name is changed by a new Charter. 3 *Lev.* 238.  
—If a Corporation bind themselves in a Bond, and are afterwards dissolved, they shall not be charged in their natural Capacities. 1 *Lev.* 237. & *vide Owen* 73. 2 *And.* 107.

## Costs.

- (A) Of the first Introduction of, and giving the Plaintiff, Costs de incremento.
- (B) In what Cases the Plaintiff shall have no more Costs than Damages: And herein,
1. Of Actions of Trespas, where the Right of Freehold or Inheritance may come in Question.
  2. Of Actions of Slander.
  3. Of Actions of Assault and Battery.
- (C) Where the Costs shall be doubled or trebled.
- (D) Of awarding the Defendant his Costs.
- (E) What Persons are intitled to or exempted from paying Costs: And herein,
1. Of Executors and Administrators.
  2. Of Officers and Ministers of Justice.
  3. Of Informers, and where the Prosecution may be said to be carried on at the Suit of the King.
  4. Of Paupers.

- (F) Of Costs in Replevin.
- (G) Of Costs in a Writ of Error.
- (H) Of Costs in the several Steps and Proceedings of a Cause.
- (I) Costs how assessed or taxed.

(A) Of the first Introduction of, and giving the Plaintiff, Costs de incremento.

**T**HERE were no Costs at Common Law; but if the Plaintiff did not prevail he was amerced *pro falso clamore*; if he did prevail, then the Defendant was *in misericordia*, for his unjust Detention of the Plaintiff's Right, and therefore were not punished with the *expensa litis*, under that Title.

But it being thought exceeding hard that the Plaintiff, for the Costs which he was out of Pocket in obtaining his Right, could not have any Amends;

By the Statute of Gloucester, made 6 E. 1. cap. 1. by which in an Assise, &c. Damages, upon the Insufficiency of the Disseisor, are given against him that is found Tenant, and Damages are given in a Writ of *Mort d'ancestor Aiel*, &c. reciting that whereas before that Time, Damages were not taxed but to the Value of the Issues of the Land, it is provided the Demandant may recover against the Tenant the (a) Costs (b) of his Writ, together with his Damage; and that this Act shall hold Place (c) in all Cases where the Party is to recover Damages.

(a) This extends to all legal Costs of Suit, but

not his Expences of Travel, Loss of Time, &c. 2 Inst. 288.—In a Writ by Journeys Account, the Plaintiff shall recover his Coils of the first Writ, and the Proceedings thereupon. 2 Inst. 288. Secus if the first Writ was naught through the Plaintiff's Default. 2 Inst. 288. as if brought against one Jointenant only. *Kelw.* 127. (b) If Judgment arrested, the Plaintiff, in a new Action, shall not recover the Costs of the first. *Cro. Car.* 545. (c) Where a Man before, or by this Act, did not recover Damages, though single, double or treble, are given by a subsequent Act, the Plaintiff shall recover no Costs. 10 Co. 116. a.—As in a *Quare impedit*. 2 Inst. 289. 10 Co. 116. a. *Kelw.* 26. a.—*decies tantum*. 10 Co. 116. b.—So in an Action upon 5 E. 6. cap. 14. of Ingrossers, 10 Co. 116. b.—But in all Cases where Damages were recovered before, or by this Act, the Plaintiff shall recover his Costs also. 10 Co. 116. b.

This was the Original of Costs *De incremento*; for when the Damages were found by the Jury, the Judges held themselves obliged to tax the moderate Fees of Counsel and Attornies that attended the Cause.

And this was done in (d) all Real Actions in which there were Damages at Common Law, and also in all Personal Actions; for even in an Action of Debt, there are Damages given for the unjust Detention.

10 Co. 116. (d) That in a Formedon, no Damages

were recovered, and consequently no Costs. *Cro. Car.* 425. 1 Vent. 88. 1 Lev. 146. *Raym.* 134.—On traversing Inquisitions, *vide Carth.* 242. and for Costs on Penal Statutes, *vide infra*, Letter (E) and Tit. Damages, in what Actions Damages were recovered.

“ Also by 8 & 9 W. cap. 10. in all Actions of Waste and Debt, upon the Statute for not setting forth Tithes, wherein the single Value or Damages found by the Jury shall not exceed twenty Nobles; and in all Writs of *Scire facias*, and Suits (e) upon Prohibitions, the Plaintiff obtaining Judgment, or any Award of Execution, after Plea pleaded or Demurrer joined, shall recover Costs.

(e) For recovering Costs on a Declarati-

on or Attachment upon a Prohibition before this Statute, *vide* 1 *Rel. Abr.* 516. 2 *Inst.* 644. 1 *Fones* 447. *Cro. Car.* 559. 2 *Fones* 128. *Raym.* 387. 1 *Vent.* 348, 350. 3 *Lev* 360.

(B) In

## (B) In what Cases the Plaintiff shall have no more Costs than Damages: And herein,

## I. Of Actions of Trespafs where the Right of Freehold or Inheritance may be said to come in Question.

BY the 43 *Eliz. cap. 6.* it is enacted, “ That if upon Actions Personal to be brought in any of her Majesty’s Courts at *Westminster*, “ not being for any Title nor Interest of Lands, nor concerning the “ Freehold nor Inheritance of any Lands, nor for any Battery, it shall “ appear to the Judges of the same Court, and so signified or set “ down by the Justices before whom the same shall be tried, that the “ Debt or Damages to be recovered there in the same Court, shall “ not amount to the Sum of 40s. or above, that in every such Case “ the Judge and Justices, before whom any such Action shall be pur- “ sued, shall not award for Costs to the Party Plaintiff any greater or “ more Costs than the Sum of the Debt or Damages so recovered shall “ amount unto, but less at their Discretions.

The Intent of this Statute was to reduce all Actions where the Debt or Damages were under 40s. into the Court-Baron, or other County Courts, whereby it was thought the Profits of Landlords would be increased, and the Costs of Defendants diminished; but the Statute failed of effecting that Purpose; for it does not put it merely upon the Damages given by the Jury under forty Shillings, (for it would be hard when the Jury gave too little Damages, to have punished the Plaintiff with the Loss of his Costs) but leaves it to the Judge to certify the Damages proved were not above 40s. in Approbation of the Verdict; but the Judges thought it extremely hard to certify, in order to make Plaintiffs lose their Costs where they had prevailed, unless the Action were exceedingly impertinent and vexatious; and therefore seldom made use of this Power.

(a) The Statute 11 & 12 *W. 3. cap. 9.* enacts, that this Statute shall extend to the Principalities of *Wales*, and Counties Palatine. (b) Yet *Q.* if it may be avoided by Plea.

2 *Vent.* 36.  
2 *Vent.* 180,  
195, 215.  
3 *Mod.* 39,  
40.  
2 *Mod.* 141.  
2 *Lev.* 234.  
1 *Salk.* 208.

“ By the 22 & 23 *Car. 2. cap. 9.* for preventing trivial Suits, contrary “ to the Intention of 43 *Eliz.* commenced in the (a) Courts at *West-* “ *minster*, it is enacted, for the making the said Law effectual, that in “ all Actions of Trespafs, Assault and Battery, and other Personal Ac- “ tions, wherein the Judge at the Trial shall not find and certify under “ his Hand, upon the Back of the Record, that an Assault and Battery “ was sufficiently proved, or that the Freehold or Title of the Land “ mentioned in the Plaintiff’s Declaration, was chiefly in Question, if “ the Jury find Damages under 40s. the Plaintiff shall not recover “ more Costs than the Damage, and if more Costs given, the Judg- “ ment shall be (b) void, &c. and the Defendant may have his Action “ for such vexatious Suit.

This Statute seems to have pursued the same Purpose with that of the 43 *Eliz.* but neither of them repealed the Statute of *Gloucester*, (for a Statute cannot be repealed by Implication) nor did the Statute of *Car. 2.* take away Costs *de incremento*, except where the Judge’s Certificate was necessary, and that was only where the Trespafs was done to the Freehold, or to Things fixed to the Freehold, and the Damages under 40s. and in Battery, where the Damages were under such Sum for the Wording of the Statute is, that there should be no Costs in Battery, Trespafs, or other Personal Actions, unless the Judge certify the Battery to be proved, or the Title of the Freehold to have come in Question; hence these Words in the Act, *other Personal Actions*, were construed to extend no farther than to Cases where the Judge was permitted

ted to certify, which was only in Battery and Actions of Trespafs, relating to the Freehold, and Things fixed to the Freehold.

Therefore in Trover, or Action of Trespafs *de bonis asportatis* of Goods and Chattels not fixed to the Freehold, the Plaintiff shall have his full Costs, though the Damages be found to be under 40s. and though the Judge does not certify pursuant to the Statute.

So if an Action of Trespafs to the (a) Freehold, and an Action of Trespafs *de bonis asportatis*, are joined, and the Plaintiff recovers in General upon both Counts, he hath no need of a Certificate to obtain his Costs; and therefore Costs *de incremento* shall go upon the Statute of Gloucester.

Tradesman, contrary to the Statute, and the Action conclude so, the Plaintiff shall recover full Costs. *Carth. 582, 424.* like Case, *vide Tit. Game.*

As in Trespafs for breaking his Close, and impounding his Cattle, the Plaintiff shall have his full Costs; (b) for the impounding his Cattle is an Injury to his Personal Property, in which no Right of Freehold can come in Question.

chasing his Cow, and his Domestick Fowls, *viz.* Hares, Geese, &c. with Dogs which were used to bite Tame Fowl, by whose biting they were killed; on not Guilty, Verdict for the Plaintiff; and he had his full Costs, because this is not a Trespafs, wherein the Right of Freehold may come in Question. *Mi. h. 9 Geo. 1. in C. B. Keen and Whistler.*—So in Trespafs for breaking his Close, and chasing his Bull, Verdict for the Plaintiff, and One Penny Damages; and held by the Court that he should have his full Costs, because the 22 & 23 *Car. 2. cap. 9.* extends only to such Actions of Trespafs where the Freehold may come in Question. *Pascb. 9 Geo. 1. in C. B. Thompson and Berry.*

So in Trespafs for chasing his Sheep, and that he the Defendant *ad loca ignota eos abduxit & elongavit*, after Verdict for the Plaintiff, and 2d. Damages, he had his full Costs principally upon the Word (c) *abduxit*, which is the same in Signification with *asportavit*.

carried off from the Grounds, though of never so little Value, it will be an *Asportavit*; for the Words *Abcariavit* and *Asportavit* in Declarations mean such a Carrying as amounts to the Defendant's Use.—And *vide 2 Vent. 215.* where Digging Roots, and Removing them about two Yards, in the same Ground, amounted to an *Asportavit*.

So in Trespafs *Quare vi & armis* the Defendant flung down certain Stalls of the Plaintiff's, in a Market-Place, on not Guilty, and Verdict for the Plaintiff, but Damages under 40s. the Court held that the Plaintiff, without the Judge's Certificate, should have full Costs; for this is a Trespafs done to a Chattel in which no Title of Freehold can come in Question; and though they had been fixed to the Freehold, yet if the Defendant had carried them away, it would be out of the Statute.

But where the Trespafs is merely to the Freehold; as where in Trespafs the Plaintiff declared that the Defendant *Herbam depascendo, & scilicet aquæ cursum suum obstupand', per quod clausum suum inundat' fuit, &c.* the Plaintiff shall have no more Costs than Damages.

So Trespafs *Quare clausum fregit*, and putting Stakes in the Plaintiff's Ground, was held within the Statute.

So in Trespafs *Quare clausum fregit, & quondam taurum Personæ ignotæ fugavit, per quod* the Plaintiff's Gooseberry Bushes, *neqnon quinque perticas (Angl. Poles) in eodem claus. erect', officiat' & existent' fregit, lateravit & spoliavit*, after Verdict and One Penny Damages, the Court held that the Taking and Pulling up the Poles was not such an *Asportation* as amounted to Conversion; and that though the Trespafs begun by chasing the Bull, yet the Damage is laid to be done to the Freehold; and so the Title thereof might well come in Question.

*Mich. 12 Geo.*  
1. in *C. B.*  
*Blunt and*  
*Miller, ad-*  
*judged.*

So in Trespass for breaking and entering the Plaintiff's House, and keeping him out of Possession and Use of the said House, with a *Contumando* for a Month, *per quod* he was put to great Expence to gain the Possession of his House, and in the mean Time lost the Profit and Use thereof; after Verdict for the Plaintiff, and 2s. 6d. Damages, the Court held that this was a plain Trespass *Quare clausum fregit* within the Statute, and that the *per quod* was only Matter of Aggravation.

1 *Vent.* 180,  
195.

Also if there be a Trespass upon the Freehold, and likewise a Count laid *de bonis asportat'*, in order to put in for Costs meerly, if there be no Evidence of the carrying away of the Goods, by which the Defendant is acquitted as to that, though he is found Guilty as to the Trespass to the Freehold, yet if the Damages be under 40s. the Plaintiff shall recover no more Costs than Damages.

(a) 2 *Mod.*  
141, 142.  
(b) Where  
the Defen-  
dant justifies  
for a Way,

It is further to be observed in the Construction of the Statute 22 & 23 *Car.* 2. that there is no need of a Judge's Certificate, where by the Pleading it appears that the Title or Interest of the Land is in Question; (a) as in an Action for eating his Grass, *per quod* his Common was impaired; so (b) if the Defendant justifies by any Thing that brings the Title of the Land in Question, the Judge need not certify to intitle the Plaintiff to his Costs.

and Issue is joined upon *extra viam*, and found for the Plaintiff, he shall have full Costs. 2 *Lev.* 234.

Also by the 8 & 9 *W.* 3. c. 10. for preventing wilful and malicious Trespasses, it is enacted, " That in all Actions of Trespass, to be commenced and prosecuted from and after the 25 *March* 1697. in any of his Majesty's Courts of Record at *Westminster*, wherein at the Trial of the Cause at *Westminster* it shall appear and be certified by the Judge, under his Hand, on the Back of the Record, that the Trespass upon which any Defendant shall be found Guilty, was wilful and malicious, the Plaintiff shall recover not only his Damages but his full Costs of Suit, any former Law to the contrary notwithstanding.

4 *Mod.* 378.  
so ruled, but  
2 *Lev.* 124.  
*S. P. dubita-*  
*tur.*

If an Action be commenced in an inferior Court, and removed by *Habeas Corpus* or *Certiorari*, into the Courts of *Westminster*, the Plaintiff shall have full Costs, although the Damages are under 40s.

## 2. Of Costs in Actions of Slander.

(c) It ex-  
tends to Ac-  
tions begun  
before, and  
prosecuted  
after.

By the 21 *Jac.* 1. cap. 16. it is enacted, " That in Case for slanderous Words to be sued or (c) prosecuted in the Courts at *Westminster*, or other Courts that have Power to hold Plea thereof, after the End of that Session of Parliament, if the Damage is found to be under 40s. the Plaintiff shall recover (d) no more Costs than Damages.

2 *Rel. Rep.* 485. *Latch* 2, 58. (d) By this the Power of the Judges is taken away, as to giving Costs *De incremento*, where the Damage is under 40s. but it is said to have been the Resolution of the Judges, that though the Court cannot increase the Costs, yet the Jury are not bound by the Statute, and therefore they may give 10l. Costs where they give but 10d. Damages. 1 *Salk.* 207.

*Cro. Car.* 141.  
*Law and*  
*Horwood,*  
*adjudged.*  
*Ley* 82.  
*Palm.* 530.

In the Construction of this Statute, it has been held that it extends not to Actions for Slander of Title, for that is not properly Slander, but a Cause of Damage; and the Slander intended by the Statute is to the Person.

1 *Jones* 196. *S. C.* adjudged.

*Cro. Car.* 163,  
327.

So if for calling Thief, and causing him to be arrested, &c. and the Defendant is found Guilty of both, it is not within the Act.

So where the Plaintiff brought an Action on the Case for slanderous Words spoken of his Wife, viz. *That she was a Whore*, per quod *she lost such and such Customers*, after Verdict for the Plaintiff, and Damages under 40 s. the Court held that the Plaintiff should have full Costs; for it is not the Words, but the special Damage which is the Cause of Action in this Case; and it was incumbent on the Plaintiff to prove the special Damage, otherwise the Action would not have laid for the Words.

1 Salk. 206  
Browne and Gibbons, adjudged.

3. Of Costs in Actions of Assault and Battery.

By the 22 & 23 Car. 2. c. 9. it is enacted, " That in Actions of Assault and Battery, wherein the Judge at the Trial shall not find and certify, under his Hand, upon the Back of the Record, that an Assault and Battery was sufficiently proved, if the Jury find Damages under 40 s. the Plaintiff shall not recover more Costs than Damage.

On this Part of the Statute it has been (a) held, that if an Assault be only proved, the Plaintiff shall have no more Costs than Damage.

(a) 1 Vent. 256.  
2 Lev. 102.

That if a Man brings Trespafs for beating his Servant, per quod *servitium amisit*, it is not an Action of Assault and Battery within the Statute, but is an Action founded upon the special Damage, in which there shall be full Costs.

1 Salk. 206.  
5 Mod. 74- S. P.

In Trespafs of Assault and Battery, Wounding and Imprisonment; as also for entering and breaking his House, and opening the Doors of the said House, and breaking three Locks and three Bars belonging to the said Doors; the Defendant pleaded Not guilty to all except the Imprisonment, and for that he justifies; and on the Trial the Justification was found for the Defendant, and the Not guilty for the Plaintiff, and the Damages 2 s. 6 d. and held by the Court that the Damages being under 40 s. he could not have full Costs for the Battery, because the Judge had not certified the Battery to be well proved; neither could he have full Costs for breaking the House, because this is a Trespafs relating to the Freehold.

Mich. 10 Geo. 1. in C. B. Beck and Nicholls.

(C) Where the Costs shall be doubled or trebled.

IT seems agreed that where Damages were before recoverable, and a Statute increases them to double or treble the Value, the Plaintiff shall recover his double or treble Damages, and Costs also, as Parcel of the Damages, shall be trebled.

10 Co. 116. a.  
2 Inst. 289.  
Hard. 152.  
Carth. 297.  
S. P.

But where a new Statute gives either single, double or treble Damages, where there were no Damages recoverable before, (a) there no Costs shall be allowed, because the Party can have nothing more than such new Statute has already given; and that is Damages only; for the Statute of Gloucester cannot operate to add Costs to what is given by a subsequent Statute; because the new Statute must be construed from itself, which gives Damages only.

2 Inst. 285.  
1 Salk. 205.  
Carth. 297.  
S. P.  
(b) As upon the Statute 2 E. 6. cap. 15. for not setting out

Tithes, &c. 2 Inst. 651. Cro. Jac. 70. Cro. Car. 560. Hard. 152. but now vide the 8 & 9 W. 3. cap. 10.

(c) In an (d) Action for a Forcible Entry, upon 8 H. 6. cap. 9. which gives treble Damages, the Plaintiff shall recover not only treble Damages but (e) treble Costs also.

(c) 2 Inst. 289.  
10 Co. 116.  
1 Vent. 22.

S. P. adjudged. (d) So in an Assise upon the Statute for a Disseisin with Force. And the Costs De incremento, as well as those given by the Jury, shall be trebled.

10 Co. 116 b. (e) Cro. Eliz. 582.  
1 Leon. 282. 2 Leon. 52. Co. Lit. 257. 3 Lev. 352.

But

2 *Inst.* 289. But in an Action of Debt upon the Statute of 1 & 2 *Pb. & M. cap.*  
*Kelw.* 209. 12. of Distresses, upon the Branch of the Statute by which the 5*l.* and  
*N. Bendl.* triple Damages are given to the Party grieved, for driving a Distress out  
 80. S. C. of the Hundred, no Costs are to be given, because the Statute, by  
 1 *Rot. Abr.* Intendment, gives triple Damages in Lieu of the whole.  
 516.

2 *Inst.* 289. So in an Action of Waste against Tenant for Life or Years, by the  
*Kelw.* 26. a. Statute of *Gloucester, cap. 6.* the Place wasted, and treble Damages shall  
*Godb.* 210. be recovered, (a) but no Costs, because no Action lay against them at  
 S. P. ad- the Common Law; but the Action and Damages are merely given.  
 judged.

(a) But now  
*vide supra, 8 & 9 W. 3. cap. 10.*

2 *Inst.* 289. But in Waste against Tenant in Dower, &c. treble Damages and  
 (b) A Prohi- Costs also shall be recovered, because (b) an Action of Waste lay against  
 bition of them at the Common Law; and for the Waste, Damages should have  
 Waste only, in which no been recovered.

Damages  
 were recoverable, but only for Waste, after the Prohibition delivered. 10 *Co.* 116. a.

1 *Rot. Abr.* In an Action upon the Statute of 2 *H. 4. cap. 1.* for suing before the  
 517. Admiral for a Thing done upon the Land, in which Case the Statute  
*Dyer* 159. gives to the Plaintiff double Damages, without speaking of any Costs,  
 10 *Co.* 116. yet he shall recover as well double Costs as double Damages.

1 *Salk.* 205. So on the Statute 2 *W. & M. cap. 5.* by which treble Damages and  
*Lawson and* Costs are given against the Rescousor of a Distress for Rent, in an  
*Storie.* Action upon the Case for a Rescous upon the Statute, the Plaintiff shall  
*Carth.* 321. recover treble Costs, as well as treble Damages; for the Damages are not  
 S. C. resol- given by the Statute, but increased, and an Action upon the Case lay  
 ved. for a Rescous at Common Law.

## (D) Of awarding the Defendant his Costs.

**B**Y the 23 *H. 8. cap. 15.* it is enacted, "That in any Suit in a  
 " Court of Record, or elsewhere, in any Action, Bill or Plaint of  
 " Trespass, upon 5 *Rich. 2.* Debt or Covenant, upon any Specialty or  
 " Contract, Detinue, Account, charging as Bailiff or Receiver, Case,  
 " or (c) upon any Statute for any Offence or Wrong (d) Personal, im-  
 " mediately done to the Plaintiff, if the (e) Plaintiff (f) after Appear-  
 " ance of the Defendant, be (g) Nonsuited or (h) any (i) Verdict  
 (a) pass  
 (c) Extends not to an Action for an Escape; for though  
 within the Equity of *Westm. 2.* that gives it against the Warden of the *Fleet*, yet it is not properly  
 an Action upon the Statute, because no Mention is made of the Statute in the Declaration; and this  
 was no Personal Wrong. 2 *Leon.* 9, 10. 4 *Leon.* 182 — Nor to an Action upon 8 *H. 6.* for a Force-  
 ble Entry; for that was no Personal Wrong; and the Writ says *Quod disseisivit.* 2 *Leon.* 9, 10. 4 *Leon.*  
 182. — So it extends not to an Action upon 1 & 2 *Pb. M.* for unlawfully impounding a Distress.  
 2 *Leon.* 52. 3 *Leon.* 92. and the rather, because this Action is grounded upon a subsequent Statute.  
 — Nor to an Action upon 5 *Eliz.* for Perjury. *Hut.* 22. 1 *Brownl.* 66. *Cro. Eliz.* 177. — So it  
 extends not to an Action upon 2 *E. 6.* for not setting forth Tithes, because a mere Non-feasance,  
 and no Personal Wrong. 2 *Inst.* 651. *Noy* 32. (d) It extends not to an Assise. 1 *Brownl.* 28, 29.  
 (e) Otherwise if he is an Infant, for commencing his Suit by Guardian, there can be no Malice  
 supposed in him. *Cro. Eliz.* 33. & *vide* 1 *Bull.* 189. — Nor to Persons who sue in *Auter Droit*; for  
 which *vide infra*, concerning Executors and Administrators. (f) For this *vide* 2 *Lev.* 81, 82. (g) *Se-*  
*cius* if the Original be discontinued. 1 *Leon.* 105. *Hut.* 36. *Cro. Car.* 575. — The Plaintiff the Day  
 before the Trial came into Court, and entered a *Nolle Prosequi*, and whether the Defendant should  
 have Costs, *Hard.* 152. *dubitatur.* (h) Though Special. *Cro. Eliz.* 465. *Hard.* 152. (i) In Covenant  
 against two for not building, Judgment is given against one by Default, and the other pleads Perfor-  
 mance, and it is found for him, the Plaintiff can have no Judgment, but the Defendant shall have  
 his

“(a) pass by lawful Trial against the Plaintiff, the Defendant (b) shall his Costs. have Judgment to recover his Costs, to be taxed by the Judge of the Court, and the Defendant shall have such Process and Execution for the same, as the Plaintiff should have had, in Case the Judgment had been for him.

<sup>1</sup> Lev. 63.  
(a) Not upon Demurrer that goes to the Writ only; *seus* if

to the Action. <sup>1</sup> And. 117. But *Q.* if upon any Demurrer, & *vide* *Hard.* 152. *Cro. Car.* 533. *March* 30. and 8 and 9 *W. cap.* 10. By which it is now certainly given. (b) Though Judgment is not given upon the Nonsuit, but upon the Insufficiency of the Pleading. *Moor* 625. *pl.* 857. *Wimb* 69. *3 Bulst.* 248. *Godb.* 220. & *vide* *Dyer* 32. *Cro. Jac.* 159.

Also by the Statute of 4 *Jac.* 1. *cap.* 3. it is enacted, “ That if any (c) Person, after the End of that Session of Parliament, should commence or sue in any Court, any Action, Bill or Plaint of Trespass, Ejectment, or other Action, (d) wherein the Plaintiff or Demandant (e) might have Costs; and after Appearance of the Defendant becomes Nonsuit, or any Verdict passes by lawful Trial against him, the Defendant shall have Judgment to recover his Costs, to be assessed and levied as Costs, by 23 *H.* 8.

(c) That it extends not to Executors, *vide infra.*  
(d) Not in an Attaint, where the first Verdict is affirmed, because if

the Jurors had been attainted, the Plaintiff should have had such Costs only as in the first Action, if found for him, but not more in respect of the Attaint. *Daly* and *Bellamy*, *Cro. Car.* 542. *March* 24. *1 Jones* 432. adjudged. (e) Though the Declaration is insufficient, yet the Defendant shall have Costs. *2 Rol. Rep.* 213. *Palm.* 147. & *vide* *Godb.* 329, 345. *Hob.* 219. *Hut.* 16. *Palm.* 365. *3 Lev.* 322. *Style* 153.—Though the *Nisi prius* Roll varied from the Plea-Roll, so as the Nonsuit was immaterial. *Raym.* 38.

By the 8 & 9 *W.* 3. *cap.* 10. “ In Trespass, Assault, False Imprisonment, or Ejectment against several, if any one or more is acquitted by Verdict, every Person so acquitted shall recover his Costs, as if a Verdict had been given against the Plaintiff, unless the Judge shall immediately after Trial, in open Court, certify upon Record, that there was a reasonable Cause for making such Person Defendant.

And by the same Act, “ In all Actions of Waste, Debt upon the Statute for not setting forth of Tithes, where the single Value or Damages found by the Jury exceeds not twenty Nobles; and in a *Scire Facias*, and Suits upon Prohibitions, the Plaintiff shall recover his Costs; and if the Plaintiff be nonsuit or discontinue, or a Verdict pass against him, the Defendant shall recover his Costs.

(E) What Persons are intitled to, or exempted from paying Costs: And herein,

1. Of Executors and Administrators.

(f) AN Executor Defendant pays Costs in (g) all Cases, and the Judgment is *de bonis Testatoris si*, &c. & *si non tunc de bonis Propriis*, also (b) when he is Defendant, and there is Judgment for him, he shall have his Costs.

(f) 31 *H.* 6. 13.  
*Bro. Exec.* 164.  
*Plowd.* 183.

(g) But a Defendant in Equity shall not pay Costs, for he cannot plead it at Law in Excuse of Assets. *Hard.* 165. and *note*, That in Equity the Costs are usually awarded out of the Assets. *Eq. Abr.* 125.  
(b) That an Executor Defendant shall have his Costs. *Cro. Eliz.* 503. *Hut.* 69, 79.

But an Executor or Administrator is not within the 23 *H.* 8. *cap.* 15. *N. Fendl.* 19. or 4 *Jac.* 1. *cap.* 3. which give Costs to the Defendant after a Verdict or

*pl.* 28.  
*Kelw.* 207.

*Cro. Eliz.* 69, 503. *Winch* 10, 70. *Savil* 133. *Cro. Jac.* 361. *1 Rol. Rep.* 63. *Cro. Car.* 289. *Hut.* 69, 79. *Cro. Jac.* 229. *Yelv.* 168, *1 Brownl.* 107.

Nonfuit; nor within the 8 and 9 *W. & M. cap. 10.* which gives Costs upon a Demurrer, being made upon the same Platform; so that when they are Plaintiffs they pay no Costs, for they sue *in auter droit*, and are but Trustees for the Creditors, and are not presumed to be sufficiently conusant in the Personal Contracts of those they represent; and this by an equitable Construction of the Statutes, for there are no express Words to exempt them.

(a) 2 H. 7. 15. But (a) if Executors or Administrators bring an Action in their own Right, as for a (b) Conversion or Trespas in their own Time, they shall pay Costs.

Sav. 134.  
Hut. 79.

Although they name themselves Executors, for it is but Surplusage. *Dalf. 96. Litch 220. 1 Vent. 92.* — But *vide Mason and Jackson 60.* adjudged *cont' per totam Curiam*; because in the Right of the Testator, though of a Thing done in their own Time. — So in a Ravishment of Ward brought by Executors, for a Ravishment in their Time. *Peacock and Steer, Cro. Car. 29.* By three Judges *cont' Yelv.* But *Hut. 78. S. C.* by two Judges against two; and in *6 Mod. 94 S. C.* cited *per Holt*, and the Reason of the Resolution was, because the Ward never came to the Defendant's Possession. (c) Where the Trover is in the Life-time of the Testator, and the Conversion in the Time of the Executor, he shall not pay Costs. *6 Mod. 92.*

1 Salk. 207.  
*Fenkins & Ux' v. Plume.*  
6 Mod. 92,  
181. S. C.  
adjudged.

So in an *Indebitatus Assumpsit* by Husband and Wife, who declared, That the Defendant was indebted to them in 20 *l.* as Executors of the Last Will and Testament of *J. S.* for Money had and received to their Use as Executors, which he promised to pay, &c. on the Trial the Plaintiffs were nonsuited; and it was held, That the Plaintiffs should pay Costs, for the Cause of Action arose in their Time; for the Receipt being since the Death of the Testator, if it was by the Consent of the Executor it is the Receipt of the Executor; or if without his Consent, yet the bringing the Action is a Consent, and the naming themselves Executors is only to deduce their Right, and set it forth *ab origine.*

2 Lev. 165.  
2 Jones 47.  
adjudged.

But if an Executor brings an *Indebitatus* upon an Account made in his Time, it is in the Right of his Executorship, and he (c) shall pay no Costs.

(c) If he

brings an *Infirmul computasset*, and is nonsuited, he shall pay no Costs; because there was no new Cause of Action, but a new Action upon ascertaining an ancient Right, notwithstanding which, it still remains the Testator's Debt. *6 Mod. 93.* Said to have been adjudged, *2 Ann. 1 Salk. 207. S. P.*

1 Salk. 208.  
*per Holt, C. J.*

So if the Goods of the Testator be taken and converted before they come to the Hands of the Executor, he shall not pay Costs upon a Nonfuit in an Action brought for these, for they were never Assets.

*Pasch. 27*  
*Car. 2. in*  
*B. R. Anne*  
*Taylor v.*  
*Earebone.*

So where Debt was brought by an Administratrix for Money lent by the Intestate, the Defendant pleaded Payment to the Plaintiff after the Death of the Intestate, and Issue joined upon it, and Verdict for the Defendant; it was insisted upon, that the Defendant should have Costs upon 4 *Jac. 1.* this being a Falsity in her own Conusance; but it was denied, the Action being as Administratrix; so that upon the bringing the Action, that which is pleaded to be in her own Conusance does not appear.

*Cath. Gale*  
*and Till.*  
4 Mod. 244.  
and 3 Lev.  
375. S. C.

If an Administrator brings an Action on the Case in *C. B.* and there is a Verdict and Judgment against him, and thereupon he brings a Writ of Error in *B. R.* where the Judgment is affirmed; yet he shall not pay Costs, for he is not a Person within the Intent of the Statute which gives Costs in this Case, although it was objected, that it was his own Act, and lay in his own Knowledge, and was brought *in dilacione executionis.*

2. Of Officers and Ministers of Justice.

By the Statute 7 *Jac. I. cap. 5.* it is enacted, " That if any Action upon the Case, Trespass, Battery, or false Imprisonment, shall be brought in the Courts of *Westminster*, or elsewhere, against any Justice of Peace, Mayor, Bailiff of City or Town Corporate, Headborough, Portreeve, Mayor, Bailiff, (a) Constable, Tithing-men, Collectors of Fifteenths and Subsidies, concerning any Thing by them done by Virtue of their Office, they, and all others, doing any Thing in their Assistance, or by their Command concerning their Office, may plead the general Issue, &c. and (b) if the Verdict shall pass with the Defendant in any (c) such Action, or the Plaintiff become nonsuit, or suffer a Discontinuance, the Justices, or (d) such Judge before whom the Matter shall be tried, shall allow the (e) Defendant his double Costs.

(a) Extends to a Deputy Constable. 3 *Bulst.* 77. 1 *Rol. Rep.* 274. *Moor* 845. (b) Though Judgment is after given upon the Insufficiency of the Declaration.

*Cro. Car.* 175. (c) But this extends not to an Action upon the Case against a Constable, for presenting that the Plaintiff was an Inhabitant of *A.* by reason of which he was compelled to pay, &c. unjustly, because to Trespass or false Imprisonment, wherein Liberty is given to plead Not guilty. *Cro. Car.* 467.—Nor to an Action by a Freeman against a Mayor, for refusing his Vote in the Election of a Mayor, because a Non-feasance. 2 *Lev.* 251. And said *per Curiam*, That the Intent of the Statute was to give double Costs in false Imprisonment, &c. where it enabled to plead the general Issue. (d) It cannot be allowed, unless the Judge of Assise marks the *Postea*. 2 *Vent.* 45. 2 *Lev.* 251. *Winch* 16. (e) All the Defendants. *Vaugh.* 117.

By the Statute 21 *Jac. I. cap. 12.* the above Statute is made perpetual, and it is thereby further enacted, " That Church-wardens, and all Persons called sworn Men, executing the Office of Church-wardens, (f) Overseers of the Poor, and others, which shall do (g) any Thing by their Assistance or Command, concerning their Office, shall have Benefit of 7 *Jac.*

(f) *Vide* 43 *Eliz. cap.* 2. and Title *Poor.* (g) Not

where an Action is brought against Church-wardens, for falsely and maliciously presenting the Plaintiff for Incontinency, because merely Ecclesiastical, and the Statute is intended only where troubled concerning Temporal Matters. *Cro. Car.* 286. 1 *Jones* 305.

If *A.* brings an Action on the Case against *B.* (who is Collector of the Taxes) and declares, that for 19 s. due to the King, he distrained 20 of his Lambs, which he might have sold to *J. S.* for 40 s. but that he deceptive sold them for 35 s. and kept the Overplus of the Money; and farther declares upon a general *Indebitatus Assumpsit* for 16 s. as so much Money received by him to the Plaintiff's Use; and the Defendant, as to the first Part, pleads Not guilty, and *quoad* the Promise *Non assumpsit*, and there is a Verdict for the Plaintiff; if the Judge of Assise certifies on the *Postea*, that the Defendant's Justification, as to all, was as Collector of the Royal Aid, by Virtue of the Statute 1 *W. 3.* the Defendant, pursuant to that Statute, shall have treble Costs.

*Carth.* 188. *Willet* and *Tydy.*

3. Of Costs for and against Informers, and where the Prosecution may be said to be at the Suit of the King.

It seems agreed, that a common Informer, upon a popular Statute, can in no Case recover Costs, unless they be expressly given by such Statute; for it is certain, that he cannot recover them at Common Law, for that doth not give Costs in any Case; neither can he recover them by Force of the Statute of *Gloucester*, which gives the Plaintiff his Costs only in Cases in which he shall recover his Damages.

2 *Keble.* 781. 1 *Rol. Abr.* 544. 1 *Lutw.* 200. 1 *Vent.* 133. 1 *Salk.* 206. *Moor* 65. 3 *Lev.* 374. 2 *Inst.* 288.

But

1 *Jones* 447. But in an Action on a Statute by the Party grieved, for a certain Penalty given by such Statute, the Plaintiff within the Statute of *Gloucester* shall recover Costs, because such Penalty is intended him by way of Recompence for his particular Damage by the Offence prohibited; and if he could recover that only, and no more, it would be in most Cases in vain for him to sue for it, since the Costs of Suit would exceed it.

2 *Inst.* 289.  
1 *Rol. Abr.* 516, 517, 574.  
*March* 56.  
3 *Lev.* 374.  
2 *Keb.* 781.  
1 *Lutw.* 200.  
*Carth.* 230, 231. The Corporation of *Plymouth*, v. *Collings*, adjudged. And the like Point said to have been adjudged *Mich.* 5 *W.* 3. between the Corporation of *Cutlers* and *Ruslin*.

1 *Rol. Abr.* 574.  
1 *Lutw.* 200.  
10 *Co.* 116.  
*Cro. Car.* 560.  
1 *Salk.* 206.  
But no Costs shall be recovered in an Action on a Statute, which gives no certain Penalty to the Party grieved, but only his Damages in general, &c. if such a Statute be introductive of a new Law, and give a Remedy in a Point not remediable at the Common Law; but there is not that Inconvenience in this Case as in the former, because no certain Sum being specified, the Jury may give the Plaintiff full Satisfaction by way of Damages.

As to Costs against Informers, by the 24 *H.* 8. *cap.* 8. it is enacted, "That the Defendant shall recover no Costs on Nonfuit or Verdict, when the Plaintiff sues to the King's Use.

But by the 18 *Eliz.* *cap.* 5. which is made perpetual by 27 *Eliz.* *c.* 10. it is enacted, "That if any Informer or Plaintiff, on a Penal Statute, shall willingly delay his Suit, or shall discontinue, or be nonfuit in the same, or shall have the Trial or Matter passed against him therein by Verdict or Judgment of Law; that then in every such Case, the same Informer or Plaintiff shall yield, satisfy and pay unto the Party Defendant, his Costs, Charges and Damages, to be assigned by the Court, in which the same Suit shall be attempted, &c.

1 *And.* 116.  
*Sav.* 50, 51.  
*Cro. Eliz.* 177.  
2 *Leon.* 116.  
1 *Salk.* 30.  
In the Construction of this Statute it hath been holden, that it extends only to common Informers, who are to have the whole Benefit of the Penalty, and not where the Penalty is given to the Party grieved, or where Part is given to the King, and Part to him who will sue for it.

1 *Sid.* 311.  
2 *Keb.* 106, 581.  
*Vide Hut.* 35, 36.  
Also it hath been holden, That where Judgment is given against an Informer, because the Court in which he sues has no Jurisdiction of the Cause, or because the Statute on which he grounds his Information is discontinued, yet he shall pay Costs within the Intent of the Statute, which shall have a liberal Construction, and was intended to prevent all vexatious Informations.

By the 18 *Eliz.* there is a *Proviso*, That it shall not extend to any Officers that have used to exhibit Informations, &c.

*Vide 9 Ann. cap.* 20. By which Costs are given in Informations in Nature of a *Quo Warranto*.  
But now by the 4 & 5 *W. & M.* *cap.* 18. it is recited, "That divers malicious and contentious Persons had more of late, than in Times past, procured to be exhibited and prosecuted, Informations in their Majesties Court of *King's Bench* at *Westminster*, against Persons in all the Counties of *England*, for *Trespases*, *Batteries*, and other *Misdemeanors*; and after the Parties so informed against had appeared to such Informations, and pleaded to Issue, the Informers had very seldom proceeded any further; whereby the Persons so informed against had been put to great Charges in their Defence; and although at the Trials of such Informations, Verdicts had been given for them, or a *Nolle Prosequi* entred against them, they had no Remedy for obtaining Costs against such Informers; and thereupon it is enacted, That after

" the

“ the first Day of *Easter-Term*, in the Year 1693. the Clerk of the  
 “ Crown in the said Court of King’s Bench for the Time being, shall  
 “ not, without exprefs Order to be given by the said Court, in open  
 “ Court exhibit, receive or file any Information for any of the Causes  
 “ aforefaid, or issue out any Procefs thereupon, before he shall have  
 “ taken, or shall have delivered to him a Recognizance from the Person  
 “ or Persons procuring fuch Information to be exhibited, with the Place  
 “ of his, her, or their Abode, Title or Profession, to be entred to the  
 “ Person or Persons againft whom fuch Information or Informations is  
 “ or are to be exhibited, in the Penalty of 20*l.* that he, ſhe or they,  
 “ will effectually profecute fuch Informations or Information, and abide  
 “ by, and obferve fuch Orders as the ſaid Court ſhall direct; which Re-  
 “ cognizance the ſaid Clerk of the Crown, and alfo every Juſtice of  
 “ the Peace of any County, City, Franchiſe, or Town Corporate  
 “ (where the Cauſe of any fuch Information ſhall ariſe) are by the ſaid  
 “ Statute impowered to take; after the Taking whereof by the ſaid  
 “ Clerk of the Crown, or the Receipt thereof by any Juſtice of the  
 “ Peace, the ſaid Clerk of the Crown ſhall make an Entry thereof upon  
 “ Record, and ſhall file a *Memorandum* thereof in ſome publick Place in  
 “ his Office, that all Persons may reſort thereunto without Fee; and in  
 “ Caſe any Person or Persons againft whom any Information or Informa-  
 “ tions for the Cauſes aforeſaid, or any of them, ſhall be exhibited, ſhall  
 “ appear thereunto and plead to Iſſue, and that the Proſecutor or Proſe-  
 “ cutors of fuch Information or Informations, ſhall not, at his and their  
 “ own proper Coſts and Charges, within one whole Year next after  
 “ Iſſue joined therein, procure the ſame to be tried; or if upon ſuch  
 “ Trial a Verdict paſs for the Defendant or Defendants; or in Caſe the  
 “ ſame Informer or Informers procure a *Nolle Proſequi* to be entred; then  
 “ in any of the ſaid Caſes, the ſaid Court of King’s Bench is autho-  
 “ rized to award to the ſaid Defendant or Defendants, his, her, or their  
 “ Coſts, unleſs the Judge before whom ſuch Information ſhall be tried,  
 “ ſhall at the Trial of ſuch Information, in open Court, certify upon  
 “ Record, That there was reasonable Cauſe for exhibiting ſuch Infor-  
 “ mation; and in Caſe the ſaid Informer or Informers ſhall not, within  
 “ three Months next after the ſaid Coſts taxed, and Demand made  
 “ thereof, pay to the ſaid Defendant or Defendants the ſaid Coſts, then  
 “ the ſaid Defendant or Defendants ſhall have the Benefit of the ſaid  
 “ Recognizance to compel them thereunto.

“ *Provided*, That nothing hereof ſhall extend, or be conſtrued to ex-  
 “ tend to any other Information, than (a) ſuch as ſhall be exhibited in (a) From  
 “ the Name of their Majeſties Coroner or Attorney in the Court of whence it  
 “ King’s Bench for the Time being (commonly called the Maſter of the follows, that  
 “ Crown-Office.) Informations  
 “ exhibited by  
 “ the Attorney

General, remain as they were at the Common Law. 2 *Hawk. P. C.* 262.

In the Conſtruction of this Statute it has been holden, That no Coſts 2 *Hawk. P.*  
 can be had on this Statute, on an Acquittal at a Trial at Bar, not only C. 263.  
 becauſe the Clause which gives Coſts, *unleſs the Judge at the Trial certify*  
*a reasonable Cauſe*, ſeems only to have a reasonable View to Trials at *Niſi*  
*prius*, but alſo, becauſe a Cauſe, which is of ſuch Conſequence as to be  
 thought proper for a Trial at Bar, cannot well be thought within the Per-  
 view of the Statute, which was chiefly deſigned againſt trifling and vexa-  
 tious Proſecutions.

Alſo if there be ſeveral Defendants, and ſome of them acquitted, and 1 *Salk.* 194.  
 others convicted, none of them can have Coſts.

But where-ever a Defendant’s Caſe is ſuch as authorizes the Court to 2 *Hawk. P.*  
 award him his Coſts, he ſeems to have a Right to them *ex debito Juſtitia*; C. 263.  
 for it ſeems a general Rule, That where Judges are impowered by Sta-  
 tute to do a Matter of Juſtice, they ought to do it of Courſe.

## 4. Of Paupers.

In the Statute 23 H. 8. cap. 15. there is a Provision, “ That whoever  
 “ sues *in Forma Pauperis* shall not pay Costs, but shall suffer such other  
 “ Punishment as the Judge of the Court shall think fit.

But notwithstanding this Statute, if he be (a) dispaupered or (b) nonsuited, the usual Practice is to tax the Costs, and for Non-payment to order him to be (c) whipped.

(a) 1 Rol. Rep. 88.

(b) 2 Salk. 506.

(c) But though the usual Course in such Cases is to tax the Costs, and if not paid, to whip the Plaintiff; yet upon Consideration of the Circumstances of the Case, it is in the Discretion of the Court to spare both. 1 Sid. 261.—And *per Holt*, Ch. Just. on Motion to whip a Pauper who had been nonsuited, there is no Officer for that Purpose, nor did I ever know it done. 1 Salk. 506.

*Eq. Abr.* 125. A brought a Bill *in Forma Pauperis*, to which the Defendant put in a Plea, and Demurrer, which were both over-ruled; and it was insisted upon, That he should have no Costs, being at none; but my Lord *Somers*, after long Debate and Inquiry of all the antient Counsel and Clerks, who agreed that he should have Costs, ordered him his Costs (d) like other Suitors; for though he is at no Costs, or but small Costs, yet the Counsel and Clerks do not give their Labour to the Defendant, but to the Pauper.

(d) But *vide* *Preced. Chan.* 219. Where a Pauper having a De-

ree to re-

cover with Costs, it was held on Motion *per Curiam*, to be unreasonable, that any one should have more Costs than he was out of Pocket; and thereupon ordered the Plaintiff and his Solicitor to make Oath before the Master, and what they swore they had paid, or were to pay, was to be allowed, but no further.

more Costs than he was out of Pocket; and thereupon ordered the Plaintiff and his Solicitor to make Oath before the Master, and what they swore they had paid, or were to pay, was to be allowed, but no further.

## (F) Of Costs in Replevin.

1 *Jones* 434. IN Replevin the Plaintiff had Damages at Common Law, and Costs by the Statute of *Gloucester*, as a Consequence of such Damage, but the Avowant or Defendant in Replevin had no Costs, although in many Cases where an Avowry or Conuzance was made, and a Return prayed, the Defendant was an Actor.

But now by 7 H. 8. cap. 4. “ Every Avowant and Person that makes  
 “ Conuzance, or justifies as Bailiff in Replevin, or second Deliverance,  
 “ (e) for (f) any Rent, Custom or Service, if (g) their Avowry, Con-  
 “ nuzance or Justification be found for them, or the (b) Plaintiffs other-  
 “ wise barred, shall recover their Damages and Costs, as the Plaintiff  
 “ should have done if he had recovered.

(e) Extends not where Avowry Damage-feasant. *Dyer*

141. *Owen* 14.

(f) Not if for a Rent-charge. *Owen* 14.

(g) If Defendant avows for 36 l. for a Year and a Half's Rent, and the Plaintiff pleads Payment of 12 l. and there is another Issue for the 24 l. and the first Issue is found for the Plaintiff, and the second for the Defendant, the Plaintiff shall have no Costs or Damage; but the Avowant shall have a Return, Damages and Costs. *Cro. Jac.* 473. (b) Extends not to a Nonsuit. 1 *Jones* 423.

Also by the 21 H. 8. cap. 19. By which the Lord may avow, as in Lands within his Fee, without naming any Tenant in certain, it is further enacted, “ That (i) every Avowant or other Person (k) making  
 “ Justification or Conuzance, as Bailiff or Servant in Replevin, or se-

(i) Extends to Executors that avow;

by 32 H. 8.

a subsequent Statute. 2 *Rol. Rep.* 457. (k) Extends not to a Defendant that claims Property. *Harb.*

cond Deliverance, (a) for Rents, Customs, (b) Services, (c) Damage-feasant, or for other (d) Rent or Rents, if the Avowry, Co-nuzance, or Justification be found for them, or the (e) Plaintiff be non-suit or otherways barred, they shall recover Damages and Costs, as the Plaintiff should have done.

Hard. 153.  
(a) The Defendant avowed the Taking as a Stray within his Manor;

and whether he should have Costs, *Hillop and Chaplain, dubitatur*; but Judgment reversed for another Cause. *Cro. Eliz.* 257, 329. *Oxven* 13. but 1 *Jones* 435. cited, and said, the Judgment was reversed because Damages and Costs were given; and that this Reason is entred upon the Roll.—Not if an Avowry for an Amereement in a Lect, &c. *Porter v. Grey. Cro. Eliz.* 300. *Moor* 893. *Cro. Jac.* 520. 2 *Roll. Rep.* 75 But releasing his Damages, he had Costs, by 4 *Jac.* 1. & vide 1 *Jones* 424, 435. But *Cro. Eliz.* 257, 329. It has been the constant Practice since this Act, to give Cost and Damages.—Where the Avowry was for the Penalty upon Breach of a By-Law. *Cro. Car.* 497, 532. 1 *Jones* 421, 435. *March* 29. (b) Where the Avowry for Relief *dubitatur*, because no Service, but a Flower thereof only, and goes to Executors. *Cro. Jac.* 28. *Cro. Car.* 422, 533, 534. 1 *Jones* 422. 2 *Roll. Rep.* 75.—But upon a Distress for a Heriot, no Question but Costs shall be paid. *Cro. Jac.* 28. Yet vide *Cro. Eliz.* 257, 329. (c) But he shall recover Damages for the Trespass at the Time of the Taking only, and not for the mean Time. *Dalf.* 52. (d) Extends not to an Avowry for a *Nomine Pæne*. (e) Therefore 2 *Sid.* 155. Where the Defendant avowed for a Rent-charge, and the Plaintiff, after Evidence, was nonsuit, the Court took the Verdict of the Jurors, who found for the Defendant, and assessed Damages and Costs.

### (G) Of Costs in a Writ of Error.

As there were no Damages given in a Writ of Error, but only a Reversal or Affirmance of the former Judgment, there could be no Costs, either at Common Law or by the Statute of *Gloucester*: Hence it was thought necessary to make a Statute to redress the Mischiefs that arose from Writs of Error, in order to delay Execution. Therefore,

By the (f) 3 *H. 7. cap.* 10. “Whereas Plaintiffs or Demandants had been delayed of Execution, for that Defendants, &c. against whom the Judgment was given, or others bound thereby, brought Error to reverse the Judgment, to the Intent only to delay Execution, it is enacted, That if any Defendant, &c. or others bound thereby, before Execution had, bring any Writ of Error in delay of Execution, then, if Judgment be affirmed, or the Writ of Error discontinued through Default of the Party, or the Plaintiff therein be nonsuit in the same, the Party against whom the Writ of Error is sued, shall recover his Costs and Damage, for the Delay, and wrongful Vexation, by the Discretion of the Justices before whom the Writ of Error is sued.”

(f) By the Statute of 19 *H. 7. c.* this Act is confirmed; and it is enacted, That the same should from thenceforth be put in Execution.

In the Construction of this Statute, it has been holden, That it extends not to *Ireland*, because not particularly named; therefore a Judgment upon a Writ of Error in the King’s Bench there, wherein Costs were given; was for that Reason (g) reversed here, as to the Costs.

1 *Sid.* 357.

*C. B.* in *Ireland* was affirmed in *B. R.* there, as also on a Writ of Error in *B. R.* here, and likewise on a Writ of Error in the House of Lords here, and a *Capias ad Satisfaciend* in *B. R.* here, as well for the Costs given by the Courts in *Ireland*, as for those given by the Courts here, was superseded as Irregular. *Carth.* 460. 5 *Mod.* 421. 1 *Salk.* 321.

(g) Where a Judgment in

It extends not to Executors or Administrators, where they bring Error upon a Judgment against their (b) Testator, or upon a Judgment against (i) themselves, for being *in auter droit* they are not presumed to bring the Writ of Error for Delay.

(b) 1 *Vent.* 166.  
1 *Mol.* 77.  
(i) 3 *Lev.* 375.  
*Carth.* 281.  
4 *Mod.* 244.

There are no Costs by this Act where Execution is executed, for then there can be no Delay of Execution.

*Cro. Jac.* 636.  
*Cro. Car.* 401.

Hence

1 *Vent.* 88. Hence there can be no Costs in a Writ of Error upon a Judgment in Ejectment, where Execution was executed as to the Costs and Damages, though not as to the Term.

*Cro. Car.* 425. Nor in Error upon a Judgment in *Formedon*, because the Plaintiff had  
1 *Vent.* 88. no Costs in the (a) first Judgment, and the Intent of the Statute is to  
1 *Lev.* 146. prevent the Delay of Execution for the first Damages and Costs.  
*Raym.* 134.

But *vide Cro. Eliz.* 617, 659. *cont.* (a) But in a *Quare Impedit*, though therein no Costs are recoverable, but Damages only, the Party shall have Costs. *Dyer* 77. *Cro. Car.* 145, 175.

2 *And.* 123. This Statute extends to a Writ of Error in the Exchequer-Chamber;  
*Cro. Eliz.* 588. though given by a subsequent Statute.

Also the more effectually to prevent Defendants from bringing frivolous Writs of Error, by the 13 *Car. 2. Stat. 2. cap. 2.* it is enacted,  
“ That if any prosecute a Writ of Error for Reversal of any Judgment  
“ after Verdict in the Courts of *Westminster*, Counties Palatine of  
“ *Chester*, *Lancaster*, or *Durham*, or of the great Sessions in *Wales*, and  
“ the Judgment is affirmed, they shall pay double Costs; popular Ac-  
“ tions upon Penal Laws (except Debt for Tithes) Indictment, Infor-  
“ mations, &c. excepted.

2 *And.* 123. But as these Statutes do not extend to Cases where Judgment is given  
*Cro. Car.* 401. for the (b) Defendant, and the Plaintiff brings a Writ of Error, it was  
(b) Although thought necessary to remedy this Inconveniency: And therefore,  
a Defendant

in Replevin, who is considered in some Cases as a Plaintiff, yet shall not have Costs within those Statutes, which are to be construed strictly, because Costs are in Nature of a Penalty. *Carth.* 179.  
4 *Mod.* 7. 1 *Salk.* 205. S. C.

By the 8 & 9 *W. 3. cap. 10.* “ If in any Action, &c. upon Demurrer  
“ by Plaintiff or Defendant, Judgment shall be given for the Defendant,  
“ or if after Judgment for the Defendant in such Action, &c. the Plain-  
“ tiff shall bring Error, and the Judgment shall be affirmed, the Writ  
“ of Error discontinued, or the Plaintiff nonsuit, the Defendant shall  
“ have Judgment for his (c) Costs, and Execution for the same by  
“ *Capias ad Satisfaciend*’.

(c) But not for double Costs, for this shall not be presumed merely for Delay, since the Plaintiff keeps Possession of nothing by his Writ of Error.

## (H) Of Costs in the several Steps and Proceedings of a Cause.

AS the Courts exercise a Discretionary Power in awarding Costs, before there is a final Judgment in the Cause, it seems difficult to ascertain the several Cases in which the Courts will make use of this Power; however, it may be observed in general, that the Delays or Contempts, which either Party is guilty of, can only be remitted or purged on Payment of Costs.

*Vide Title Amendment, Letter (G).* As for not going on to Trial, &c. so if the Plaintiff moves to amend his Declaration (which is seldom refused whilst the Proceedings are in Paper) it must be on Payment of Costs.

1 *Salk.* 208, There are no Costs in Abatement upon Demurrer, because there are  
209. no Damages given, but only a *Respondas ouster* awarded.

6 *Mod.* 157. But the Statutes give Costs on a *Non Profs*, and this either before de-  
1 *Leon.* 105. claring, and then he is demandable, for he is not in Court by Attorney  
*Hutt.* 36. until he has declared; but since he has put in his Appearance by Attor-  
*Cro. Car.* 575. *Hard.* 152. ney,

ney, the Court will vacuate his Appearance, if he does not do as he ought to do in Declaring; and this Sort of Nonsuit is as well within the Statutes, as when he is demandable at the *Nisi prius*; but because the King's Bench suffered them to lie three Terms without awarding a *Non Profs*: Therefore,

By the 8 *Eliz. cap. 2.* If upon a *Latitat*, *Alias*, or *Pluries Capias* issuing out of the *King's Bench*, the Plaintiff does not Declare within three Terms after Bail put in, or after Declaration, shall delay or suffer his Suit to be discontinued, or be nonsuit, the Court shall award the Defendant his Costs and Damage.

After a Declaration put in by the Plaintiff, and the Defendant puts in a Bar or Rejoinder, and the Plaintiff does not reply, &c. there is a Judgment against him on the Bar, &c. and Costs awarded, because he does not prosecute his Writ with Effect.

After Issue joined or a Verdict given, the Plaintiff cannot discontinue without Leave of the Court, which is never granted but upon Payment of Costs.

The Plaintiff cannot bring a new Ejectment without paying the Costs of the first.

or second Issue be directed out of Chancery, it must be on Payment of Costs. 4 Mod. 374. That if a new Trial, 2 Vern. 75.

The Defendant shall not pay the Costs of reversing an Outlawry, until the Plaintiff declares against him; and if the Plaintiff be nonsuit, the Defendant shall have them again in his Costs; and if there be more Defendants than one, and they be all outlawed, they shall all be contributory for the Costs, and not every one pay the whole Costs. Vide Title Outlawry.

(I) Costs, how assessed or taxed.

AFTER the making the Statutes that introduced Costs, it was agreed on as a Rule, That the Jury should tax the Damages a-part, and the Costs apart, that so it might appear to the Court, that the Costs were not considered in the Damages; and when it was evident that the Costs taxed by the Jury were too little to answer the Costs of the Suit, the Plaintiff prayed, that the Officer might tax the Costs, and that was inserted in the Judgments; and therefore said to be done *ex assensu* of the Plaintiff, because at his Prayer. 1 Rol. Abr. 517.

If there are several Issues found for the Plaintiff, or against several Defendants, intire Costs are given upon the whole Pleadings, for that is the whole Charge the Plaintiff is at. 10 Co. 117. b.

So if in Debt the Defendant pleads several Pleas, upon which they are at Issue, and the Jury find one Issue for the Plaintiff, and Damages 12 *d.* another Issue for the Plaintiff, and Damages 10 *d.* and another Issue for the Plaintiff, and Damages 6 *d.* and one Issue against the Plaintiff, they must assess the Costs intirely, and not according to the Damage severally, for every Issue found for the Plaintiff. Keilw. 48. 2 Leon. 177. 1 Brownl. 3.

Upon a *Scire Facias* on a Recognizance in *C. B.* against Bail, the Plaintiff had Judgment for Execution upon the Recognizance, & *quod recuperet Damna sua occasione dilationis executionis*; upon a Writ of Error in *B. R.* this was recovered; for the Bail are only liable to Costs of Suit by the Statute, and Damages, by reason of the Delay of Execution, are not Costs, nor Costs of Suit; but Damage sustained by being so long out of his Money, which uses to be assessed by allowing the Party what lawful Interest would have come to him in the mean Time; to

that Costs and Damages are different in this Case, given for different Ends, and assessed by different Measures.

1 Rol. Abr.  
516. *Crusee*  
and *Berry*,  
adjudged up-  
on a Writ of  
Error.

If Baron and Feme join in an Action, and a Verdict is given for the Plaintiffs, and the Jury assesses Damages *ultra misas & Custagia per ipsum* (the Baron) *circa sextam suam exposita*, to so much, & *pro misis & Custagiis illis*, to so much; and thereupon Judgment is given, That the Baron and Feme shall recover the Costs and Damages, though it is found, that the Baron only expended and disbursed the Money for the Costs of the Suit, in as much as the Feme had nothing, yet the Judgment is good, that the Baron and Feme shall recover the Costs; for there cannot be one Judgment for the Costs, and another for the Damages.

## Covenant.

**C**OVENANTS, Contracts and Agreements, are often used as Synonymous Words, signifying an Engagement entered into, by which one Person lays himself under an Obligation to do something Beneficial to, or to abstain from an Act, which if done, might be prejudicial to another.

As the Good of Society requires a punctual Performance of, and that no Person should be allowed to rescind and break through his Contracts; so the Law has provided a Remedy by Action of Covenant, in which the injured Party is to recover Damages for the Violation of the Contract, in Proportion to the Loss he has sustained.

But here it may be necessary to observe, That where the Covenant or Agreement is for doing something in *Specie*, as conveying Lands, executing Deeds, &c. the most usual, and indeed the most proper Remedy is by Bill in Chancery; which, in Cases reasonable, will decree an Execution in *Specie*; whereas at Common Law, the Party can only be repaired in Damages.

But if the Matter of the Bill is merely in Damages, the Remedy is only at Law, because the Damages cannot be ascertained by the Conscience of the Chancellor, and therefore must be settled by a Jury at Law.

But if there be Matter of Fraud mixed with the Damages, as if *A.* sues *B.* on a Covenant at Law, for Damages; and *B.* files a Bill for an Injunction, upon this equitable Suggestion, that the Covenant was obtained by Fraud; if *A.* files his Cross-Bill for Relief upon that Covenant, the Court will retain it, because the Validity of the Covenant is disputed in that Court, and on a Head properly conuzable there; and therefore, if the Validity of the Deed be established, the Court will direct an Issue for the *Quantum* of the Damages.

But for the better understanding of this Action of Covenant, I shall consider,

(A) Of the Manner, and by what Words an express Covenant is created.

(B) Of Covenants created by Implication of Law.

(C) Where an Action of Covenant is the proper Remedy.

(D) Where there are several Parties; and herein of joint Covenants.

(E) Of Covenants Real and Personal; and therein of the Persons to whom they shall extend: And here,

1. Of Covenants which shall extend to the Heir or Executor, so as to be bound by them, though not expressly named.
2. Of Covenants which the Heir or Executor may take Advantage of.
3. Where an Assignee shall be bound by the Covenant of the Assignor.
4. Where the Assignor continues still liable.
5. Where an Assignee shall take Advantage of a Covenant.
6. Of Covenants which bind by Force of the Statute 32 H. 8.

(F) How Covenants are to be construed.

(G) Where the Principal, and all ancillary Covenants shall be said to be void and extinguished.

(H) What shall be deemed a Breach, or construed a good Performance.

(I) Where the Breach shall be said to be well assigned.

(K) Where the Performance shall be said to be well set forth and pleaded.

(L) What may be pleaded in Bar to the Action.

(A) Of the Manner, and by what Words an express Covenant is created.

(a) THE Law does not seem to have appropriated any set Form of Words, which are absolutely necessary to be made use of in creating a Covenant; and therefore it seems that any Words will be effectual for that Purpose, which shew the Parties Concurrence to the Performance of a future Act; as (b) if Lessee for Years covenants to Repair, &c. *Provided always, and it is agreed, that the Lessor shall find great Timber, &c.* this makes a Covenant on the Part of the Lessor to find great Timber, by the Word (c) *agreed*, and it shall not be a Qualification of the Covenant of the Lessee.

(a) 1 Chan.

Ca. 294.

1 Leon. 324.

(b) 1 Rol. Abr.

518.

1 Brownl. 23.

S. C.

(c) But it is

said, that

without this Word it would have been only a Qualification of the Covenant of the Lessee. 1 Rol. Abr. 518. 1 Sid. 423. 2 Co. 72. b. 1 Lev. 155.

So if A. Leases to B. for Years, upon Condition that he shall acquit the Lessor of ordinary and extraordinary Charges, and shall keep and leave the Houses at the End of the Term, in as good Plight as he found them; if he does not leave them well repaired at the End of the Term, an Action of Covenant lies.

40 E. 3. 5 b.

1 Rol. Abr.

518. S. C.

1 Rol. Abr. 518. Bret and Cumberland, adjudged. Cro. Jac. 399, 521. 3 Bullst. 163. So these Words in a Lease of a Mill, and the Lessee shall repair the Mills as often as Need shall require, and shall leave them sufficiently repaired at the End of the Term, make a Covenant, (a) because it is the clear Agreement of the Parties; for otherwise the Words, shall leave, &c. would have no Effect.

1 Rol. Rep. 359. 2 Rol. Rep. 63. S. C. adjudged. (a) As if A. by Indenture agrees to give B. 70 l. for an House, if B. executes one Part of the Indenture to A. A. may bring Covenant for the House. *Portage and Cole*, 1 Lev. 274. per Cur'. *Raym.* 183. per Cur'. 1 Sand. 319. That on the Part of B. it amounted to a Covenant to convey. 1 Sid. 423. per Cur'.

1 Co. 155. 1 Rol. Abr. 518. Moor 478. If A. Leases to B. for Life, with a Proviso, That if the Lessee dies within the Term of forty Years, that then the Executors of the Lessee shall have it for so many of the Years as amount to the Number of forty Years, to be accounted from the Date of the Indenture of Lease; this Proviso shall not be a Lease, but only a Covenant.

1 Rol. Abr. 518, 519. If there are Articles of Agreement between A. and B. by which it is agreed upon a Marriage intended between A. and C. that all the Stock of C. shall remain in the Hands of B. till A. shall make a certain Jointure to C. *ipso B. annuatim solvendo to A. interesse proinde secundum Ratam 8 l. per Centum*, &c. if B. does not pay the said Interest, an Action of Covenant lies against him upon these Words, because (b) every (c) Agreement by Deed is a Covenant, otherwise A. could not have any Remedy for the Money.

(b) So where a Man acknowledges himself to be

accountable to another for all Money by him charged upon A. to be paid to B. 1 Lev. 47.—Where the Words were only by way of Recital, that it was intended that a Fine should be levied, &c. 2 Mod. 89, 91. & vide 1 Leon. 122. (c) Where a Man assigns and transfers a Chose in Action, tho' nothing passes; yet it amounts to a Covenant, that the other shall have the Thing. 1 Mod. 113.

1 Rol. Abr. 519. If A. makes a Deed to B. in these Words, *I have in my Custody one Writing obligatory, in which Writing obligatory, one William now standeth bound to the said B. for the Payment of 400 l. upon such a Day, being the*

(d) So where the Words of a Deed are, *I oblige myself to pay so much Money and I will be ready at all Times, when I shall be required, to redeliver the same Writing obligatory to the same B. if B. after I oblige myself to pay so much Money and I will be ready at all Times, when I shall be required, to re-deliver the same, &c.*

Day, and so much at another. *Hard.* 178. adjudged; but the Chief Baron doubted, if the Words had been *teneri & firmiter obligari*; for that these Words sound in Debt, and not in Covenant.

Raym. 25. Robinson and Anpton, adjudged. 1 Keb. 103, 118. S. C. 1 Sid. 48. S. C. If A. enters into a Statute to B. and afterwards B. by his Deed covenants, that upon Payment of such a Sum at a Day to come, the Statute shall be void, and that he will deliver it in, and cause it to be vacated; if B. before the Day sues Execution upon the Statute, A. may bring an Action of Covenant; for though it be true, that a Covenant that is to take Effect presently is to stand or fall by the Operation of Law, and no Action of Covenant will lie; as if a Man covenants that a Bond shall be void upon doing such an Act, or to stand seised, no Action of Covenant will lie upon these; but here the last Words bind the Party to the Performance of a future Act, *viz. to deliver in the said Statute, and cause it to be vacated*, which without all Question sound in Covenant.

Carth. 64. Comb. 123, 124.

Carth. 64.

If A. enters into an Obligation to B. and afterwards B. covenants not to sue A. without any Limitation of Time, this amounts to a Release, and may be pleaded as such.

But if the Covenant be Temporary, and limited to a certain Time, as if it be, that B. will not sue for ninety-nine Years, &c. this still remains a Covenant; and for the Violation thereof, an Action of Covenant is the proper Remedy, but it cannot be pleaded in Bar; so if there

be two Obligors, and the Obligee covenants that he will not sue one of them, this is no Release, but only a Covenant.

A Letter of License containing the Words following, viz. *That if the Creditor sue within such a Time, his Debt shall be forfeited*, works a Forfeiture by the Commencement of the Suit, and therefore may be pleaded in Bar to the Action.

If there are Articles of Agreement made by Indenture between *A.* and *B.* in which *A.* agrees that *B.* shall have a House in a Street in London, for certain Years; provided, and upon Condition, that *B.* shall receive and pay the Rents of the other Houses of *A.* in the same Street mentioned in a Schedule annexed to the Indenture; and it is further agreed, that *B.* for his Labour in collecting of the said Rents, shall have the Overplus of the Rents, over and above such a certain Sum; this is not any Covenant on the Part of *B.* to bind him to receive and pay the Rents mentioned in the Schedule; but the *Proviso* and Condition only will make the Estate of *B.* void in the House.

If *A.* by Deed enfeoffs *B.* provided, that if *A.* pays Money to *B.* by a Day, the Feoffment shall be void, and covenants to save harmless from Incumbrances and Arrears of Rent, and to make further Assurance; and after *A.* enters into an Obligation conditioned for the Performance of all (a) Covenants, Payments, Articles and Agreements comprised in the Deed, if *A.* pays not the Money, yet the Bond is not forfeited; for there being no Covenant to pay the Money, it is a *Proviso* in Advantage of the Feoffor, that if he paid the Money, that he should have the Land again; so that it is in his Election to pay the Money or lose the Land, which is a sufficient Loss to him, and the Word *Payment*, in the Bond, hath Reference to the Covenant to save harmless from Arrears of Rent.

shall have Reference to such Payments only, as by the Deed are compulsory, not such as are voluntary; for otherwise the Obligation and Condition would be repugnant, and contrary to the Deed. 1 *Brownl.* 113. S. C. and *Bulst.* 156 S. C. adjudged. 2 *Mod.* 37. S. P. (a) Otherwise if the Condition of the Bond had been for the Performance of all Covenants and Conditions in the Deed. *Tomles* and *Chandler*, 2 *Lev.* 117. adjudged. But in *Keb.* 454, 460. Judgment is given for the Plaintiff, unless the Defendant discontinue.

An Action of Covenant may be brought as (b) well on a Deed Poll, as on a Deed indented.

Covenant lies upon the King's Patent, though there is no Counterpart sealed by the Lessee, who is to be charged. *Cro. Jac.* 240. 1 *Bulst.* 21. *Cro. Jac.* 399, 521. 3 *Bulst.* 163. 1 *Rol. Rep.* 359. 2 *Rol. Rep.* 63. *Popk.* 156.

But though Covenant lies as well on a Deed poll as upon a Deed indented, yet the Parties must be named therein; and therefore, where in Covenant the Plaintiff declared, that *J. S.* being arrested at his Suit, and in the Custody of the Bailiff, he, the Defendant, promised and engaged to bring in the Body of *J. S.* into the Custody of the Bailiff such a Day; and on Demurrer it was held, That the Action would not lie, the Plaintiff not being named in the Agreement, and no Averment *dehors* could avail him.

1 *Rol. Abr.* 518. *Geary* and *Reed.* *Cro. Car.* 128, 129. S. C. adjudged. *Et vide Cro. Eliz.* 242, 385. 2 *Co.* 71.

*Cro. Jac.* 281. *Brisco* and *King*, adjudged; *Yelv.* 206. S. C. adjudged; the *Proviso* being, That if *A.* paid for *B.* 40 l. to *C.* *Et c.* for the Word *Payment*, in the Obligation,

1 *Rol. Abr.* 517. (b) So a Writ of

1 *Salk.* 197. *Green* and *Horn*, adjudged.

## (B) Of Covenants created by Implication of Law.

48 E. 3. 2. b. **T**HERE are some Words, which of themselves import no exprefs  
7. Covenant, yet being made use of in certain Contracts, they amount to such, and are therefore called Covenants in Law, and will as  
1 Rol. Abr. 519. effectually bind the Parties, as if expressed in the most explicit Terms.

5 Co. 17. a. As if a Man (a) makes a Lease for Years of Land, by the Words  
resolved. (b) *concessi* or *demisi*, these import a Covenant, and if the Lessee, or his  
(a) So if an Assignee are (c) evicted, they may bring an Action thereupon.

thereof be made by the Word *Grant*. 2 Rol. Rep. 399. *Palm*. 388. (b) *Carth*. 98. S. P. admitted.—  
Where a Man *assignavit* & *transposuit* all the Money that should be allowed by any Order of a Foreign State, to come to him in Lieu of his Share in a Ship. 1 *Mod*. 113. Said by *Hale*, though it cannot be assigned, yet this amounts to a Covenant that he shall have all the Money; & vide 4 Co. 81. *Cro. Eliz*. 214. 2 *Leon*. 104. (c) Whether the Lessor himself, or a Stranger ousts him. Vide 1 *Rol. Abr*. 519. 2 *Leon*. 104. *Cro. Eliz*. 214.—So if the Cattle of the Lessee are distrained by the Lord Paramount, he may have Covenant against his Lessor. *Raym*. 257.

So if a Man Leases for Years, reserving Rent, an Action of Covenant lies for Non-payment of the Rent, for the (d) *Reddendo* of the Rent is an Agreement for Payment of the Rent, which will make a Covenant.

1 Rol. Abr. 519. *Style* 387. *Carth*. 135. (d) So the Words Yielding and Paying make a Covenant. *Style* 406, 407, 431. 2 *Brownl*. 215. 1 *Sid*. 266, 401. 2 *Mod*. 92. 1 *Vent*. 10. 2 *Jones* 102. 3 *Lev*. 155.

4 Co. So. b. Also if a Man Leases for Years by the Words *Demise*, *Grant*, &c. and in the Deed there are several Covenants on the Part of the Lessor, and he enters into a Bond conditioned for the Performance of all the Covenants, &c. in the said Deed; this extends as well to the Covenants in Law, as exprefs Covenants.

4 Co. So. But if a Man Leases for Years by the Words *Demisi*, &c. and the  
*Cro. Eliz*. 674. Lessor covenants that the Lessee shall enjoy during the Term, without  
*Yelv*. 175. Eviction by the Lessor, or any claiming under him; this exprefs Covenant qualifies the Generality of the Covenant in Law, and restrains it by the mutual Consent of both Parties, that it shall not extend farther than the exprefs Covenant.

1 Rol. Abr. 520. If a Man Leases to me by Indenture the Land of (e) *f. S.* of which  
*Cro. Jac*. 75. *f. S.* is seised at the Time, upon which I enter, and he re-enters, I shall  
S. C. adjudg- have a Writ of Covenant upon this Indenture, though I was not in the  
ed. (e) So if Land by the Lease, but by Estoppel, for the Lessor is estopped to say  
by Indenture that I was not in of his Lease.

he Leases to me my own Land, and I am ousted by a Stranger. *Cro. Jac*. 73. 1 *Rol. Abr*. 520, 871.

1 Rol. Abr. 520. So if a Man Leases to me Land of *f. S.* of which *f. S.* is seised at the Time, I shall have a Writ of Covenant before Entry upon *f. S.* and  
*Holder* and *Taylor*. Re-entry by him; for I need not alledge an Eviction, for this is a Covenant in Law, which is broke when he is not seised of the Land at the  
2 *Brownl*. 22. S. P. Time of the Demise, for the Word *Demise* imports a Power of Let-  
*Hob*. 12. S. C. ting; and it is not reasonable to enforce the Lessee to enter into the  
But vide in *Rol.* the Case Land, and so to commit a Trespass.

immediately following; which seems *cont'*, and that if a Man Leases Lands for Years, and a Stranger enters before the Lessee enters, he shall not have an Action of Covenant upon this Ouster, because he was never a Lessee in Privy to have the Action. 1 *Rol. Abr*. 520. *Owen* 105. S. P. *per Fenner*.

*Owen* 104. But if a Man Leases certain Goods for Years by Indenture, which  
1 *Rol. Abr*. 519. are evicted within the Term, yet he shall not have a Writ of Covenant; for

for the Law does (a) not create any Covenant upon such Personal Thing. (a) And therefore in Case of a

Lease of a House, together with the Goods, it is usual to make a Schedule thereof, and affix it to the Lease, and to have a Covenant from the Lessee to re-deliver them at the End of the Term; for without such Covenant the Lessor can have no Remedy but Trover or Detinue for them after the Lease ended.

So in the Case of a Grant of an (b) Inheritance, by the Words *enfeoff, grant, &c.* the Law does not create a Covenant. (b) If for Life. 2 Jones 102. *dubitatur.*

Also if two or more join in making a Lease by the Words *concessi, &c.* this creates a Covenant in Law, for the Breach of which, all of them shall be jointly sued; but if the Breach be the Personal Tort of one of them, as if one of them enters and ousts the Lessee, the Action may be brought against him alone; for it is unreasonable, that the others should suffer for the Personal Wrong of their Companion. *Carth. 97, 98. Coleman and Sherwin, adjudged. 1 Salk. 137. 1 Show. 79. S. C.*

*A.* by Indenture granted and demised to *B.* certain Lands, except a little Piece, upon which a Pump was standing, together with the Use and Occupation of the Pump, in common with other the Tenants of *A.* for thirty-one Years; and after the Pump became useless for want of Repairs, and *B.* brought Covenant against *A.* and assigned the Breach in *A.*'s permitting the Pump to run to decay; and it was held by *Kelynge*, Chief Justice, *Rainsford* and *Moreton*, Justices, that the Action lay; for that when the Use of a Thing is (c) demised, and it runs to decay, so that the Lessee cannot have the Use and Benefit thereof, he may have Covenant upon the Word *demisi*; and here the Lessee himself could not Repair, having no Interest in the Pump, or Lands where it stood; but *Twifden totis viribus cont'*. 1. Because a Covenant created by Law, as this is, never lies but on an (d) actual Ouster. 2. This Covenant created by Law, is not (e) properly to recover Damages, but the Term it self, and the Damages that are recovered are for the whole Term, whereas the Pump may be repaired the next Day. 3. The Lessee may repair the Pump himself, and may come on the Ground without being a Trespasser; as where I grant that you shall fish in my Pond, you have Liberty to come upon my Ground; so if you have a Grant to lay Pipes in my Ground, you may dig up the Ground for that Purpose; and for these Reasons of *Twifden's*, the Judgment was *una voce* reversed in *Cam' Scac'*. *1 Vent. 26, 44. Pomfret and Ricraft, adjudged, cont' Twifden in B. R. 1 Sid. 429. S. C. adjudged, cont' Twifden in B. R. But 1 Sand. 321, 322. S. C. reversed for Twifden's Reasons in Cam' Scac', and Hale said, That if I lend one a Piece of Plate, and covenant he shall have the Use thereof, yet*

if the Plate be worn out by ordinary Use, without any Default, no Action of Covenant lies against me.—But if one by Deed grants a Water-course, and after stops it, an Action of Covenant lies against him. 1 Sand. 322. For by *Twifden*, This is a voluntary Mifeasance.—So if I Lease a House, and therewith grant Estovers out of such a Wood, if I cut down the Wood, so that no Estovers can be had, the Lessee may bring Covenant against me. (c) But if *A.* in Consideration that *B.* will build a Mill upon the Land, and a Water-course through the Land, demises to *B.* by the Words *dedi & concessi*; and after *A.* stops the Water-course, yet no Action of Covenant lies; for the Covenant extends not to a Thing which was not *in Esse* at the making the Lease. 1 Leon. 278. (d) *Vid. 275. and 1 Rol. Abr. 519. & Q. (e) Vide F. N. B. 145.*

If *A.* Leases a House to *B.* excepting two Rooms, and free Passage to them, and the Lessee assigns to *J. S.* who disturbs the Lessor in the Passage; this, though a Covenant in Law, shall bind the Lessee; for where the Lessee agrees to let the Lessor have a Thing out of the demised Premises, as a Way, Common, &c. Covenant lies for a Disturbance; but if the Disturbance had been in the Rooms excepted, Covenant would not have lain. *Carth. 232. Bush and Cole, adjudged. 1 Salk. 196. 1 Show. 383. S. C. & vide Mor 553. Civ. Eliz. 657.*

## (C) Where an Action of Covenant is the proper Remedy.

**I**F *A.* for valuable Consideration, promised by his Deed not to do a certain Thing, no Action upon the Case lies upon this Promise; but a Writ of Covenant.

**S**o if *A.* recovers a Debt against *B.* and *B.* pays him the Condemnation, upon which *A.* releases all Actions, Executions, &c. to *B.* by Deed, and by the same Deed promises that he will withdraw and discharge all Writs of Execution against *B.* upon the said Judgment, yet no Action upon the Case lies upon this Promise; because it is made by Deed, and so he ought to have a Writ of Covenant.

**I**f a Man Leases for Years, reserving Rent; he may have an Action of Covenant, as well as Debt; for the Rent arrear; so if *A.* grants a Rent to *B.* payable at a certain Feast yearly, and covenants to pay the Rent at the Feast; an Action of Covenant lies for Non-payment, though he might have an Action of Debt for it.

**I**t seems by the better Opinion; That upon the Eviction of a Freehold, no Action of Covenant will lie upon a Warranty, either in Deed or in Law, for the Party might have had his *Warrantia Chartæ*, or Voucher; but in Case of a Lease for Years upon an Eviction, there can be no other Remedy.

## (D) Where there are several Parties, and herein of joint Covenants.

**I**F *A.* covenants to do an Act for the Benefit of two or more, and *A.* breaks his Covenant, one of them alone (*b*) cannot maintain Covenant against him, for then might he be doubly or trebly charged for the same Breach.

But where a Covenant may be joint or several, *vide* 2 *Rol. Abr.* 149. *Skin.* 401. (*b*) In an Indenture between *A.* and *B.* of the one Part, and *C.* of the other Part; among other Covenants there is one thus, *viz.* It is agreed between the Parties, that *C.* shall enter into a Bond to *B.* to pay him 100 *l.* at a Day; in an Action for Non-performance, *A.* and *B.* mult join. *Yelv.* 177.

**S**o if *A.* covenants to do an Act for the Benefit of *B.* and *C.* and enters into a Bond to them *et cuilibet eorum* for Performance; yet this being a joint Interest, each cannot bring a separate Action, but two may bind themselves severally to pay Money, or if jointly and severally bound, the Obligee may sue which he pleases.

**A** Lease was made to three, who covenanted jointly and severally for the Rent; Covenant being brought against two, it was laid, that they (without saying, or the Third) had not paid such Rent, *sed Redditum Prædicti aretro existent solvere o'io recuf.* and it was held, that this was a sufficient Averment that the Rent was behind, and that it was not paid by the Third.

**I**f *A.* covenants with *B.* that *A.* or his Son, or either of them, shall work with *B.* at the Grinding and Polishing of Glafs, *B.* paying to each of them so much, &c. and *B.* requests *C.* to work with him, &c. if he doth not, the Covenant is broke, for *B.* had the Election to require both, or any one of them, to work with him.

If an Agreement be entred into between several Fidlers, that they would not Play, &c. afunder, unless on my Lord Mayor's Day, &c. and they bind themselves in 20 l. each to the other jointly and severally, and one only brings Covenant, and assigns the Breach, That the Defendant played *ad Quendam Tabernam*, &c. this is naught; for they ought all to have joined, the Interest being Joint; and it is (a) repugnant and contradictory, for four Persons to bind themselves the one to the other jointly and severally.

Comb. 115.  
Spencer and  
Durant.

(r) But vide  
Skin 401.  
and Carth 98.  
Comb 163.

## (E) Of Covenants Real and Personal; and therein of the Persons to Whom they shall extend: And here,

### 1. Of Covenants which shall extend to the Heir or Executors, so as to be bound by them, though not expressly named.

IN every Case where the Testator is bound by a Covenant, the Executor shall be bound by it, (b) if it be not determined by his Death.

48 E. 3. 2.  
Bro. Covenant  
12. S. C.

*Cro. Eliz.* 553. Same Rule *per Curiam*, and so *Dyer* 14. pl. 69. (b) *Viz.* Where it was to be performed by the Person of the Testator, the Executor cannot perform it. *Cro. Eliz.* 553. & *vide* 2 *Mod.* 268.

If *A.* be (c) Tenant for Life, the Remainder to *B.* in Fee, and *A.* by Indenture demises, &c. to *C.* for fifteen Years, and after *A.* dies, and *B.* enters upon *C.* yet *C.* shall have no Action of Covenant against the Executors of *A.* for the Covenant was but (d) during the Term, which determined by the Death of the Tenant for Life.

1 *And.* 12.  
adjudged.  
1 Moor 74.  
pl. 204.  
Bendl. 150.  
S. C.  
*Dyer* 257.

*S. P.* by three Judges against one, who differed from the others because the Lease was by Indenture, which is a Matter of Conclusion; but if it had been by Deed Poll, he agreed with the Rest.

1 *Brownl.*  
22. *S. P.* adjudged.

(c) So if Tenant in Tail demises, and dies without Issue. *1 And.* 12. 1 *Leon.* 179. *Cro. Eliz.* 157, & *vide Lit. Rep.* 334. (d) So if the Lessee had granted, bargained and sold all his Estate to another (admitting there was, by these Words, a Warranty implied) yet it determines with the Estate. *Cro. Eliz.* 157. 1 *Leon.* 179.

If a Man covenants that *A.* shall serve *B.* as an Apprentice for seven Years, and dies, if *A.* departs within the Term, a Writ of Covenant lies against the Executor of the Covenantor, without naming.

48 E. 3. 2.  
Bro. Covenant  
12. S. C.

If a Man be bound to instruct an Apprentice in a Trade for seven Years, and the Master dies, the Condition is dispensed with; for it is Personal; but if he were likewise bound to find him with Meat, Drink, Cloaths and Lodging, this the Executors are obliged to perform.

1 *Sid.* 216.  
1 *Keb.* 761,  
820.  
1 *Lev.* 177.

### 2. Of Covenants which the Heir or Executors may take Advantage of.

Covenants Real, or such as are (e) annexed to Estates, shall descend to the Heirs of the Covenantee, and he alone shall take Advantage of them.

42 E. 3. 4.  
1 *And.* 55.  
(e) *Secus* of  
Covenants

in *Gros. Palm* 558. — Also for a Breach in the Time of the Covenantee, the Action shall be brought by his Executor, though the Covenant was with him, his Heirs and Assign, only. 1 *Vent.* 175. 2 *Lev.* 26 adjudged.

2 H. 4. 6. b. As if an Abbot and Covent covenant to sing for the Covenantee and  
5 Co. 18. his Heirs in such a Chapel, his Heirs at all Times shall have a Writ of  
Covenant for the not doing thereof.

2 Lev. 92. If a Man Leases for Years, and the Lessee covenants with the Lessor,  
Lougher and his Executors and Administrators to repair, and leave it in good Repair  
Williams. at the End of the Term, and the Lessor dies, &c. his Heir may have an  
Skin. 305. Action upon this Covenant; for this is a Covenant that runs with the  
S. C. cited. Land, and shall go to the Heir, though he is not named; and it appears,  
that it was intended to continue after the Death of the Lessor, in as  
much as his Executors, &c. are named.

### 3. Where the Assignee shall be bound by the Covenant of the Assignor.

1 Rol. Abr. The Assignee of a Term is bound to perform all the Covenants an-  
521. nexed to the Estate; as if *A.* Leases Lands to *B.* and *B.* covenants to  
Cro. Eliz. 457. (*a*) pay the Rent, repair Houses, &c. during the said Term, and *B.*  
Moor 399. assigns to *J. S.* the Assignee is (*b*) bound to (*c*) perform the Covenants  
5 Co. 24. (*d*) during the Life of the first Lessee, though the Assignee be not  
S. C. named, because the Covenant runs with the Land being made for the  
(*a*) Where the Assignee Maintenance of a Thing in (*e*) *Esse* at the Time of the Lease made.  
shall be

chargeable with a *Nomine Pœna* incurred after Assignment, *vide* Cro. Eliz. 383. Moor 357. pl. 486.  
Goldsb. 129. (*b*) By the Common Law, but without Question by the Statute of 32 H 8. Cro. Eliz.  
457. (*c*) 1 Lev. 109. 1 Sid. 157. Raym. 80. S. P. (*d*) During the Term. Moor 399. and *vide* Cro.  
Eliz. 457. S. P. by two Judges against two. (*e*) When the Covenant extends to a Thing in *Esse*, Par-  
cel of the Demise, it is *quasi* annexed to the Thing demised, and runs with the Land, and shall bind  
the Assignee, though not expressly named. 5 Co. 16. b. Godb. 270.

5 Co. 15. But if *A.* Leases for Years to *B.* and *B.* for himself, his Executors  
Spencer's Case. and Administrators, covenants with *A.* to build a Wall upon Part of the  
Land demised, and after *B.* assigns, the Assignee is not bound by this  
Covenant; for the Law will not annex the Covenant to a Thing not  
in *Esse*.

5 Co. 15. per Cur. But if *B.* had covenanted for him and his Assigns to build the Wall,  
&c. this would have bound the Assignee, because it is to be done upon  
the Land, and the Assignee is to have the Benefit thereof.

1 Salk. 199. If Lessee for Years covenants for him and his Assigns to rebuild and  
per Holt Ch. finish a House within such a Time, and after the Time expired, the  
Just. Lessee assigns over the Premises, the House not being built and finished  
according to the Covenant; this Covenant shall not bind the Assignee,  
because it was broke before the Assignment; *aliter* if broke after; as if  
the Lessee had assigned before the Time expired.

5 Co. 15. Also though the Covenant be for him and his Assigns, yet if the  
per Cur. Thing to be done be merely collateral, and no way concern the Thing  
(*f*) Cro. Jac. demised, the Covenant shall not bind the Assignee; as if it be to build  
438. S. P. an House upon other Land of the Lessor, or (*f*) to pay a collateral  
adjudged. Sum.

5 Co. 16. b. So if a Man demises Sheep or other Personal Things for a certain  
17. a. Time, and the Lessee covenants for him and his Assigns at the End of  
the Term, to deliver such Sheep, &c. or the Price of them, and the  
Lessee assigns them over, the Assignee shall not be bound by the Cove-  
nant; for it is but a (*g*) Personal Contract, and there is not (*b*) such  
(*e*) So of a Privity as between Lessor and Lessee of Land and his Assigns.

Fair, Wine- Licence, &c. *Hard.* 88.— But where such an Assignee may be made liable in Equity, *vide* 2 Vern.  
425. (*b*) If having Land charged with the Payment of a Fee-farm Rent, grants Part of the Land  
to *B.* and covenants that the same shall be discharged of the said Rent, and after grants the Resi-  
due of the Land to *C.* this shall not be taken as a Covenant Real, which shall in Equity charge the  
other Land granted to *C.* with the whole Rent. *Hard.* 87.

So (a) if a Man Leases Lands for Years (b) with a Stock of Cattle, and the Lessee for him and his Assigns covenants to deliver the Stock at the End of the Term.

for six Years, Leases to another for three Years; and it was covenanted, that during the three Years *quolibet mense* the Lessee should give an Account to the Lessor, of the Wine which he sold, and should pay unto him for every Tun sold, so much; and after the Lessor grants the remaining three Years to another, the Covenant being collateral, it passes not by the Assignment of the three Years. *Godb. 120. Moor 245.* Though the Covenant was to Account to the Lessor, or his Assigns. (b) As in *Owen 139. 1 Leon. 42. Godb. 113.*

If Lessee for Years, for himself, his Executors and Administrators, covenants with his Lessor to leave fifteen Acres every Year for Pasture, *absque Cultura*, and after the Lessee assigns, the Assignee, though not named, must perform the Covenant; because it is for the Benefit of the Estate, according to the Nature of the Soil; but a collateral Covenant, as to build *de novo*, &c. shall not bind him, unless named.

If A. demises to B. several Parcels of Land, and the Lessee covenants for him and his Assigns to repair, &c. and after the Lessee assigns to D. all his Estate in Parcel of the Land demised, and D. does not repair that to him assigned, the Lessor may have an Action of Covenant against D. the Assignee.

able, and follows the Land, with which the Defendant is chargeable by the Common or by Statute Law. *1 Jones 245. S. C. adjudged.*—So if the Lessor had granted the Reversion of Part to one, and of other Part to another; they might have brought an Action of Covenant. *1 Lev. 109. 1 Sid. 157. Raym. So. Kitchen and Buckley.*

If a Man Leases for Years, and the Lessee covenants, for him and his Assigns, to pay the Rent so long as he and they shall have the Possession of the Thing let, and the Lessee assigns, the Term expires, and the Assignee continues the Possession afterwards; an Action of Covenant will lie against him for Rent behind after the Expiration of the Term, though he is not an Assignee (c) strictly according to the Rules of Law; yet he shall be accounted such an Assignee as is to perform the Covenants.

pair, assigns to J. S. by way of Mortgage, and J. S. never enters, Equity will not compel him to repair, though he had the whole Interest in him; and though it was his own Folly to take an Assignment of the whole Term, when he should have taken a derivative Lease, by which Means he would not be liable at Law. *2 Vern. 275.*—But where such an Assignee, though he never entered, and had lost his Mortgage Money, was by Law compelled to pay the Rent; and having sued in Equity could have no Relief. *2 Vern. 374.*

If A. Leases to B. and B. covenants to repair, &c. and he assigns to J. S. who dies Intestate, the Premises being out of repair, the Lessor may bring Covenant against his Administrator as Assignee, and declare that he made a Lease to B. &c. *cujus Status & residuum termini Annorum*, &c. *devenit*, &c. *per assignationem* to the Administrator.

#### 4. Where the Assignee continues still liable.

If a Lessee covenants that he and his Assigns will repair the House demised, and the Lessee grants over the Term, and the Assignee does not repair it, an Action of Covenant lies either against the Assignee at Common Law, because this Covenant runs with the Land; or it lies against the Lessee (d) at the Election of the Lessor.

charge both, but Execution shall only be against one of them; for if he takes both in Execution, he that is last taken shall have an *Audita Querela*. *Cro. Jac. 523.*

1 *Rol. Abr.* 522. So if a Man Leases for Years, rendring Rent, and the Lessee covenants for him and his Assigns to repair the House during the Term, and after the Lessee assigns over the Term, and the Lessor accepts the Rent from the Assignee; and after the Covenant is broke, notwithstanding judged, that the Acceptance of the Rent from the Assignee; yet an Action of Covenant lies against the first Lessee, for the Lessee hath covenanted expressly for him and his Assigns, and this Personal Covenant cannot be transferred by the Acceptance of the Rent.

1 *Rol. Rep.* 359. 2 *Rol. Rep.* 63. *Po'h.* 136. *Godh.* 276. *Cro. Car.* 188, 380. 1 *Jones* 223. 1 *Sand.* 240. 1 *Brownl.* 20. *Style* 300. 2 *Mod.* 139. 1 *Sid* 402, 447. 2 *Keb.* 640.

3 *Lev.* 233. So if *A.* Leases to *B.* rendring Rent, and *B.* covenants to pay it, and after *B.* assigns to *C.* and *A.* grants the Reversion to *D.* and *D.* after accepts Rent from *C.* yet for Non-payment at another Day, *D.* may have an Action against *B.* it being upon an (a) exprels Covenant.

*Carth.* 178. S. C. cited. (a) *Brownl.* 20. 1 *Sid.* 447. S. P.

1 *Lev.* 215. Also an Assignee, who assigns over, is liable, and shall pay the Rent which incurred due before, and (b) during his Enjoyment.

*Raym.* 303. 1 *Salk.* 81. (b) Where such an Assignee was made liable in Equity, though the Privy of Estate was destroyed at Common Law. 1 *Vern.* 165.

*Carth.* 177. But in Covenant against *A.* as Assignee for Non-payment of Rent, he may plead, That before any Rent was due and payable, viz. on such a Day, he granted and assigned all his Term and Estate to *J. S.* who by Virtue thereof entred, and was possessed for the Residue of the Term; and this shall be a good Discharge, without alledging any Notice of the Assignment, or that the Lessor accepted *J. S.* as his Tenant.

*Tovey and Pitcher,* adjudged. 1 *Salk.* 80, 81. 2 *Vent.* 228. S. C.

### 5. Where an Assignee Shall take Advantage of a Covenant.

1 *Rol. Abr.* 521. As an Assignee shall be bound by a Covenant Real annexed to the Estate, and which runs along with it; so shall he take Advantage of such; and therefore, if the Lessor covenants to repair, or if he grants to the Lessee so many Estovers as will repair, or that he shall burn within his House during the Term; these, as Things appurtenant, shall go with it into whose Hand so ever it comes.

So if a Man Leases Land to another by Indenture, this Covenant in Law, created by the Word *Demise*, shall (c) go to the (d) Assignee of the (e) Term, and he shall have Advantage of it.

1 *Rol. Abr.* 521. *Dyer* 257. 4 *Co.* 80. 5 *Co.* 17. b. S. P. resolved. (c) So of Tenant by Statute-Merchant, &c. of a Term, &c. though they came to the Land by Act in Law. 5 *Co.* 17. a.— But not to an Assignee of a Lease by Estoppel only. *Moor* 419. *Cro. Eliz.* 373. (d) The Assignee of the Assignee, the Executors of the Assignee, the Executors or Administrators of every Assignee, are all comprised within this Word Assigns. 5 *Co.* 77. b. *Carth.* 519. (e) When the Estate passes, though by Parol, the Warranty and Covenants follow it, and the Assignee of the Estate shall have the Benefit thereof. *Cro. Eliz.* 373, 436.

*Moor* 27. But if one by Indenture Leases an House for forty Years, and the Lessee covenants with the Lessor, that he will sufficiently repair the House during the Term, and that the Lessor may enter every Year, to see if the Repairs are done; and if upon View of the Lessor it was repaired according to the Agreement, that then the Lessee should hold the House for forty Years after the first Term ended; and the Lessee grants to another *totum interesse, terminum & terminos quæ tunc habuit in tenementis*, and after the first Term ends, the Assignee shall not take Benefit of this Agreement.

*Skern's Case,* adjudged by three Judges against one, who held, That the Possibility was inherent to the Land and Term.

Upon Equality of Partition, if one Coparcener covenants to acquit the other and her Heir of Suit, the Assignee of the Land shall have Benefit of this Covenant. 5 Co. 18. Co. Lit. 384. b. S. P.

If *A.* seised of Lands in Fee, conveys it by Deed indented to *B.* and covenants with *B.* his Heirs and Assigns, to make any other Assurance upon Request, for the better Settlement of the Land, &c. and after *B.* conveys it to *C.* who conveys it to *D.* and after *D.* requires *A.* to make another Assurance according to the Covenant, and he refuses, *D.* shall have an Action of Covenant in this Case against *A.* by the Common Law, as Assignee to *B.* 1 Rol. Abr. 521. Midlemore and Goodal. Cro. Jac. 503, 505. 1 Jones 406. S. C.

If *A.* by Deed enfeoffs *B.* of certain Lands, reserving Rent, Fealty, and Suit of Court, and by the same Deed grants, that if the Feoffee shall be distrained, vexed, or charged for other Rents or Services, then he may enter and distrain for his Amends in other Lands; this is annexed to the Estate of the Land, and shall go with it to every Assignee. Moor 185. per Cur'.

If *A.* Leases an House to *B.* for Years, and covenants to repair, and that his Heirs and Assigns, may at all Times enter, and see in what Plight the same is; and if upon such View any Default shall be found in the not repairing, and thereof Warning shall be given to *B.* his Executors, &c. then within four Months after such Warning such Default shall be amended; and after, the House in Default of *B.* becomes ruinous, and *A.* grants the Reversion to *C.* who upon View of the House gives Warning to *B.* of the Default, &c. if it is not repaired, *C.* may have an Action against *B.* as Assignee of *A.* though the House became ruinous before *C.* was intitled to the Reversion; (a) for the Action is not founded upon the ruinous Estate of the House, but for not repairing within the Time appointed by the Covenant. 1 Leon. 61. Mascall's Case adjudged. Moor 242. pl. 380. S. C. adjudged.

tion upon a Breach of Covenant before his Time. Cro. Eliz. 863. 3 Leon. 51. 2 Vent. 278. — But upon a Breach after his Time, though his Estate is determined, he may. 1 Rol. Rep 80. Owen 152. 2 Bulst. 281.

If Lessee for Years covenants to leave the Houses in good Repair at the End of the Term, and the Lessor grants his Reversion to another, (b) though this Covenant is not to be performed during the Term, yet for a Breach thereof the Grantee of the Reversion may bring an Action, and there cannot be a more apt Covenant to run with the Land. Cro. Eliz. 599, 617. Gouldf. 175. S. C.

make a new Lease at the End of the Term, and the Lessor grants over his Reversion. Moor 150. 1 And. 82.

If *A.* Leases Lands to *B.* for 200 Years, and by the same Deed covenants for himself, his Heirs and Assigns, with *B.* his Executors and Assigns, that if *B.* is disturbed for respite of Homage, or inforced to pay any Charge, or Issues lost, that he shall withhold so much of his Rent as he shall be inforced to pay, and *A.* grants his Reversion to *C.* and *B.* assigns the Term to *D.* *D.* may take Benefit of this Covenant against *C.* for it runs with the Land. Cro. Car. 137. 1 Jones 242. S. C.

6. Of Covenants which bind by force of the Statute  
32 H. 8.

By the 32 H. 8. cap. 34. reciting, “Whereas divers had Leased Manors, &c. or other Hereditaments (c) for Life or Lives, or Years, by Writing, containing certain Conditions, Covenants and Agreements, as well on the Part of the Lessees and Grantees, their Executors and Assigns, as on the Part of the Lessors and Grantors, their Heirs and Successors; and whereas by the Common Law, no Stranger to any Condition or Covenant could take Advantage thereof, by Reason whereof all Grantees of Reversions, and all Grantees and Patentees of  
(c) Extends not to Gifts in Tail. Co. Lit. 215. Cro. Eliz. 863.  
“ the

“ the King, of Abbey Lands, could have no Entry or Action for any  
 “ Breach, &c. it is enacted, That all Persons Bodies Politick, their Heirs,  
 “ Successors and Assigns, which have, or shall have any Grant of our  
 (a) It extends “ (a) said Lord the King, of any Lordship, &c. Rents, Tithes, Por-  
 to his Suce- “ tions, or other Hereditaments, or any Reversion thereof which be-  
 cessors, tho’ “ longed to the Monasteries, &c. or which belonged to any other Per-  
 not named. “ son, &c. and also all other Persons, (b) (c) being (d) Grantees or  
 Co. Lit. 215. a. “ Assignees, (e) to, or (f) by our said Lord the King, or to, or by  
 (b) It extends “ any other Person or Persons, and the Heirs, (g) Executors, Successors  
 not to Gran- “ and Assigns of every of them, (b) shall and may have (i) like Advan-  
 tees by Fine “ tage by Entry for Non-payment of Rent, or for doing Waste or  
 till Attorn- “ (k) other Forfeiture; and the (l) same Remedy by Action only for  
 ment; for “ not performing other Conditions, Covenants and Agreements con-  
 it must be “ tained in the said Leases against the Lessees and Grantees, their Exe-  
 intended of “ cutors, Administrators and Assigns, as (m) the (n) Lessors and Gran-  
 such only as “ tors, their Heirs or Successors, ought, should, or might have had at  
 have had all “ any Time or Times.  
 Ceremonies “  
 by Law re- “  
 requisite. “  
 Co. Lit. 215.

5 Co. 112, 113. (c) Though after Breach, and before the Action brought, their Estate determines.  
 1 Rol. Rep. So. Owen 151. 2 Bulst. 281. (d) It extends to Grantees of Part of the Estate of the Re-  
 version, &c. Co. Lit. 215. a. Godb. 162. 1 Rol. Rep. So. Owen 151. 2 Bulst. 181. & vide 1 Leon. 252.  
 Moor 93. pl. 230.— But not to Grantees, &c. of the Reversion in Part of the Land. Co. Lit. 215.  
 Cro. Eliz. 833. Moor 98. (e) It extends to him that comes in by Limitation of an Use, though in the  
 Poss; for coming in by the Act and Limitation of the Party, he is a sufficient Grantee, &c. within the  
 Statute. Co. Lit. 215. Moor 98. 4 Leon. 27, 29.— But it extends to such as come in merely by Act in  
 Law, as the Lord upon an Escheat, Alienation, upon a Mortmain, &c. Co. Lit. 215. b.— Nor to  
 him who is in of another Estate. Moor 876. (f) But if a Copyholder by Licence of the Lord Leases  
 for Years, &c. and after surrenders the Reversion to the Use of another in Fee, who is admitted,  
 yet he is not a Grantee, &c. within the Act, for he is not privy to the Lease made by the Copy-  
 holder, nor in by him, but may plead a Grant of his Estate immediately from the Lord. *Brasier and*  
*Beal, Yelv. 222. per Curiam*, Upon the first opening. *Cro. Jac. 205.* Adjudged by two Judges, & vide  
*Cro. Car. 25, 44. Hob. 178.* But in the Case of *Glover and Cope, 3 Lev. 326.* It is adjudged, that such  
 Surrendree may have an Action of Covenant by this Act. (g) Lessee for twenty Years Leases for ten  
 Years, and his Lessee covenants, &c. and the first Lessee grants his Reversion, this Grantee is a suf-  
 ficient Assignee within the Statute. *Moor 525, 527. Cro. Eliz. 599, 617, 649. Gouldf. 175. Godb. 161.*  
 (h) Whether this doth not imply that the Grantor shall not, 3 *Lev. 155. dubitatur*, & vide 1 *Sid. 402.*  
 (i) But he shall not take Advantage of a Condition before he has given Notice to the Lessee. *Co. Lit.*  
*215. 5 Co. 113. b.—Secus of a Covenant. Godb. 262. Cro. Jac. 476. Bridg. 130.* (k) Viz. by Force of  
 a Condition incident to the Reversion, as Rent, or for the Benefit of the Estate, as for doing Waste,  
 not keeping Houses in Repair, &c. and not for the Payment of any Sum in Gross, Delivery of Corn,  
 &c. So as other Forfeiture shall be taken for other Forfeitures, like to these Examples put, viz.  
 Payment of Rent, and not doing Waste, which are for the Benefit of the Reversion. *Co. Lit. 215. b.*  
 & vide 5 *Co. 18. Moor 159, 243, 876. Owen 41. 1 And. 82. Raym. 250. 1 Sand. 159.* So if the *Proviso*  
 be to enter for Non-payment of a Rent, or gross Sum by way of Fine, the Grantee of the Reversion  
 shall not take Advantage of it; for the Condition cannot be apportioned. *Style 316.* (l) The  
 Privy of Action is transferred, and it may be brought in the County where the Covenant was made,  
 though the Lands lie in another. 1 *Sand. 237.* adjudged; but a Writ of Error was brought in *Cam’*  
*Seacc*, and it was after compounded. 1 *Sid. 401. 1 Lev. 259. 1 Vent. 10. & 3 Mod. 338.* and *Tit.*  
*Actions Local and Transitory.* (m) Therefore if the Conuzee of the Reversion before Attornment  
 bargains and sells to another, to whom the Lessee attorns, the Bargainee may, &c. though his Bar-  
 gainor could not. 5 *Co. 113. a.* (n) A. devises to B. for Years, rendering Rent, upon Condition to  
 re-enter for Non-payment; and after devises the Reversion in Fee to another, and dies; the Devisee  
 may take Advantage of the Condition, though there never was any Reversion, &c. in the Devisor.  
 2 *Leon. 33.*

And by the same Act it is enacted, “ That all Farmers, Lessees and  
 (o) But if “ Grantees of Lordships, &c. Rents, Tithes, Portions, or other Here-  
 Lessee for 30 “ ditaments for Years, Life or Lives, their Executors, Administrators  
 Years Leases “ and (o) Assigns, shall and may have like Action and Remedy against  
 to another “ all Persons, Bodies Politick, their Heirs, Successors and Assigns, which  
 for ten, he is “ by Grant of the King, or other Persons, shall have the Reversion of  
 no Assignee “ the same Lordships, &c. so letten, or any Part thereof, for any Con-  
 within the “ dition, Covenant or Agreement contained in their Leases, as the Les-  
 Statute; for “ sees, or any of them might or should have had against the Lessors and  
 he is not Ten- “ Grantors, their Heirs and Successors, Recovery in Value, by reason  
 nant to the “ of any Warranty in Deed or Law, only excepted.  
 first Lessor. “  
 Moor 93. “  
 pl. 230.

*A.* demised a House for a Term for Years to *B.* who assigned to *J. S.* Carth. 289, 290. Miggley and Gilbert v. Lovelace, adjudg. ed. the Lessor devised one Moiety of the Reversion to *C.* and the other to *D.* who granted the Reversion to *J. D.* after which Grant *C.* and *D.* brought Covenant against *J. S.* for Rent due before the Assignment by them; and it was held, 1. That *C.* and *D.* being Tenants in Common, may at their Election join or sever, as well in Debt as in Covenant, for the Rent; but if they sever, they must not each of them make his Demand of such a certain Sum, which amounts to a Moiety; but the Demand must be *de una medietate* of the whole Rent. 2. That this Action was maintainable for the Arrears of the Rent, notwithstanding the Reversion was out of the Plaintiffs; for though the Defendant was but an Assignee of a Term, yet the very Privity of Contract was transferred by the Statute of 32 H. 8. which gives the Action for and against Assignees; and the Contract still remains, though the Privity of Estate is gone.

### (F) How Covenants are to be construed.

ALL Contracts are to be taken according to the Intent of the Parties, expressed by their own Words, and if there be any Doubt in the Sense of the Words, such Construction shall be made as is most strong against the Covenantor, left by the obscure Wording of his Contract, he should find Means to evade and elude it; hence, (a) if *A.* covenants with *B.* That if *B.* marries his Daughter, he will pay him 20 *l.* per Ann. without saying for how long, yet it shall be for the Life of *B.* and not for one Year only; for by the Word *per Annum*, the (b) Meaning of the Parties appears to be, that it should continue longer than one Year; and this is the Construction that is most strong against the Grantor.

to deliver so many Yards of Cloth, and I cut it in Pieces, and then deliver it, this is a Breach; for the Law regards the real and faithful Performance of Contracts, and discountenances all such Acts as are done in fraudem Legis. *Raym.* 464.—So if the Condition of a Bond be to pay 50 *l.* though it is not said of Money, yet it must be so intended, and the Obligee cannot tender fifty Pounds weight of Stone. *1 Sid.* 151. Said by *Twisden*, That he remembered it to have been adjudged.—But if a Man covenants that his Son, then *Infra annos nobiles*, shall marry the Daughter of *B.* before such a Day, and he marries her accordingly, but at the Age of Consent disagrees to the Marriage, yet is the Covenant performed; for it was a Marriage, though subject to be defeated by Disagreement, and no other could be had within the Time. *Owen* 25. adjudged.

If two Men Lease for Years, and covenant that the Lessee shall enjoy free from all Incumbrances made by them, and after the Lessee is disturbed by *J. S.* to whom one of the Lessors had made a precedent Lease; this is a Breach, for they shall be taken severally, and not jointly only.

If a Man Leases for six Years, and covenants, that if he shall be disposed to Lease the Land after the Expiration of the Term of six Years, that the Lessee shall have the Refusal; and within the six Years he Leases to another; this is no Breach, because (c) out of the Words of the Covenant.

Years, and covenants that he shall enjoy it during the Term without Interruption, discharged from Tithes, and after the six Years he is sued for Tithes, this is a Breach; for the Meaning was, that he should be freed from Suits, and the Payment of Tithes; and a Suit after the Expiration of the Term, is as prejudicial as if before. *Cro. Eliz.* 916. 2 *Brownl.* 22.

If a Man Leased for nine Years by Indenture, Dated 1 Jan. 16 Car. 2. and covenanted to save the Lessee harmless from all Evictions during the Term, but this Deed was not delivered till 1 Jan. 17 Car. 2. if he was in Possession and evicted before the Delivery, this was a Breach; for during

during the Term shall be construed during the Term in Computation; and not only from the Time of the Delivery of the Deed, when it first commenced, in Point of Interest.

3 Lev. 264.  
Douse and  
Earl.  
2 Vent. 126,  
127. S. C.  
adjudged;  
because ta-  
ken as seve-  
ral Cove-  
nants; but  
Rokeby doubt-  
ed, it seem-  
ing to him to  
be all one

If *A.* Leases three Messuages to *B.* for forty-one Years, and *B.* covenants to pull them down, and erect three other in their Place, *ac etiam de tempore in Tempus* to maintain the Messuages agreed to be erected in sufficient Repair; *ac etiam* to repair the Pavements, &c. *ac etiam dicta premissa*, & *Domos superinde fore erect'*, at the End of the Term to leave in good Repair; and after *B.* pulls down the three Houses, and builds five, he must leave them all in good Repair at the End of the Term; for though by the first Covenant he is bound only to repair, &c. the Messuages *agreat' fore erect'*, yet by the last Covenant he is obliged to leave in good Repair *Domos superinde erect'* indefinitely, which extends to all Houses which shall be built upon the Premises during the Term.

Covenant, and that the subsequent Matter concerning leaving the Houses in good Repair, must be refrained to, and understood of, those agreed to be built.

3 Lev. 265.  
per Curiam.

So if a Man takes a Lease of a House and Land, and covenants to leave the demised Premises in good Repair at the End of the Term, and he erects a Messuage upon Part of the Land, besides what was before, he (*a*) must keep or leave this in good Repair also.

(*a*) S. P. ad-  
judged be-  
tween *Brown* and  
*Blunden*, *Skin.* 121. For it is a continuing Covenant, and though the House had no actual, yet it had a potential, Being at the Time of the Lease.

Carth. 135.  
Giles and  
Hooper.

If a Lease be made for Years, rendring 80 *l.* per Annum Rent, free and clear from all manner of Taxes, Charges and Impositions whatsoever, the Lessee is bound to pay the whole Rent without any manner of Deduction, for any old or new Tax, Charge or Imposition whatsoever.

1 Salk. 198.  
Brewster and  
Kitchell, ad-  
judged.  
Carth. 438.  
S. C.  
5 Mod. 368.  
S. C.  
(*b*) Which  
must be pre-  
sumed to  
have been  
made before  
the Deed

So where *A.* by Deed, Dated 1649. granted a Rent-charge of 40 *l.* per Annum to *B.* and his Heirs, and on the same Deed there was an (*b*) Indorsement, that the Rent was to be paid clear of all Taxes; by the 3 *W. & M.* 4 *s.* per Pound is laid upon Land, and Power given to the Tenant to deduct 4 *s.* in the Pound, with a *Proviso*, not to alter the Covenants or Agreements of Parties; and it was held, That such a Covenant, if made in the Year 1640, would not have freed the Rent-charge from the Taxes imposed by those Acts, because there was no such Parliamentary Tax in Being, or known at that Time; but because there were such Taxes in the Year 1645. which was before the Grant, therefore this Covenant must be construed to extend to them.

was executed, and so Parcel thereof. *Carth.* 439. *per Cur'.*

### (G) Where the Principal, and all ancillary Covenants shall be said to be void and extinguished.

6 H. 4. 1.  
1 Rol. Abr.  
522.

(*c*) But if he  
had not re-  
taken such

IF a Man covenants with Tenant for Life of an House, to find a Chaplain to Sing, &c. every *Saturday* during the Life of the Covenantee, if the Covenantee surrenders the House, and (*c*) retakes an Estate for Years, yet the Covenant remains.

Estimate, *Q.* 1 *Rol. Abr.* 55.

If *A.* grants a Rent-charge to *B.* for the Life of *C.* *habend'* to *B.* his Heirs and Assigns, to the Use of *C.* and *A.* covenants to pay it *ad usum C.* if the Rent is behind, *B.* may have an Action of Covenant against *A.* for though the Rent-charge is executed by the Statute, and the Power of distraining, as incident thereto, transferred to *C.* yet the Covenant being collateral, is not transferred nor discharged, but remains with *B.*

1 Mod. 223.  
Boscawen and Herle, adjudged.  
2 Mod. 138.  
S. C.

If a Man hath good Title to Lands by Virtue of a Fine, and sells the same, and covenants with the Vendee, his Heirs and Assigns, that he shall enjoy against him and *B.* and all claiming under them; and after by an Act of Parliament, reciting, that *B.* had settled this Estate upon *C.* and that certain Persons had unduly procured the said Fine from her, it is enacted, The Fine shall be void, and that every Person may enter as if no such Fine had been; and after one enters, claiming Title under *C.* this is a Breach of the Covenant; for the Act makes no new Title, but removes the Obstruction of the Old, and it was said, that doubtless *B.* was named in the Covenant for this Purpose, in Case this Fine unduly obtained should be avoided.

2 Lev. 26.  
Luy and Lecington.  
1 Vent. 175.  
2 Keb. 831.  
S. C.

As to Covenants which are repealed or extinguished by Act of Parliament, the following Diversities are laid down, *viz.* Where *A.* covenants not to do an Act or Thing which was lawful to do; and an Act of Parliament comes after, and compels him to do it, the Statute repeals the Covenant; so if *A.* covenants to do a Thing which is lawful, and an Act of Parliament comes and hinders him from doing it, the Covenant is repealed; but if a Man covenants to do a Thing which then was unlawful, and an Act comes and makes it lawful to do it, such an Act of Parliament does not repeal the Covenant.

1 Salk. 198.

If *A.* being a Custom-House Officer by Patent, makes *B.* his Deputy, and covenants, *inter alia*, to surrender the old Patent, and procure a new one to *B.* and himself before a Day, and that if *B.* dies before *A.* that *A.* shall pay 300 *l.* to the Executors of *B.* and gives Bond for the Performance thereof; admitting these Covenants void (*a*) by the 5 *Ed.* 6. *cap.* 16. the whole Bond is void, though some of the Covenants are not void or illegal.

Cro. Eliz. 529.  
Lee and Colshill. 2 And. 55. S. C.  
By the Report of which it appears, that by the A-

greement *B.* was to pay 600 *l.* and to allow *A.* 100 *l.* yearly for this Deputation, and adjudged; because the Obligation is one intire Act and Deed of the Party; & *vide* 2 *And.* 207, 208. 3 *Co.* 82. S. C. cited. (*a*) So where a Sheriff takes a Bond for a Point against 23 *H.* 6. and also for a just Debt, the whole Bond is void according to the Letter of the Statute; for a Statute is a strict Law, but the Common Law divides according to common Reason; and having made that void which is against Law, lets the rest stand. *Hob.* 14. *per Cur.* *Moor* 856. *Godb.* 213. 10 *Co.* 100. *Latch* 143. 1 *And.* 35. *Brownl.* 282. 1 *Vent.* 237. *Carter* 230.

If the principal Thing to be performed, as the conveying an Estate, &c. be void, further Covenants which are relative and dependant thereon are so likewise.

1 *Sd.* 309.  
*Yelv.* 19.  
*Style* 357.

So if Lessee for Years grants so much of the Term as shall be to come at the Time of his Death, and covenants that the Lessee shall enjoy it, although he gives Bond for Performance of Covenants, yet the principal Thing, *viz.* the Grant, being void for Uncertainty, (*b*) both Bond and Covenants are void likewise.

1 *Lev.* 45.  
*Caponhurst* and *Caponhurst.*  
*Raym.* 27.  
S. C.

they are several Deeds, yet they make but one Assurance, and are but one Contract. 4 *H.* 7. 6. 20 *H.* 6. 293. *Bro. Obligation* 6. *Dyer* 4. 28. *Hob.* 168.

(*b*) For tho'  
1 *H.* 7. 6.

But where the Dean and Chapter of *Norwich*, 8 *Eliz.* leased to *B.* for ninety-nine Years, and after in 42 *Eliz.* they Leased to *C.* for three Lives, and covenanted to save him harmless against *B.* if he is disturbed by *B.* he may have an Action of Covenant against the Dean and Chapter, though the Lease is void; because the Covenant is for a Thing collateral, as that the Lessor is Owner, &c. and the Covenant was broke immediately upon sealing the Lease to *C.*

*Owen* 136.  
*Waller* and the Dean and Chapter of *Norwich.*  
1 *Brownl.* 21.  
*Moor* 877.  
S. C. & *vide* 2 *Brownl.* 134, 136, 138, &c.

1 Salk. 199.  
Northcote and  
Underbil, ad-  
judged.

So where in Covenant the Plaintiff declared, that the Defendant by his Deed did grant, bargain and sell to the Plaintiff and his Heirs, &c. Provided, That if the Grantor paid so much Money, it should be lawful for him to re-enter; and that he covenanted to pay the said Money; and the Breach assigned was the Non-payment of the Money; although it was admitted that nothing passed by the Deed for want of Inrollment; yet the Covenant in this Case being to pay Money, it is a distinct, separate, and independent Covenant; and therefore not material whether any Estate passed or not.

### (H) What shall be deemed a Breach, or construed a good Performance.

1 Sid. 48.  
Robinson and  
Ampton, ad-  
judged.

Raym. 25.

1 Keb. 103,

118. S. C.

(a) So if A.

is bound to

B. in an Ob-

ligation con-

ditioned, That

A. shall deliver

to B. before such

a Day, an Obliga-

tion, in which B.

is bound to A.

if A. sues B. upon

the Obligation, and

recovers, and after,

before the Day,

delivers it to B.

this is no Perfor-

mance of the Con-

dition; for notwith-

standing the Deliv-

ery of the Obliga-

tion, he may take

Benefit of the Judg-

ment, and so the

Intent of the Con-

dition is not per-

formed. Cro. Eliz.

7. And to the same

Purpose, vide Moor

709. Gouldf. 177.

1 Leon. 52.—

So in Case of a

Promise. 1 Rol.

Abr. 448.

5 Co. 20, 21.

Sir Anthony

Scot and

Main.

2 And. 18.

Moor 452.

Cro. Eliz. 450.

Poph. 109. S. C.

adjudged. (b) So

if the Lessee assign

his old Lease, he

disables him-

self to take Benefit

of the Covenant. 1

**I**F *A.* enters into a Statute to *B.* and afterwards *B.* by his Deed covenants, That upon Payment of such a Sum at a Day to come, that the Statute should be void, and that he would deliver it in, and cause it to be vacated; if before the Day *B.* sues Execution, *A.* may bring Covenant; and it is no Objection, that nevertheless *B.* at the Day, may deliver it in, and cause it to be vacated; for it is an (a) apparent present Breach; for after the Statute was set a-foot, and had its Course, it did *transire in rem Judicatam*, and could not be vacated.

And to the same Purpose, vide Moor 709. Gouldf. 177. 1 Leon. 52.— So in Case of a Promise. 1 Rol. Abr. 448.

5 Co. 20, 21.

Sir Anthony

Scot and

Main.

2 And. 18.

Moor 452.

Cro. Eliz. 450.

Poph. 109. S. C.

adjudged. (b) So

if the Lessee assign

his old Lease, he

disables him-

self to take Benefit

of the Covenant. 1

Bulst. 22.

Raym. 464.

Griffith and

Gooland.

2 Jones 191.

S. C. adjudg-

ed.

Skin. 39. S. C.

(c) If one co-

venants to

leave all the

Hops are put into

them. Timber up-

on the Ground at

the Expiration of

a Term, and after

cuts it down, it is

a Breach of Cove-

nant, tho' he

carry it not away;

but if a Stranger

cuts it down, it is

no Breach of Cove-

nant. Skin. 40.

If *A.* being a common Brewer, covenants that *B.* shall have seven Parts of his Grains made in his Brew-house for seven Years; and after *A.* puts in great Quantities of Hops into his Malt, of which the Grains were made, by Means whereof the Grains are spoiled, this is a Breach; because in all Contracts the (c) Intention of the Parties is to be considered; and here it was the Intention of the Parties that *B.* should have the Grains for the Use of his Cattle; and they will not eat them when Hops are put into them.

Timber upon the Ground at the Expiration of a Term, and after cuts it down, it is a Breach of Covenant, tho' he carry it not away; but if a Stranger cuts it down, it is no Breach of Covenant. Skin. 40. per Cur.— So if a Man covenants to deliver a Horse, and he poisons him, and then delivers him, this is a Breach. Skin. 40. per Cur'.

2 Jones 195.

Nash and

Ashton, ad-

judged.

If two Men, upon Sale of their Wives Lands, covenant that they and their Wives have good Right to convey Lands, and to make further Assurance; if one of the Women is under Age, this is a Breach, for she hath not Power to convey the Estate according to the Covenant.

If the Lessor covenants with his Lessee for Years, that he quietly and peaceably shall enjoy the Land, without the Impediment or Disturbance of the Lessor, if the Lessor exhibits a Bill in Chancery against the Lessee, to restrain his committing Waste, this is no Breach, though the Bill be dismiss'd with Costs, because the Suit does not relate to his Title or Possession. 2 Vent. 213. adjudged.

If a Parson leases his Rectory for Years, and covenants that the Lessee shall have and enjoy it during the Term, without Expulsion, or any thing to be done by the Lessor, and after, for not reading the Articles, he is *ipso facto* deprived by the Statute 13 Eliz. and the Patron presents another, who ousts the Lessee, this is no Breach; for he was not ousted by Reason of any Act done by the Lessor, but for a (a) Non-feasance; and so it is out of the Compass of the Covenant. 4 Leon. 39. adjudged.

dring Rent, with a Condition of Re-entry for Non-payment, leases Part for a less Term, and covenants that his Lessee shall enjoy, without Impeachment of him, or of any other, occasioned by his Impediment, Means, Procurement or Consent, and after he neglects to pay his Rent, upon which the first Lessor enters, &c. this is a Breach. 1 Bulst. 182, 183. adjudged.

Tenant in Tail of a Rent, purchases the Land out of which it issues, and makes a Feoffment thereof, and covenants that it is free from all former Incumbrances, this is a Charge, though not *in esse*, but in Suspense; for if Tenant in Tail dies, his Issue may distrain, and then the Covenant is broke. Owen 7. per Cur', but vide Co. Lit. 389. a.

If *A.* be Tenant in Tail, the Reversion in the King, and *A.* leases for Years, and covenants that the Lessee shall enjoy it against all Persons, and without the Interruption of any, except the King, his Heirs and Successors, *existentibus Regibus vel Reginis Angliæ*, and the King grants his Reversion to *B.* and *A.* dies without Issue, and *B.* enters, the Covenant is broke; for that extends only to the King and his Successors, in which Words his Patentee is not included. Cro. Eliz. 517. Woodruff and Greenwood, adjudged.

If *A.* by the Means and Procurement of *B.* by Fine conveys Lands to *B.* and his Wife, and the Heirs of *B.* and after *B.* leases the same for Years, and covenants that the Lessee shall quietly enjoy, during the Term, without the Disturbance of him, his Heirs or Assigns, or of any other Person, by or through his Means, Title or Procurement, and *B.* dies, and his Wife enters, this is a Breach; for she claims by the Means of the Baron; and therefore it is within the Covenant. Cro. Fac. 657. Butler and Swinnerton, adjudged per totam Curiam. Palm. 339. S. C. adjudged, ab-

sente Chamberlain, though objected, by his Means and Procurement, must refer to subsequent Acts. 2 Rel. Rep. 286. S. C. adjournatur.

## (1) Where the Breach shall be said to be well assigned.

IF in an Action of Covenant, the Plaintiff declares upon a Lease for twenty-one Years to the Defendant, and that he covenanted to pay 20*l.* per Ann. by equal Portions, at Michaelmas and Lady-Day, and assigns for Breach, that he did not pay the Rent, *debit' ad præd' separalia festa durante termino*, this Breach is (b) sufficiently assigned; and it shall be intended that the Rent was not paid at either of those Days. 1 Lev. 78. Coniers and Smith.

the Breach was generally alledged, without shewing in what; 1 Brownl. 23. adjudg'd, it was help'd after Verdict; so 2 Mod. 176. 2 Jones 125. where the Covenant was to repair all the Pales, except those on the West-Side; and the Breach assigned was, in not repairing the Pales, contra formam conventionis. —But where the Breach assigned, or Performance pleaded, must pursue the Words and Substance of the Covenant or Condition. 1 Leon. 245. Cro. Eliz. 202, 203, 780. Mar. b. 17. All. 60. 2 Mod. 229.

*Cro. Eliz.*  
830.  
*Cutler and*  
*Brewster, ad-*  
*judged.*

If in Debt upon an Obligation, the Condition whereof is of three Parts. 1. That he shall serve the Plaintiff well. 2. That he shall duly Account. 3. That within three Months after Notice he shall make Satisfaction for all Losses sustained by his Apprenticeship, the Defendant pleads Performance specially, and the Plaintiff assigns for Breach, that upon Account he was found in Arrear 60*l.* which he received and converted to his own Use, and so had not served the Plaintiff well; this is a good Replication, without alledging Notice; for though it might be alledged as a Breach of the third Part of the Condition, yet the Conversion of the Money to his own Use, may be alledged as an ill Service.

*Cro. Car.* 176.

In an Action of Covenant several Breaches may be assigned; otherwise in Debt upon an Obligation, conditioned to perform Covenants.

But now by the 8 & 9 *W. 3. cap. 11.* it is enacted, "That in all  
" Actions upon any Bond or Bonds, or on any Penal Sum, for  
" Non-performance of any Covenants or Agreements in any Indenture,  
" Deed or Writing contained, the Plaintiff may assign as many Breaches  
" as he shall think fit; and the Jury, upon Trial of such Action or Ac-  
" tions, shall and may assess not only such Damages and Costs of Suit  
" as have heretofore been usually done in such Cases, but also Damages  
" for such of the said Breaches so to be assigned, as the Plaintiff,  
" upon the Trial of the Issues, shall prove to have been broken, and  
" that the like Judgment shall be entred on such Verdict as heretofore  
" hath been usually done in such like Actions; and if Judgment shall  
" be given for the Plaintiff, on a Demurrer, or by Confession, or *nihil*  
" *dicit*, the Plaintiff upon the Roll may suggest as many Breaches of  
" the Covenants and Agreements as he shall think fit, upon which shall  
" issue a Writ to the Sheriff of that County where the Action shall  
" be brought to summon a Jury to appear before the Justices or Justice  
" of Assise, or *Nisi prius* of that County, to inquire of the Truth of  
" every one of those Breaches, and to assess the Damages which the  
" Plaintiff shall have sustained thereby, in which Writ it shall be com-  
" manded to the said Justices, &c. that he or they shall make a Return  
" thereof to the Court from whence the same shall issue at the Time,  
" in such Writ mentioned; and in Case the Defendant or Defendants,  
" after such Judgment entred, and before any Execution executed,  
" shall pay unto the Court where the Action shall be brought, to the  
" Use of the Plaintiff or Plaintiffs, or his or their Executors or Admi-  
" nistrators, such Damages so to be assessed, by Reason of all or any of  
" the Breaches of such Covenants, together with the Costs of Suit,  
" a Stay of Execution on the said Judgment, shall be entred upon Rec-  
" ord; or if by Reason of any Execution executed, the Plaintiff or  
" Plaintiffs, or his or their Executors or Administrators, shall be fully  
" paid or satisfied all such Damages so to be assessed, together with his  
" or their Costs of Suit, and all reasonable Charges and Expences for  
" executing the said Execution, the Body, Lands or Goods of the De-  
" fendant, shall be thereupon forthwith discharged from the said Exe-  
" cution, which shall likewise be entred upon Record, but notwith-  
" standing in each Case such Judgment shall remain, continue, and be  
" as a farther Security to answer to the Plaintiff or Plaintiffs, and his  
" or their Executors or Administrators, such Damages as shall or may  
" be sustained for further Breach of any Covenant or Covenants in the  
" same Indenture, Deed or Writing contained, upon which the Plaintiff  
" or Plaintiffs may have a *Scire facias* upon the said Judgment, against  
" the Defendant, or against his Heir, Terre-tenants, or his Executors  
" or Administrators, suggesting other Breaches of the said Covenants or  
" Agreements, and to summon him or them respectively to shew Cause  
" why Execution shall not be had or awarded upon the said Judgment,  
" upon which there shall be like Proceeding, as was in the Action of  
" Debt

“ Debt upon the said Bond or Obligation, for assessing of Damages  
 “ upon Trial of Issues joined upon such Breaches, or Enquiry thereof,  
 “ upon a Writ to be awarded in Manner as aforesaid, of such future  
 “ Damages, Costs and Charges as aforesaid, all further Proceedings on  
 “ the said Judgment are again to be stayed, and so *toties quoties*; and  
 “ the Defendant his Body, Lands or Goods, shall be discharged out of  
 “ Execution, as aforesaid.

If *A.* leases to *B.* for Years, and covenants that he hath full Power and lawful Authority to lease, &c. and in an Action upon this Covenant, *B.* says he had (*a*) not full Power and lawful Authority to lease, &c. the Breach is well assigned, for he hath well pursued the Words of the Covenant *negative*; and what Estate he had lies more in the Knowledge of the Lessor than Lessee; and therefore he ought to shew what Estate he had at the Time of making the Lease, that it may appear that he had full Power, &c.

9 Co. 60, 61.  
*Bradshaw*  
 and *Salmon*.  
*Cro. Jac.* 304.  
 S. C. ad-  
 judged, and  
 that the De-  
 fendant must  
 shew he was  
 seised in  
 Fee, and

then the Plaintiff must shew a Special Title in some Body else; but the Covenant being general, the general Assignment of a Breach *prima facie* is good. (*a*) That he was not lawfully seised in Fee of an indefeasible Estate. *Cro. Jac.* 369. & *vide Raym.* 14, 15.

If *A.* leases to *B.* for Years, and *B.* covenants to repair during the Term, and at the End of the Term to leave the Premises well repaired, in an Action upon this Covenant, it may be assigned for a Breach, that he did not leave them well repaired at the End of the Term; and if the Defendant pleads that at the End of the Term he delivered them up well repaired, then if the Plaintiff will assign a Breach, he ought to shew particularly in what Part it was not repaired, so that the Defendant may give a particular Answer thereto; but it was said that in a Declaration in Covenant, it sufficeth to assign the Breach as (*b*) general as the Covenant is.

*Cro. Jac.* 171  
*Hancock* and  
*Field*.

(*b*) *Cro. Jac.*  
 661. S. P.

In an Action of Covenant, the Plaintiff declared that Queen *Elizabeth* leased a Messuage, &c. to the Defendant for Twenty-one Years, and that the Defendant, his Executors and Assigns, were thereby bound to repair and leave the Premises at the End of the Term in good Repair, and that the Queen granted the Reversion to *B.* and that *B.* granted the same to the Plaintiff; and for not repairing, &c. this is a good Declaration, though the Plaintiff is not named Assignee.

*Cro. Jac.* 240.  
 Lord *Ewre*  
 and *Strick-*  
*land*, ad-  
 judged.

If in an Action of Covenant the Plaintiff declares, whereas by Indenture, bearing Date, &c. *Testatum existit*, that the Plaintiff had demised to the Defendant a Messuage and Garden for two Years, and the Defendant, by the said Indenture, covenanted not to erect any Building in the Garden, &c. and avers *in facto*, that he did erect, &c. this is a good Declaration, though he does not expressly say *Quod dimisit & convenit*; and it is the (*c*) usual Course in *B. R.* to declare in this Manner.

*Cro. Car.* 188.  
*Batibolor* and  
*Gaye*, ad-  
 judged.

*Cro. Eliz.* 195.  
*Cro. Jac.* 383.  
 S. P. ad-  
 judged, &  
*vide* 1 *Sid.*

375. where the Plaintiff declares *per quoddam scriptum per quod Testatum existit*, &c. (*c*) And so are the Precedents in *B. Cro. Eliz.* 195. 2 *Roll. Rep.* 210, 211.

If Baron and Feme being seised of an House, to them and the Heirs of the Baron, lease to *A.* and he covenants with them and the Heirs and Assigns of the Baron, to repair, &c. and the Baron and Feme convey the Inheritance to *B.* in an Action upon this Covenant, *B.* may shew the whole Matter, and conclude *Quod Actio ei accrevit*, as Assignee of the Baron, without shewing the Death of the Feme; for the Estate for Life being transferred with the Fee, it is drowned therein.

*Cro. Car.* 285.  
*Major* and  
*Talbot*, ad-  
 judged.

1 *Fones* 305.  
 S. C. ad-  
 judged; but  
 by the Re-  
 port thereof,

the Baron was dead, and the Feme and the Heir of the Baron conveyed, and the Action was brought as Assignee of the Heir, and said that it was no Benefit to the Lessee to have the Estate for Life continue, and therefore, &c.

- 2 *Mod.* 311. If in an Action of Covenant the Plaintiff declares upon an Indenture, in which the Defendant had covenanted that he was seised in Fee, &c. and would free the Premises from all Incumbrances, and that the Plaintiff should quietly enjoy, and for Breach assigns an Entry and Eviction by a Stranger, & sic conventionem suam (in the singular Number) fregit, this is well enough; (a) for *conventio est nomen collectivum*, and if twenty Breaches are assigned, the Count is *de placito quod teneat ei conventionem*.  
*After and Maceen, adjudged.*
- (a) *Quod teneat, &c.* & Breaches are assigned, the Count is *de placito quod teneat ei conventionem*.  
*de conventionem fracta*, all one. *Hard.* 178.—If a Breach of Covenant is sufficiently alledged, the Plaintiff need not conclude & sic non tenuit conventionem in hoc, &c. for that is but Repetition. *Cro. Jac.* 298. *adjudged.* 2 *Mod.* 229. S. P. *adjudged.*
- Cro. Jac.* 446. If in Action of Covenant the Plaintiff declares upon a Lease in London, of a Messuage in *D. in Com' S.* and that the Lessee covenanted to repair, &c. and assigns for a Breach, that *apud London* he permitted the Houses to decay, &c. this is naught, because the Breach is in a Matter local, and not transitory.  
*Sheers and Britton, adjudged.*
- 3 *Lev.* 170. If in an Action of Covenant the Plaintiff declares upon a Covenant, to find the Plaintiff with Meat, Drink, Apparel, and other Necessaries, and Assigns the Breach as general as the Covenant, viz. that he did not find him with Meat, Drink, Apparel, and other Necessaries, this is good, without shewing in particular what other Things are necessary, and the *alia necessaria* shall be intended small Things, as Trimming, Washing, &c. which would be too long to insert, and the Breach being assigned in the Words of the Covenant, it is sufficient.  
*Protter and Burdet, adjudged.*  
 2 *Med.* 69, 70. *adjudged cont.*  
*Cro. Jac.* 486.
- 1 *Lev.* 94. So in Debt, upon an Obligation conditioned to satisfy for all Goods that an Apprentice shall Waste, in his Replication, the Plaintiff assigned for Breach, that he had wasted *diversa bona ad valentiam 100l.* and *adjudged* that it was good, without shewing in particular, what the Goods were; for (b) the Penalty of the Obligation is to be recovered upon any Breach; but said that it would be otherwise in Covenant, where there is to be a Recompence for the Damages.  
*Frenb and Pierce, adjudged.*  
 (b) *Vide supra S. & 9 W. 3.* and 1 *Salk.* 137, 138.
- Yelv.* 226. If in Debt upon an Obligation conditioned to save the Plaintiff harmless from all Charges and Troubles, by Reason of the Last Will of *A.* or any thing therein mentioned, touching one *B.* or any Legacy to her given, &c. the Defendant pleads *non Damnificatus*, and the Plaintiff replies that he paid 60*l.* to *B.* for a Legacy, &c. this is no good Replication; for he ought to have shewed that a Legacy of 60*l.* was given her by the Will; for though the Will is recited in the Date, against which Recital the Defendant cannot say he made no such Will, yet the Legacy given to *B.* is not recited, but in general against which the Defendant may take a Traverse.  
 1 *Brownl.* 117.  
 2 *Bullst.* 19.  
 S. C. & *vide Cro. Jac.* 259.
- 1 *Jones* 218. If *A.* covenants to permit *B.* his Heirs and Assigns, to take and enjoy the Rents, Issues and Profits of certain Lands, and in an Action of Covenant, the Plaintiff assigns for Breach, that *A.* took the Profits, & *adjudged* that it was good, without shewing in particular, what the Goods were; for (b) the Penalty of the Obligation is to be recovered upon any Breach; but said that it would be otherwise in Covenant, where there is to be a Recompence for the Damages.  
*Symons and Smith.*  
*Cro. Car.* 176. S. C. & *vide Hard.* 132.  
 (a) *But non permittit alone* is too general. 8 *Co.* 89. b. 91. b. & *vide 1 And.* 137. 2 *Vent.* 278.
- 1 *Mod.* 223. If *A.* grants a Rent to *B.* and his Heirs, for the Life of *C.* to the Use of *C.* and covenants with *B.* to pay the Rent *ad opus & usum* of *C.* and in an Action upon this Covenant, *B.* assigns the Breach, in not paying the Rent to him *ad opus & usum* of *C.* this Breach is well assigned in the Words of the Covenant, though a (c) Negative Pregnant.  
 2 *Mod.* 138. S. C. *adjudged* and said that if it was paid to *C.* which is a Performance in Substance, the Defendant ought to have pleaded it. (c) For this *vide 2 Lecn.* 197.

If in an Action of Covenant the Plaintiff declares upon a Charter-Party, by which the Plaintiff, being Master of a Ship, was to pay two Parts of the Port-Charges, and the Factor of the Defendant the other Part, and the Plaintiff shews that he sailed from L. to C. and there paid all the Port-Charges, viz. two Parts for himself, and the other Part for the Defendant, and that the Defendant had not repaid him; this Breach is well assigned; for when the Plaintiff says he paid the third Part, it shall not be intended the Defendant did, but that the Plaintiff was necessitated to pay it, or otherways his Ship would have been stayed in the Port.

In Covenant, which was that the Defendant should make out a good Title in Law and Equity, before such a Time, to the Satisfaction of the Plaintiff, his Heirs or Assigns, or to his or their Counsel learned in the Law; the Breach was assigned in the very Words of the Covenant; and it was objected, that the Covenant, being in the (a) Disjunctive, viz. *to satisfy the Plaintiff or his Counsel*, he had his Election, and therefore the Plaintiff ought to have given Notice who his Counsel was, before which Time the Defendant could not satisfy him; but it was resolved that the Breach, being in the very Words of the Covenant, was sufficient; and (b) if the Truth was that the Defendant did not know who the Plaintiff's Counsel was, he should have set it forth in pleading.

If an Assignee of a Term has a Covenant from the Assignor, that he shall quietly enjoy, free and clear from all Taxes, and all Arrears of Rent, &c. though there be Rent Arrear, yet he cannot assign this as a Breach of the Covenant; for the Rent being Arrear, is no Damage to him, unless he be sued or charged therewith; and if paid at any Time, before he is damnified, it is sufficient for him.

So if a Counter-Bond or Covenant be given to save harmless from a Penal Bond, after the Condition of the Obligation be broken, or to save harmless from a single Bill, without a Penalty, the Counter-Bond cannot be sued without a special Damnification.

But where the Counter-Bond or Covenant is given to save harmless from a Penal Bond, before the Condition broken, there if the Penal Sum be not paid at the Day, and so the Condition not preserved, the Party to be saved harmless does by this become liable to the Penalty, and so is damnified, and the Counter-Bond forfeited.

The Defendant covenanted to pay so much *per Chaldron* for all Coals laden either at *Newcastle*, or upon the River *Tyne*, and brought to *London*; and the Breach assigned was, that the Coals were laden on such a Ship *infra portum de Tinnmouth*, viz. at *North Shields*, and brought from thence to *London*; and on Demurrer, the Court inclined that the Breach was not well assigned, for that they could not take Notice Judicially, that *Tinnmouth* is upon the River *Tyne*, but gave the Plaintiff Leave to discontinue upon Payment of Costs.

2 Jones 186.  
Bellamy and  
Ruffel, ad-  
judged.

Carth 124.  
Rawlins and  
Vincent, ad-  
judged.

(a) Vide Cro.  
Eliz. 348.

5 Mod. 135.  
1 Salk. 139.

(b) Vide  
1 Mod. 233.

1 Salk. 196.  
Griffith and  
Harrison, ad-  
judged.

1 Salk. 196,  
197.  
Per Cur'.

1 Salk. 197.  
Per Cur'.

5 Mod. 352.  
Toddard and  
Middleton.

## (K) Where the Performance shall be said to be well set forth and pleaded.

*Co. Lit.* 303. *b.* **I**F a Man is bound to perform all the (a) Covenants in an Indenture, *Kelw.* 95. if they are all in the Affirmative, he may plead Performance thereof generally. *1 Leon.* 136. *Palm.* 70.

*1 Lev.* 303. S. P. (a) But in Debt upon an Obligation, conditioned to do several Things in the Condition mentioned, the Defendant cannot plead Performance generally; but ought to plead to every Thing particularly by itself. *1 Lev.* 303. & *vide 1 Sid.* 215. *Kelw.* 95. *b.*—*Quod conditio nunquam infracta fuit*, is naught. *2 Vent.* 156.

*Co. Lit.* 303. *b.* But to (b) such as are in the (c) Negative, he (d) must plead Specially, (for a Negative cannot be performed) and to the rest Generally. *Moor* 856. *Cro. Eliz.* 691.

*Palm.* 70. (b) But if the Negative Covenants are all void and against Law, and the Affirmative good and lawful; he may plead Performance generally, and the Court shall take Notice that the Negative Covenants are void and against Law. *Moor* 850. *Godb.* 212. *Hob.* 12, 13. (c) Unless the Negative Covenant is only in Affirmance of the affirmative Covenant precedent. *1 Sid.* 87. (d) But it is but Matter of Form, and helped upon a General Demurrer. *Cro. Eliz.* 232. *1 Leon.* 311. & *vide All.* 72. *Stile* 63.

*Co. Lit.* 303. *b.* If any of them are in the Disjunctive, (e) he must shew which Part *Sav.* 120. S. P. he hath performed. *arguendo.*

*Cro. Eliz.* 560. *Palm.* 70. S. P. and if Performance generally is pleaded, it is naught upon a general Demurrer; for that the Court cannot tell which Part he hath performed. *Cro. Eliz.* 232. *1 Leon.* 311. (e) But if the Condition of an Obligation be to perform the Award of *J. S.* and he awards the Obligor to pay 100 *l.* or to procure a Stranger to be bound in 200 *l.* &c. the Defendant may plead Performance Generally, because one Part is void; and it will be intended that he pleads Performance of that Part which he was bound to perform, and not the other Part. *Sav.* 120.

*Co. Lit.* 303. *b.* If any of them are to be done (f) of Record, the Performance thereof (f) As to of must be shewed specially, and it cannot be involved in the general levy a Fine. Pleading.

*Cro. Jac.* 560.

*2 Rel. Rep.* 159. *Palm.* 70. S. P. adjudged, and the Reason given, because the Record shall be tried by itself, and its Credit shall not be examined by a Jury; and perhaps the Plaintiff will reply, that all the Lands are not comprised in the Fine, or other Matter upon which the Fine shall be examined.

*2 Co.* 4. *a.* If in Debt upon an Obligation conditioned that the Plaintiff shall enjoy certain Lands (g) discharged, otherwise saved harmless (h) from all Incumbrances, the Defendant pleads that the Plaintiff hath enjoyed the

*Cro. Jac.* 363. Lands discharged, and kept indemnified from all Incumbrances; this *Winch* 9. Plea is naught; for being in the Affirmative (i) it ought to have been *March* 121. shewed

adjudged. (g) If the Condition be to Acquit, Discharge and save Harmless from such a Bond, *non Damnificatus*. *1 Leon.* 71.—But in an Action upon a Bond, condition'd to Acquit, Discharge and save Harmless, a Parish from a Bastard Child, the Defendant pleaded *non Damnificat'*, and the Plaintiff demurred; and because it did not appear upon the whole Record, that the Parish was damaged, it was adjudged for the Defendant. *3 Mod.* 352. *vide March* 121.—But if in Debt upon a Bond, conditioned to save Harmless *J. S.* and the mortgaged Premises, and to pay the Interest for the principal Sum, the Defendant pleads *J. S. non fuit Damnificatus*; for that the Defendant paid the Principal Money, and all Interest due at such a Day; this is no good Plea, because *non Damnificatus* goes to the Person, and not to the Premises. *2 Mod.* 305. adjudged.—If the Condition be to save Harmless the Obligee against another, *non Damnificatus* is a good Plea. *Kelw.* So.—But if to Discharge the Obligee, it ought to be shewed in the Affirmative how. *Kelw.* So. *per Frowick.* (h) So if the Condition be to save Harmless from all Bonds entered into for the Obligor, *exoneravit & indemnitatem conservavit* is no good Plea, without shewing how. *Cro. Eliz.* 216. But that he need not shew from what Bond he saved him Harmless; and *per Cro. Eliz.* 433. *per Gaudy*, there is a Diversity when the Condition is to Discharge from a particular Thing, and when from a Multiplicity of Things; for in the last Case it is sufficient to plead Generally. (i) *Cro. Jac.* 165. S. P. adjudg'd. *All.* 72. S. P. adjudg'd, & *vide Cro. Eliz.*

shewed (a) how; but if he had pleaded in the Negative *non fuit damnificatus*, it had been otherwise. Cro. Eliz. 477. Cro. Jac. 503. (a) But a

Man may plead *Quod exoneravit, &c.* from an Arrest, without shewing how, for that it may be done by Composition, &c. without Deed. Cro. Eliz. 914. adjudg'd.—So in Debt upon a Bond, conditioned to perform the Award of *J. S.* if it is awarded that a Suit in Chancery, by the Defendant against the Plaintiff, shall cease, and the Plaintiff stand acquitted *de qualibet materia in eadem contenta*; the Defendant may plead *quod stetit inde quietus*, without shewing how, or that he *in iudicio* discharg'd him; for it was not intended that an actual Discharge should be given, but that by the Arbitrament he should be acquitted. Cro. Jac. 339. 1 Rol. Rep. 8. 2 Bullf. 93, 94—Otherways if the Award had been that he should Discharge and save him Harmless from a certain Obligation. 1 Leon. 71.

In Debt upon an Obligation, conditioned that the Defendant shall repair and do other Things, and also pay his Rent every Day of Payment, he cannot plead Performance Generally, but must plead Specially. Kelw. 95. b

But where the Condition refers to such a Generalty, that by Intendment it is past the Remembrance of Man; as if the Under-Sheriff is bound to discharge his Master from all Accounts and Returns of Writs within the County, he may plead Performance of the Condition generally. Kelw. 95. b. Cro. Eliz. 869.

In Debt upon a Bond, conditioned that the Defendant shall enfeoff the Plaintiff of all his Lands, the Defendant must plead Performance specially. S. P. per Cur' cont. 1 Sid. 215. Lat. b. 16.

But if the Condition be that (b) a Stranger shall enfeoff the Obligee, a general Performance may be pleaded. Kelw. 95. (b) But by the Case of

Lee and Luttrell. Cro. Jac. 559. 2 Rol. Rep. 159. Palm. 70. it is otherwise.

If the Condition of an Obligation be to make to the Obligee a lawful Estate in certain Lands, it is safe to plead that he hath (c) enfeoffed him thereof, which is a lawful Estate, though in Strictness it is not necessary, because it appears to be a lawful Estate. Kelw. 95. b. (c) If the Condition be to convey an Estate, in pleading, it

must be shewed by what Manner of Conveyance it was done. 1 Leon. 72. 2 Leon. 39. Godb. 360. 2 Mod. 240.—So if the Condition be to shew a sufficient Discharge of an Annuity, in pleading Performance it must appear what Manner of Discharge it was, that the Court may adjudge whether sufficient or not. 9 Co. 25. a. Hob. 107. 2 Mod. 240.

But if the Condition be to build a sufficient House, the Defendant must say that he hath built such an House, which is sufficient. Kelw. 95. b.

In Debt upon an Obligation conditioned to deliver all Evidences concerning such Lands, the Defendant (d) must plead that he hath delivered such and such Charters, which are all the Charters concerning the Land. Kelw. 95. b. (d) But per Cro. Eliz. 869. per Cur', he may plead

that he hath delivered all, &c. and the contrary in some Particular, ought to be shewed on the other Side.

In Debt upon an Obligation, conditioned that the Defendant at all Times, upon Request, should deliver to the Plaintiff all the Fat and Tallow of all Beasts which should be killed or dressed by the Defendant, his Servants or Assigns, before such a Day; the Defendant may plead that upon every Request to him made, he did deliver to the Plaintiff all the Fat and Tallow of all Beasts, &c. without shewing how many Beasts were killed or dressed, or what Quantity of Fat he delivered; for when Matters tend to Infinity and Multiplicity, whereby the Rolls should be incumbred with Length, the Law allows of such general Pleading. Cro. Eliz. 749. Et vide 1 Sid. 215, 334. Cro. Eliz. 916. Like Point.

In Debt upon an Obligation, conditioned for the Payment of 60*l.* Cro. Eliz. 281. viz. 30*l.* at one Day, and 30*l.* at another Day, the Defendant may plead Payment of the 60*l.* *secundum formam & effectum conditionis præd'*; adjudged. For

(a) But such for *reddendo singula singulis*, it is as if he had pleaded the several Payments at the several (a) Days.

general Pleading is not good, where a certain Day of Payment is not mentioned in the Condition. 2 *Bulst.* 267.—In Debt upon an Obligation conditioned to deliver such Briefs such a Day, the Defendant pleads that he delivered them *secundum formam Conditionis præd.* 1 *Lev.* 145.

*Cro. Eliz.* 870. *Waller and Croct*, adjudged. If in Debt upon an Obligation, conditioned that if the Obligee shall enjoy such Lands till the Age of 7. S. and if 7. S. within one Month after his full Age, makes an Assurance thereof to the Obligee, then, &c. the Defendant pleads that 7. S. is not yet of full Age; this Plea is not good, without shewing the Obligee hath enjoyed the Lands in the mean Time; for the Condition is in the Copulative.

*Cro. Jac.* 359. *2 Bulst.* 267. *S. C. Halsley and Carpenter.* 1 *Bulst.* 43. S. P. If in Debt upon an Obligation, conditioned to pay 30*l.* to A. B. and C. *tam cito* as they shall come to the Age of Twenty-one Years, the Defendant pleads that he paid those Sums *tam cito* as they came of Age, this is no good Plea; for the (b) Time, Place and Manner of Performance, ought to be shewed in certain; so that a certain Issue might be taken upon it.

(b) If the Condition be to surrender a Copyhold, the Defendant must not plead Generally that he hath surrendered it, but must shew when the Court was held, &c. *Winch.* 11. adjudg'd.—If the Condition be that the Obligee shall enjoy an Office according to Letters Patents, the Defendant must not plead in *hac verba*, but shew the Effect of the Letters Patents, and the Enjoyment accordingly. *Hob.* 295.

*2 Mod.* 33. *Duck and Vincent*, adjudged. If in Debt upon an Obligation, conditioned to perform Covenants, one of which was for the Payment of Money, upon the making an Assurance, the Defendant pleads that he paid the Money such a Day, but saith not when the Assurance was made, this is naught; for that it ought to appear that the Money was immediately paid, pursuant to the Covenant.

*2 Sand.* 420. *Walton and Waterhorse.* In an Action of Covenant, the Plaintiff declared that his Father was seized in Fee of a Messuage, and leased to the Defendant for Twenty-one Years, and that the Defendant covenanted to repair, support and amend the same, during the Term, and that his Father died, &c. and that the Messuage was *totaliter dirut' & ruinos'*, and the Defendant pleaded that before the House was ruinous, &c. he assigned to 7. S. and that after the House was burnt, *quodque in convenienti tempore post destructionem domus præd'*, and before the Action brought, *Messuag' præd' cum pertinentiis sufficienter re-edificat'*, &c. *suit, & adhuc in bona reparatione sufficienter existit*; adjudged upon a special Demurrer, that this Plea was naught; because it was not shewed by whom it was rebuilt; though it was objected, that (a) it was not material by whom it was rebuilt; and if by a Stranger, it could not be built again by the Defendant, and he having assigned all his Interest before, it lay not in his Notice by whom it was built, but that it could not be presumed to be built by the Plaintiff; for that he could not intermeddle with the Possession during the Term; but by the Report, it being alledged that the Plaintiff had rebuilt it at his own Charge, *Halc* refused to hear the Reasons, and *quasi* in a Passion, without considering the Matter in Law, gave Judgment for the Plaintiff.

*Carth.* 4, 5. Seems to be admitted, that he cannot plead Performance, without shewing it. *All.* 72. 1 *Vent.* 57. 1 *Sid.* 50. 1 *Mod.* 266.—Where he swears he never had Part thereof, or hath lost it. 1 *Sand.* 8, 9. *Cro. Jac.* 429.

*Skin.* 397. *Giffin and Hurrfon.* In Covenant by an Assignee of a Lease, against the Assignor, who covenanted to indemnify the Assignee from all Rent Arrear, &c. the Breach

Breach assigned was in the Non-payment of the Rent; to which the Defendant pleaded as to Part, Payment to the Lessor; and as to the other Part, that he left Money with the Plaintiff *ca intentione quod solveret* to the Lessor; and the Plea was held good, though it was objected no Issue could be taken on his Intention. <sup>4 Mod. 249.</sup> <sup>1 Salk. 190.</sup> <sup>S. C. adjudged.</sup>

### (L) What shall be a good Plea in Bar to the Action.

**I**N an Action of Covenant for Non-payment of Rent, the Defendant cannot plead *levied by Distress*, for that is a Confession it was not paid at the Day; for it could not be distrained for till after the Day; but it was agreed that the Covenant alters not the Nature of the Rent, but that (a) Nothing behind, or Payment at the Day, is a good Plea. <sup>2 Brownl. 273.</sup> <sup>Hare and Savil, adjudged.</sup>

(a) But <sup>1 Brownl. 19.</sup> *per Curiam*, It was held a bad Plea; for that by it the Defendant confessed the Covenant broke, and it tended but in Mitigation of Damages.—And whether *nil habuit in Tenementis* be a good Plea, *vide* <sup>2 Vent. 99.</sup>

In Debt upon an Obligation, conditioned that if a Ship that was going such a Voyage, should return, (the Perils of the Sea excepted) the Defendant should pay so much; but if the Ship should be lost, Nothing, &c. the Defendant pleaded that the Ship did go on her Voyage, and in her Return such a Day *amissa fuit*; and it was adjudged a good Plea, though it was not said *quod amissa fuit periculo maris*; and she might be lost by the Defendant's own Default; for the Plea is in the last Part of the Words of the Condition, which makes the Bond void, as well as if the Ship had returned, &c. <sup>2 Lev. 7.</sup> <sup>Watton and Weddington.</sup>

It has been adjudged that to avoid Circuity of Action, where there are reciprocal Covenants in the same Deed, that one Covenant may be pleaded in Bar to another; as (b) in an Indenture of a Lease for Years, where the Covenant was that the Lessee might subduct for Charges, and he pleaded this Covenant in Bar to an Action of Debt for the Rent, and it was held good. <sup>(b) 1 Lev. 152.</sup> <sup>Foberson and Carr.</sup>

But in <sup>2 Mod. 309.</sup> it is said that reciprocal Covenants cannot be pleaded one in Bar of another, and that in the assigning of a Breach of Covenant, it is not necessary to aver Performance on the Plaintiff's Side. <sup>Et vide 5 Co. 78.</sup> <sup>7 Co. Ughtreds's Case.</sup>

*Cro. Jac. 645. 3 Keb. 352. 3 Lev. 41, 42. 1 Show. 391. Comb. 265.*

As where a Writing was drawn in these Words, *It is agreed that A. shall pay to B. 170l. for his Land and House, &c. the Money to be paid before Midsummer. In witness, &c.* It was sealed by both Parties, the Money not being paid at the Day, B. without making or tendring any Conveyance of his Land, brings an Action of the Debt upon the Bill; resolved that it was well brought; and in this Case it was said, that A. might have an Action of Covenant against B. for the conveying the Land. <sup>1 Sand. 319.</sup> <sup>Cordage and Cole.</sup> <sup>1 Lev. 274.</sup> <sup>1 Sid. 423.</sup> <sup>Raym. 183.</sup> <sup>2 Keb. 542.</sup> <sup>S. C.</sup>

So in an Action of Covenant the Case was, A. covenants with B. to make him a good Lease of his Land and his Sheep, and that B. should have Firewood upon his Land, and B. covenants to pay one Half Year's Rent at *Michaelmas* following; in an Action of Covenant for this Rent, B. pleads that A. refused to lease the Land before *Michaelmas*, & *per totam curiam*, the Plaintiff must have Judgment, for B. has his Remedy upon the Covenant of A. <sup>Hill. 29 & 30 Car. 2.</sup> <sup>Dyessly and Tuer, adjudged.</sup>

But

*Carth. 64.  
per Cur'.*

But if there be a Covenant that an Obligee shall not put the Bond in Suit at any Time, such Covenant is pleadable in Bar as a Release, because in Effect it is so; but where the Covenant is that it shall not be put in Suit for a certain Time limited in the Deed, this is only a Covenant; and for Breach thereof an Action is maintainable, but is not pleadable in Bar to the Bond.

## Courts, and their Jurisdiction in general.

**F**OR the better Understanding the Nature and Jurisdiction of Courts, it may be necessary to premise some Considerations concerning them in general, before each particular Court comes to be treated of; and this I shall do by considering,

- (A) The Nature and Original of our Courts, and by what Authority constituted.
- (B) Of the Judges and Persons exercising a Jurisdiction.
- (C) What determines their Jurisdiction and Authority.
- (D) Of their Division, and the Subordination of one Court to another: And herein,
  1. In General, of the several kinds of Courts which exercise a Jurisdiction.
  2. Of such as are of Record or not.
  3. How Inferior Courts must claim their Jurisdiction; and herein of Pleading to the Jurisdiction, and demanding Conuzance.
  4. Where it must appear that Inferior Courts have a Jurisdiction.
- (E) What is incidental to all Courts in general.

## (A) Of the Nature and Original of our Courts, and by what Authority constituted.

IN the Saxon Times, the *Wittingham Mote* was the Chief Court of the Kingdom, where all Matters both Civil and Criminal, and also relating to the Revenue, were debated and determined; but for Civil and Criminal Matters, it was only a Court in the first Instance, for Facts arising within the County where it sat; but by way of Appeal from the Injustice of other Courts, it heard and determined Causes from all other Counties.

To this Court were summoned the Earls of each County, and the Lords of each Leet, and likewise Representatives of Towns, who were chosen by the Burgeffors of the Town, who appeared on the King's Summons, which issued once a Year at least; and here new Laws were enacted, or old ones repealed, after the Manner of our Parliaments.

But *William the Conqueror* caused the States to Recognize him, and fearing that these Parliaments, consisting of *Englishmen*, might prove dangerous, he established a constant Court in his own Hall, made up of the Officers of his Palace, and they transacted the Business both Criminal and Civil, and likewise the Matters of the Revenue; and as they sat in the Hall they were a Court Criminal, and when up the Stairs a Court of Revenue; the Civil Pleas they heard in either Court.

The Court consisted, 1. Of the *Justiciar* who presided, and was called *Capitalis Justiciarius totius Angliæ*, and chiefly determined all Pleas Civil and Criminal, and was also the chief Officer of State. 2. The Chancellor, who formed all Patents, and put the Seal to them, and had the Custody thereof, both for Writs and Patents. 3. The Treasurer, before whom all Accounts were chiefly audited; and he it was that presided in Matters relating to the Revenue. 4. The Constable and Marshal, to whom all Matters of Honour, and War, and Peace were referred, to determine according to the Law of Nations and of Arms. 5. The Seneschal, or Steward and Marshal, who determined the Quarrels and Disputes between the King's Menial Servants; the Marshal was also to keep the Prisoners, and take Care that no Indecency was committed in the King's House. 6. The Chamberlain, who was to count the King's Money, as it came in, and issued out of the Treasury.

This was the Sovereign Court of the Kingdom, where Justice was administered, and where all Matters of the highest Moment were transacted by the King himself and these Officers; yet, in some Cases, of great Importance, as upon the levying a new War, or raising an Escuage, most of the great Persons that held *in Capite* were called, and then it was termed the *Commune Concilium Regni*, or the Parliament; to which afterwards the Representatives of Boroughs that held *in Capite* were called.

Towards the Norman Period, the Power of the *Justiciar* became formidable, and in the Barons War was turned against the King; the King also found, that the Barons who held large Districts, were likely to grow more and more troublesome to the Crown; for though in the Conqueror's Time, and for some Reigns after the Conquest, they were kept in very good Subjection; the Norman and English Barons being a Ballance for each other; yet Time wearing away the Distinction, and the Normans growing up English, they became fond of those Liberties and Privileges that the English had enjoyed in the Saxon Times; hence it was necessary to introduce a new Policy, and hence the Original of our Courts, as we have them at this Day in *Westminster-Hall*.

To give Countenance to this new Erection and Division of Courts, (which was completed by *E. 1.*) as also that it might still be seen, that all Justice flowed from the King, the King himself (*a*) sat in Person in the Court of (*b*) King's Bench; and hence the Power of this Court, which it still retains, of exercising a Superintendency over other Jurisdications; but though the King was sometimes present, yet the Chief Justice gave the Rule, that the King might not Decide in his own Cause.

*Maddox, c. 19. fol. 21, and 135. 1 Rol. Abr. 94. & vide 2 Inst. 24, 25. (a) Speed 521. 1 Rol. Abr. 535.*

(*b*) Is still supposed to have always the King himself in Person sitting in it. *Dyer 137. pl. 6. Maddox 543. Crompton of Courts 78.*— And hence every Process in the King's Bench is made returnable before the King himself. *28 Aff. pl. 52.*

But however this Regulation might have been begun, or however it might have been formerly, as to the Kings Sitting and Determining in Causes, it seems now agreed, That our Kings having delegated their whole Judicial Power to the Judges of their several Courts, they, by the long, constant, and uninterrupted Usage of many Ages, have now gained a known and stated Jurisdiction, regulated by certain and established Rules, which our Kings themselves cannot make any Alteration in without an Act of Parliament.

*2 Inst. 73. 2 Hawk. P. C. 2.*

But as the King is the Fountain of Justice, and the supreme Magistrate of the Kingdom, intrusted with the whole Executive Power of the Law, no Court whatsoever can claim (*c*) any Jurisdiction, unless it some way or other derive it from the Crown.

*S. P. C. 54. 55. 2 Hawk. P. C. 2.*

Therefore if an Ordinary certify, or try Bastardy, without a Writ from the King's Temporal Courts, it is void; for the Spiritual Jurisdiction within these Kingdoms is derived from the King, and must be exercised in the Manner the King has appointed. *1 Rol. Abr. 361.*

But it is clearly agreed, that the King cannot give any Addition of Jurisdiction to an antient Court, but that all such Courts must be holden in such Manner, and proceed by such Rules, and in such Cases only as their known Usage has limited and prescribed; and hence it followeth, that the Court of King's Bench cannot be authorized to determine a meer real Action between Subject and Subject; so neither can the Court of Common Pleas, to inquire of Treason or Felony.

*6 H. 7. 4. b. 5. a. 4 Inst. 125, 127. 6 Co. 11. b. 12. a.*

And it is said, that the King is so far restrained by the antient Forms, in all Cases of this Nature, that his Grant of a (*d*) Judicial Office for Life, which has been accustomed to be granted only at Will, is void.

*4 Inst. 87. 1 Sid. 338.*

(*d*) That the King cannot grant a meer Spiritual Jurisdiction, as to Ordain, Institute, &c. to a Lay Person, nor can he exercise them himself; but must administer those Laws by Bishops, as he does the Common Law by Judges. *Vide Cro. Eliz. 259. Cro. Eliz. 314.*

Also Commissions to seize the Goods, and imprison the Bodies of all Persons who shall be notoriously suspected of Felonies or Trespasses, without any Indictment or other legal Process against them, are illegal and void.

*4 Aff. 5. Bro. Commif. sion 3, 15, 16. 12 Co. 30, 31. 2 Inst. 478.*

A Commission under the Great Seal to take *J. N.* a notorious Robber, and to seize his Lands and Goods, illegal. *2 Inst. 54.*

And it is said, that the King cannot grant any new Commission whatsoever that is not warranted by antient Precedents, however necessary it may seem, and conducive to the Publick Good; and therefore

(*e*) Commissions to assay Weights and Measures being of a new Invention, were condemned by Parliament; and it is (*f*) said, that the King could not authorize Persons to take Care of Rivers, and the Fishery therein, according to the Method prescribed by the Statute of *Westm. 2. cap. 47.* before the making of that Statute.

*(e) 4 Inst. 163. 18 E. 3. 1, 4. (f) 2 Inst. 478.*

(B) Of the Judges, and Persons exercising a Jurisdiction.

THE King himself, though he be intrusted with the whole Executive Power of the Law, yet he cannot Sit in Judgment in any Court, but his Justice, and the Laws, must be administred according to the Power committed and distributed to his several Courts of Justice.

4 Inst. 70, 71.  
2 Inst. 103.  
8 H. 4. 13. b.  
S. P. C. 54.  
Dalt. cap. 1.

All Judges must derive their Authority from the Crown, by some Commission warranted by Law; the Judges of *Westminster*, are (all, except the Chief Justice of the King's Bench, who is created by Writ) appointed by Patent, and formerly held their Places only during the King's Pleasure; but now for the greater Security of the Liberty of the Subject, by the 12 W. 3. their Commissions are to be *Quamdiu se bene Gesserint*; but upon the Address of both Houses of Parliament, it may be lawful to remove them.

4 Inst. 74, 75.

And by the 27 H. 8. cap. 24. it is enacted, " That no Person or Persons of what Estate, Degree or Condition soever they be, shall have any Power or Authority to make any Justices of *Eyre*, Justices of Assize, Justices of Peace, or Justices of Gaol-Delivery, but that all such Officers and Ministers shall be made by Letters Patent under the King's Great Seal, in the Name, and by the Authority of the King's Highness, in all Shires, Counties Palatine, *Wales*, &c. or any other his Dominions, &c. any Grants, Usages, Allowance or Act of Parliament to the contrary notwithstanding.

As all Judges must derive their Authority from the Crown, by some Commission warranted by Law, they must also exercise it in a legal Manner, and hold their Courts in their proper Persons, for they cannot act by (a) Deputy, nor any way transfer their Power to another, as the Judges of Ecclesiastical Courts may.

*Ero. Judges* 11.  
*Lat. b* 7.  
*Cro. Car.* 259.  
*Cro. Eliz.* 314.  
(a) That a Recorder of a Town, unless the Custom allows, cannot make a Deputy; for this is a Judicial Office. *Vide Raym.* 88. 1 *Lev.* 125. 1 *Keb.* 538, 639, 659. and Title *Offi. e and Officers.*

less the Custom allows, cannot make a Deputy; for this is a Judicial Office. *Vide Raym.* 88. 1 *Lev.* 125. 1 *Keb.* 538, 639, 659. and Title *Offi. e and Officers.*

But it seems, that regularly where there are divers Judges of a Court of Record, the Act of any one of them is effectual, especially if their Commission do not expressly require more.

2 *Hawk. P.* C. 3. and *vide* the Authorities there cited.

The Judges are bound by Oath to determine according to the known Laws and antient Customs of the Realm, and their Rule herein must be the Judicial Decisions and Resolutions of great Numbers of learned, wise and upright Judges, upon Variety of particular Facts and Cases, and not their own arbitrary Will and Pleasure, or that of their Prince's.

*Vide* the Statutes 18 E. 3. cap. 1. 20 E. 3. cap. 1, 2. 4 Inst. 88, 109. *Dalt.* 13.

But though they are to Judge according to the settled and established Rules, and antient Customs of the Nation, approved for many Successions of Ages, yet are they freed from all Prosecutions for any Thing done by them in Court, which appears to have been an (b) Error of their Judgment.

S. P. C. 173.  
1 Co. 24.  
12 E. 4 18.  
21 E. 4. 67. a.  
1 *Salk.* 397.

(b) But where for wilful Corruption they have been complained of in the Star-Chamber. *Vide Vaugh.* 139. And may still be called to an Account in Parliament. 1 *Hawk. P. C.* 192. 12 Co. 24.

Nor is a Judge constituted by the King, and thereby stamp with his Approbation, and to whom alone it belongs to judge of his Fitness, to be reflected on, censured, defamed or vilified with respect to his Ability, Parts, Fitness for his Place, &c. for if this were allowed, it would be impossible to keep in the People that Veneration of their Persons, and Submission to their Judgments, without which it is impossible to execute the Laws with Vigour and Success; and hence all scandalous Reflections

*Vaugh.* 138, 139.

on the Judges of *Westminster-Hall*, are within the Statute of *Scandalum Magnatum*.

8 H. 6. 19. b. No Person can be a Judge in his (a) own Cause, but the Chief Justice of the Common Pleas may bring an Action in that Court, but then  
2 Rol. Abr. 92. the Entry must be Special, viz. *Placita coram Alex' Denton, &c.*

1 Salk. 398.

(a) The Mayor of *Hereford* was laid by the Heels, for sitting in Judgment in a Cause where he himself was Lessor of the Plaintiff in Ejectment, though he by the Charter was sole Judge of the Court. 1 Salk. 396.

1 H. 7. 26. a. No Judge of any Court of Record is compellable to deliver his Opinion before-hand, in relation to any Question which may after come judicially before him.  
3 Inst. 29.

By the 33 H. 8. cap. 24. it is enacted, " That no Justice, nor other Man learned in the Laws of this Realm, shall use nor exercise the Office of Justice of Assise, within any County where the said Justice was born, or doth inhabit, on Pain of 100 l. &c. Provided the said Act shall not extend to any Person who shall be Clerk of Assises, and Associate to any Justice of Assize; nor to any Mayor, Sheriff, Recorder, Steward, Bailiff, Suitor or other Officer, being born, or dwelling within any City, Borough or Town within this Realm of *England, &c.* nor to Justices of either Bench, for taking, hearing or determining Assises in the one Bench or the other; nor to the Justices, Justice Clerks or Clerk of Assises in the Dutchy and County *Palatine of Lancaster.*"

### (C) What determines their Jurisdiction and Authority.

1 And. 44. IT has been determined, that at Common Law the Patents of the  
Dyer 165. Judges, (a) Sheriffs, Escheators, Commissioners of Oyer and Ter-  
7 Co. 30. a. miner, Gaol-Delivery, and of the Peace, and of the Attorney General,  
Cro. Car. 1, 2. N. Bendl. 79. are determined by the Death of the King, in whose Name they are  
(b) But the made.  
Office of a  
Sheriff in such Places where he is chosen by a Corporation, having by its Charter the Inheritance of the Office, does not determine by the Demise of the King. 7 Co. 30. b.— Nor the Authority of a Coroner or Verderer. Dalf. 15. Dyer 165. 2 Inst. 175. 1 Lev. 120.— Nor does any Corporation Officer, who by the Charter is invested with Judicial Authority, lose it by such Demise. 2 Hawk. P. C. 3.

But to prevent the Disorders and other Inconveniencies which may happen upon the Death of a King, from the want of Persons armed with competent Authority to execute the Laws before the Successor can have Time to appoint others; by the 7 & 8 W. & M. cap. 27. it is enacted, " That no Commission either Civil or Military, shall cease, determine or be void, by reason of the Death and Demise of his said late Majesty, or of any of his Heirs or Successors, Kings or Queens of this Realm, but that every such Commission shall be, continue and remain in full Force and Virtue for the Space of Six Months next after any such Death or Demise, unless in the mean Time superseded, determined or made void by the next and immediate Successor, to whom the Imperial Crown of this Realm, according to the Act of Settlement in the said Statute before mentioned, is limited and appointed to go, remain or descend."

And by the 1 *Ann. cap. 8.* it is further enacted, “ That no Patent or Grant of any Office or Employment either Civil or Military, hereafter to be made, shall cease, determine or be void, by reason of the Death or Demise of any King or Queen of this Realm; but that every such Patent or Grant shall be, continue and remain in full Force for six Months next after any such Death or Demise, unless in the mean Time superseded, determined or made void by the next immediate Successor, to whom the Crown is limited and appointed to go, remain or descend.

And it is further enacted by the same Act, “ That no Commission of Assise, Oyer and Terminer, General Gaol-Delivery, or of Association, Writ of Admittance, Writ of *Si non omnes*, Writ of Assistance, or Commission of the Peace, shall be determined by the Death of any King or Queen of this Realm; but every such Commission and Writ, shall be and continue in full Force for six Months next ensuing, notwithstanding such Demise, unless superseded or determined by the next Successor; and also no Original Writ, Writ of *Nisi prius*, Commission, Process or Proceedings whatsoever, in, or issuing out of any Court of Equity, nor any Process or Proceedings upon any Office or Inquisition; nor any Writ of *Certiorari*, or *Habeas Corpus* in any Matter or Cause, either Criminal or Civil; nor any Writ of Attachment, or Process for Contempt, &c. shall be determined, abated or discontinued by the Demise of any King or Queen of this Realm, but every such Writ, &c. shall remain in full Force, to be proceeded upon as if such King or Queen had lived.

If a Judge of the Common Pleas is made a Judge of the King’s Bench, by this the Inferior Authority is determined; for it would be impertinent for him to reverse his own Judgment, which otherwise he might do upon a Writ of Error. *Dyer 259. Cro. Car. 128. S. C. cited and agreed.*

The Authority of Justices in *Eyre, Oyer and Terminer, &c.* is (a) determined by (b) the King’s Bench sitting in the same County. *Dyer 159. 4 Inst. 73. 9 Co. 118.*

(a) Their Authority, how suspended by Writ of *Supersedeas*, which is grantable on Proof that their Commission was unduly obtained, *vide Reg. 124, 125. 12 Aff. 21. 4 Inst. 163. H. P. C. 162.* (b) Whether they have Notice thereof or not. *4 Inst. 73. But Q. 21 H. 7. 29. b. Bro. Commission 10.*

If a Commission is made to Judges of Assise, and after the King makes other Judges of Assise in the same County, (c) by this the first Commission is not determined, but they may proceed thereupon (d) till Notice of the Second; and they are not bound to take Notice of a Proclamation thereof in the County, for the Law hath not provided that any such Proclamation thereof should be made. *Kelw. 116. (c) But where by the Issuing and Notice of the second Commission the first is determined, and what shall be sufficient Notice, vide 1 Leon. 270. Godb. 105. 34 Aff. 8. Bro. Commission 14. Moor 186. pl. 333. H. P. C. 162. 4 Inst. 165. Dyer 355 p. 36.—And yet the Proceedings shall not be discontinued, vide the Statutes of 11 H. 6. cap. 6. and 1 E. 6. cap. 7. and 2 Henr. P. C. 18. (d) The old Sheriff may act till the new Patent shewed him, so that he may have Notice of his Discharge. Cro. Eliz. 12, 440. Moor 186. pl. 355. 4 Inst. 165. S. P. cont’.—But Justices of the Peace left out of the new Commission, must take Notice thereof after Publication of the new Commission at the next Sessions. Moor 187. 4 Inst. 165. S. P.*

And what shall be sufficient Notice, *vide 1 Leon. 270. Godb. 105. 34 Aff. 8. Bro. Commission 14. Moor 186. pl. 333. H. P. C. 162. 4 Inst. 165. Dyer 355 p. 36.—And yet the Proceedings shall not be discontinued, vide the Statutes of 11 H. 6. cap. 6. and 1 E. 6. cap. 7. and 2 Henr. P. C. 18. (d) The old Sheriff may act till the new Patent shewed him, so that he may have Notice of his Discharge. Cro. Eliz. 12, 440. Moor 186. pl. 355. 4 Inst. 165. S. P. cont’.—But Justices of the Peace left out of the new Commission, must take Notice thereof after Publication of the new Commission at the next Sessions. Moor 187. 4 Inst. 165. S. P.*

If the Justices hold a Session without adjourning it, and the Commission have no Time limited for its Continuance, as where it is appointed *pro hac vice* only, their Authority is determined; but if the Commission be granted for a certain Time, or *quamdiu nobis placuerit*, as it does not necessarily require any Adjournment, if the Court holden by Virtue of such Commission, break up without any Adjournment, or upon a void one, as being made without the Consent of the Majority of the Commissioners; yet it may be holden again on a new Summons. *Crom. Fur. 125. H. P. C. 161. 4 Inst. 165. Dalz. 24. Dyer 205. 1 Leon. 270.*

(a) *Bro. Commission* 4, 22. It was (a) formerly holden, that by the Justice's Acceptance of any new Name of Dignity, the Commission was determined; but this is remedied by 1 *E. 6. cap. 7.* by which it is enacted, "That if any Person, " being in any of the King's Commissions whatsoever, shall fortune to " be made or created Duke, Archbishop, Marquess, Earl, Viscount, " Baron, Bishop, (b) Knight, Justice of the one Bench or of the other, " or Serjeant at Law, or (c) Sheriff, yet that notwithstanding he shall " remain Commissioner, &c.

(b) But it hath been doubted, whether the Dignity of a Baronet, which has been created since that Statute, be within the Equity of it. *Cro. Car.* 104. *Lit. Rep.* 81. (c) But now by the 1 *Ma. cap. 8.* No Person being Sheriff, shall exercise the Office of Justice of the Peace.

" By the 2 and 3 *Pb. and M. cap. 18.* a new Commission of the Peace, " or Gaol-Delivery for the County, &c. shall not supersede a former " Commission for a City or Town Corporate being no County.

## (D) Of their Division, and the Subordination of one Court to another: And herein,

### i. In general, of the several kinds of Courts which exercise a Jurisdiction.

*Hale's An.* 35. THE most general Division of our Courts is, into such as are of Record, or not; those of Record are again divided into such as are Supreme, Superior or Inferior.

*Hale's An.* 35. The Supreme Court of this Kingdom is the High Court of Parliament, consisting of the King, Lords, and Commons, who are invested with a kind of Omnipotency in making new Laws, repealing and reviving old ones; and it is on the right Ballance of these three depends the Well-being, and indeed, the very Being of our Constitution.

*Hale's An.* 36. Superior Courts of Record are again, those that are more Principal or less Principal; the more Principal ones are the Lords House in Parliament, the Chancery, King's Bench, Common Pleas, and Exchequer; and by *Hale*, such are the Justices Itinerant *ad communia Placita* & *ad Placita Forestæ.*

*Hale's An.* 36. The less Principal ones are such as are held by Commission of Gaol-Delivery, Oyer and Terminer, Assise, *Nisi prius*, &c. by Custom or Charter; as the Courts of the Counties Palatine of *Lancaster*, *Chester*, *Durham*, or by Virtue of Act of Parliament, and the King's Commission, as the Court of Sewers, Justices of the Peace, &c.

*Hale's An.* 36. The Inferior Courts of Record, as ordinarily so called, are Corporation Courts, Courts Leet, and Sheriffs' Torn, &c.

Courts not of Record are the Courts Baron, County Courts, Hundred Courts, &c.

*Vide post* of the Admiralty and Ecclesiastical Courts. Also the Admiralty, and Ecclesiastical Courts, which are not Courts of Record, but derive their Authority from the Crown, and are subject to the Controul of the King's Temporal Courts, when they exceed their Jurisdiction.

*Hale's An.* 35. All these are bounded and circumscribed by certain Laws and stated Rules, to which, in all their Proceedings and Judicial Determinations, they must square themselves.

And here it may be proper to observe, that where a Statute prohibits a Thing, and appoints that the Offence shall be heard and determined in any of the King's Courts of Record, it can be proceeded against (a) only in one of the Courts of *Westminster-Hall*, because those being the Highest Courts of Record, shall be intended only to be spoken of *secundum excellentiam*.

(a) But that on a Statute so worded, the Prosecution may be in any Court of Oyer and Terriner. *4 Inst.* 164. *H. P. C.* 261.

*Dyer* 236.  
*6 Co.* 19 b.  
*Cro. Jac.* 538.  
*Cro. Eliz.* 737.  
*Cro. Car.* 146.  
*Cromp. Jac.*  
 132.  
 1 *Salk.* 178.

2. Of such as are of Record, or not.

Every Court of Record is the King's Court, though the Profits may be another's; if the Judges of such Court err, a Writ of Error lies; the Truth of its Records shall be tried by the Records themselves, and there shall be no Averment against the Truth of the Matter recorded.

All such Courts are created (b) by Act of Parliament, Letters Patent or Prescription, and (c) every Court, by having Power given it to Fine and Imprison, is thereby (d) made a Court of Record; the Proceedings of which can only be removed by Writ of Error or *Certiorari*.

the King's Courts, and of Record. *2 Inst.* 143. *4 Inst.* 263. *Hetl.* 62. S. P.— But neither the Admiralty nor Ecclesiastical Courts are of Record. *1 Rol. Abr.* 527. *Vide post* of these Courts.— Nor the English Court in Chancery proceeding by *Subpœna*. *37 H.* 6. 14. *1 Rol. Abr.* 527. Nor the County Court. *Co. Lit.* 117. b. *2 Inst.* 380. *4 Inst.* 264.— Though Plea held there by Justices. *2 Inst.* 140, 312. *6 Co.* 11. b.— Nor the Hundred Court. *Co. Lit.* 117. *2 Inst.* 143. *4 Inst.* 264.— Nor the Court Baron. *Co. Lit.* 117. *2 Inst.* 143. *4 Inst.* 264.— The Proceedings thereof may be denied and tried by a Jury, and a Writ of false Judgment, not of Error, lies on their Judgments. *Co. Lit.* 117. b.

*Co. Lit.* 17.  
*8 Co.* 38. b.  
*2 Lev.* 93.  
*1 M.* 215.  
*3 Lev.* 205.

(b) *Co. Lit.*  
 260. a.  
 (c) *1 Salk.*  
 200. (d) The  
 Leets and  
 Torns are

A Court, that is not of Record, cannot impose any Fine on an Offender, nor award a *Capias* against him, nor hold Plea of Debt or Trespass, if the Debt or Damages amount to 40 s. nor of a Trespass done *vi & armis*, though the Damages are laid to be under 40 s.

Also by the Statute of (e) *Gloucester*, the Superior Courts shall not hold Plea of any (f) Trespass under the Value of 40 s.

pass is put but for an Example for Debt, Detinue, Covenant, and the like. *2 Inst.* 311.

But the Superior Courts may hold Plea of Trespass, &c. though under 40 s. relating to the Freehold, as Detinue for Charters, &c. or Trespass *vi & armis*.

As where in Trespass by way of Original, the Plaintiff declared, That the Defendant *vi & armis clausum suum apud H. fregit*, and concluded *ad Damnum ipsius* 20 s. and upon Demurrer it was held well enough; for this being done *vi & armis*, if it could not be punished in the Superior Court, it could not be punished at all, for an Inferior Court cannot assess a Fine.

*Co. Lit.* 117. b.  
 260. a.  
*2 Inst.* 311,  
 312.  
*14 H.* 8. 15.  
 (e) Made 6  
*E. 1. cap.* 8.  
 (f) Tref-

*2 Inst.* 311.  
*Carth.* 108.  
*Lambert and*  
*Thurston.*  
*3 Mod.* 275.  
*S. C.*

3. How Inferior Courts must claim their Jurisdiction; and therein of pleading to the Jurisdiction, and demanding Conuzance.

The Courts of *Westminster* are the Superior Courts of the Kingdom, and have a Superintendency over all other Courts by Prohibitions, if they exceed their Jurisdiction, or Writs of Error, and false Judgment of their Proceedings; and every Thing is supposed to be done within their Jurisdiction, unless the contrary especially appears; on the other Hand, nothing shall be intended within the Jurisdiction of an Inferior Court, but what is expressly alledged.

In all transitory Actions they have a Jurisdiction, unless the Plaintiff by his Declaration (a) shews, that the Action accrued within a County Palatine; or if it be between the Scholars of *Oxford* and *Cambridge*; in which Case the University shall have Conuzance; because by their Charter confirmed by Act of Parliament, they have Jurisdiction over the Persons of their Scholars; and though an Inferior Court might have determined it, yet the Superior Court being once possessed of the Action, in Arreit of Judgment cannot be (b) hindred from proceeding.

*Carth.* 11.—Nor can he take Advantage of it by way of Demurrer, but must plead to the Jurisdiction of the Court. *Carth.* 354, 355. (b) It was moved for an Attachment against the Register and Commissioners of the Court of Requests, called the Court of Conscience, confirmed by the Act 3 Jac. 1. cap. 15. Because that where *J. S.* had brought Debt upon an Obligation of 10 *l.* for Payment of 5 *l.* in *B. R.* against a Freeman of *London*; who after cited the Plaintiff in the Court of Conscience, furnishing that less than 40 *s.* was due, and the Plaintiff appeared there, and shewed the Obligation; notwithstanding, the Commissioners there, upon Allegation of the Defendant, that less than 40 *s.* was due, ordered the Plaintiff to accept it, and stay Proceedings in *B. R.* which he refusing, the Commissioners ordered the Register to keep the Obligation, so that the Plaintiff could not proceed; upon which Matter the Court granted an Attachment against the Commissioners and Register; for that Court cannot any way prohibit or stay the Proceeding in a Superior Court. *Mich.* 27 *Car.* 2. in *B. R.* 3 *Kebl.* 535. S. C. ill reported.

4 *Inst.* 224. In Local Actions Inferior Courts have a Jurisdiction, but here a Difference must be observed as to the Manner of claiming it; for as to the principal Courts of this Kind, and into which *Brevia Domini Regis non currunt*, as the Counties Palatine, they may (c) plead their Jurisdiction when intrenched upon by the Superior Courts.

(c) So ancient Demesne held of the King's Manor may be pleaded. *Herne's Pleader* 7, 351. *Hanf.* 103. *Tbo.* 2. *Raft.* 419.—So may the Jurisdiction of the *Cinque Ports.* 4 *Inst.* 224. But *vide Carth.* 109. & *Q.* For it is there said to be such a Franchise as *Ely*; and there resolved, that *Ely* being no County Palatine, but only a Royal Franchise, the Defendant cannot plead to the Jurisdiction of a Superior Court, but must demand Conuzance.—And Note, That where-ever the Defendant can plead to the Jurisdiction of the Courts at *Westminster*, there the Franchise may demand Conuzance; but not *vice versa*.

1 *Rel. Abr.* 489, 490. (d) There are three sorts of Conuzance, 1. *Tenere Placita*, which does not oust another Court of their Jurisdiction, but only creates a concurrent one. 2. *Cognitio Placitorum*; But where a Franchise, either by Letters Patent or Prescription, hath a Privilege of holding Pleas within their Jurisdiction, if the Courts at *Westminster* intrench on their Privileges, they must demand (d) Conuzance, that is, desire that the Cause may be determined before them; for the Defendant cannot plead it to the Jurisdiction; and the Reason is, because when a Defendant is arrested by the King's Writ, within a Jurisdiction where the King's Writ doth not run, he is not legally conveyed; and therefore may plead it to the Jurisdiction; but the Creating a new Franchise does not hinder the Writ from being made out as before, nor the Courts above from having the same Jurisdiction over the Cause, but grants Jurisdiction to the Lord of the Liberty; and whenever the King's Courts intrench on his Jurisdiction, he may make his Claim, and demand that the Cause be determined before him. 3. A Conuzance with an exclusive Jurisdiction; as that no other Court shall hold Plea, &c. *Hard.* 509, 510.

2 *Inst.* 140. Co. *Lit.* 117. b. No Court can demand it unless it be of Record, and of a Plea of Record; because all Courts of Record are the King's, though another may have the Profits of them; so that although the Cause goes out of the King's Courts at *Westminster*, yet it goes to another of the King's Courts, to which he has granted the Privilege of determining the Causes arising within a limited Jurisdiction; but it is below the Dignity of the King's Court, to part with any Cause to another's Court; such as the County Court, &c.

*Dalf.* 12. 1 *Rel. Abr.* 489. Also where a Franchise cannot give a Reinedy, and there would be a Failure of Justice, they shall not have Conuzance, although the Action accrued within their Jurisdiction.

As in (a) a *Quare Impedit*, because they cannot send a Writ to the Bishop, nor in (b) *Replevin*, because if the Plaintiff be nonsuited a second Deliverance shall be granted, which the Franchise cannot do.

(a) 44 E. 3. 29. b. Bro. Conuzance 12. S. C.

26 E. 3. 73. Dalf. 12. Co. Lit. 134. b. S. P. (b) 38 E. 3. 31. Conuzance is not grantable, because the Original Writ of *Replevin* is in Nature of a *Fusticies*, and not returnable, and in a *Fusties* no Conuzance can be demanded, because none can demand Conuzance but he that hath a Court of Record; but the County Court, though the Plea is holden by *Fusticies*, is no Court of Record, and if the Sheriff should grant the Conuzance, he could not award a *Re summons*. 2 *Inst.* 140. Bro. Conuzance 4. 23.

Nor in Waste, because by the Statute the Writ must issue out of the Chancery at *Westminster*, and those Writs are returnable into the Courts there, and not into any Inferior Court.

1 H. 4. 5. Dalf. 12. (c) No Conuzance can

be granted upon an *Attaint*, because all *Attaints per 25 H. 8. cap. 3.* are to be taken before the King in his Bench, or before Justices of the Common Pleas, and in no other. Co. Lit. 294. *Djer* 202. *Kelw.* 210. *N. Bendl.* 99.

Nor in Admeasurement of Pasture, because the Franchise cannot grant a Writ *de secunda superoncrations.*

Dalf. 12.

So if a Fine be removed out of a Franchise by Writ of Error in *B. R.* and a *Scire Facias* issues out to have Execution, they shall not have Conuzance; because the King never parts with the Records of his Court, and without it they can do no Right to the Party.

50 Aff. 9. Bro. Conuzance 61. 1 Rol. Abr. 492. S. C.

If a Borough have an antient Charter, by which it was granted to them *quod nullus Burgensis Inhabitans infra Burgum Præd' placit' vel implacitetur de terris, Tenementis, Contractibus, &c.* within the Borough, elsewhere out of, &c. and the Mayor and Burgesses of the said Borough are impleaded in *Banco* for Lands within their Borough, they shall not have Conuzance; for in this Action (d) the whole Body is impleaded.

N. Bendl. 88. pl. 134.

is granted to the Chancellor of the University, to hold Plea where Scholars or Privileged Persons are concerned, this shall not extend to an Action against the President and Scholars of a College. 1 *Mod.* 163.

(d) So where Conuzance

If the King grants *Majori, Ballivis & Juratis quinque Portuum*, that they shall not be impleaded for Land or other Cause elsewhere, than within the said Ports, yet in a *Quo Warranto*, &c. where the King is directly a Party, they shall not be impleaded there.

22 H. 7. Kelw. 88, 89, 90.

If a Scholar of *Oxford* or *Cambridge* be sued in Chancery for a Specifick Performance of a Contract to Lease Land in *Middlesex*, the University shall not have Conuzance; because they cannot sequester the Lands.

So in (e) *Trespals Quare clausum fregit, & damnum, &c. intravit in Oxford*, Conuzance was denied to the University, because the Freehold might come in Question.

Lit. Rep. 252. Cripps and Webb.

same Reason it shall not be granted to them in Ejectment, though nothing but a Term to be recovered. Lit. Rep. 252. *Cro. Car.* 87, 88. S. P. adjudged.

(e) So for the

If an Action of (f) *Trespals* be brought for a *Trespals* done within a Franchise, against a Foreigner that hath nothing within the Franchise, Conuzance shall not be granted, (g) because they cannot do Right to the Party, for they cannot amesne a Stranger to answer who hath nothing within the Franchise.

22 Aff. 83. 1 Rol. Abr. 494. (f) So of Debt. 22 Aff. 83. 1 Rol. Abr. 494. (g) So

of a Conspiracy against two, for a Conspiracy within a Franchise, of whom one is a Foreigner, they cannot have Conuzance, for the Action is intire. 22 Aff. 83.—So an Heir cannot be sued upon an Obligation of his Ancestor, within a Borough, where he hath not Assets within the Jurisdiction of the Court. 1 *Rol. Abr.* 494. *Cro. Jac.* 502. 2 *Rol. Rep.* 48. S. C.

*Cro. Car.* 73. As they shall not have Conuzance where there is a Failure of Justice, *Lit. Rep.* 40, so shall they not likewise where the Plaintiff is a Privileged Person in any of the Superior Courts at *Westminster*; for it would be inconvenient, and below the Dignity of those Courts, that their Officers should be compelled to quit their Attendance, to obtain Justice in an Inferior Court.

(a) *Bro. Conuzance* 50. But the Defendant being in (a) *Custod' Mar'* in the King's Bench, or the Plaintiff's commencing a Suit in the Exchequer on (b) a *Quo minus*, & vide *Carth.* 12. (b) *Hard.* 505, 506. as Debtor to the King, are not such Privileges as will oust an Inferior Jurisdiction; for they are now grown the common Methods of Suing in those Courts.

2 *Vent.* 362. Nor can they have Conuzance of such Actions which were not in esse *Hard.* 189. at the Time of their Charter, but (c) created since by Act of Parliament. (c) But if an

Action of

Common Law is given against a Person by another Name, as Debt against an Administrator, they shall have Conuzance. 14 *H. 4.* 20. 22 *E. 4.* 23.

(d) 1 *Sid.* 103. As to the Manner of demanding it, (d) if it be by Attorney the Letter of Attorney must be produced in Court, and (e) if the Conuzance 1 *Lev.* 87. be demanded by Virtue of a Charter Time out of Mind, or by Prescription, there an Allowance must be pleaded before Justices in *Eyre*.

S. C. and the

Warrant of

Attorney must be filed in Court, & vide *Dals.* 12. *Palm.* 456. *N. Bendl.* 233. per 262. *Lane* 81, 87.

1 *Sid.* 283. (e) 9 *Co.* 27. b. 28. a.

*Hard.* 505. If by Charter, confirmed by Act of Parliament, Conuzance of Pleas, *Castle and Litchfield*, adjudged. &c. is granted to the Chancellor of *Oxford*, or his Commissary, the Vice-Chancellor, by his Deputy, may demand it; though the Vice-Chancellor is but a Deputy himself, for a (f) Bailiff may properly demand Conuzance, and upon Notice of the Patent the Court ought to supersede.

(f) *Bro. Conuzance* 36,

5c. S. P.

But (g) a Plea to the Jurisdiction must be put in *Propria Persona*, for (g) In such the Defendant cannot plead by Attorney without Leave of the Court Plea the Defendant must first had, which Leave acknowledges their Jurisdiction; for the Attorney is an Officer of the Court; and if they put in a Plea by an Officer of the Court, that Plea must be supposed to be put in by Leave of the Court.

half Defence,

for if he

makes full

Defence, as *quando & ubi Cur' Consideravit*, he submits to the Jurisdiction. *Co. Lit.* 197. b.— Must be pleaded before any Imparance. 2 *H. 6.* 30. 22 *H. 6.* 7. *Hard.* 365. 1 *Lutw.* 46.— Except where ancient Demesne is pleaded. *Dyer* 210. in Margine. *Style* 30. *Latch* 83.— So Conuzance must be demanded before Imparance, and the same Term the Writ is returnable after the Defendant appears; because until he appears there is no Cause in Court. 1 *Sid.* 103. 6 *H. 7.* 9, 10.

#### 4. Where it must appear that Inferior Courts have a Jurisdiction.

1 *Rol. Abr.* 545, 546. Inferior Courts are bounded, in their original Creation, to Causes arising within such limited Jurisdiction: Hence it is necessary for them to (b) set forth their Authority; for, as has been already observed, (i) nothing shall be intended within the Jurisdiction of an Inferior Court, but what is expressly alleged to be so.

that they have

Power to hold

Plea by

Prescription,

or by Letters

Patent of the

King. 1 *Rol. Abr.*

795. *Cro. Eliz.* 489. *Moor* 422. *Owen* 50. *Noy* 35. S. C. But for this vide *Moor* 601. *Godb.* 380. *Cro. Jac.*

184, 493. *Yelv.* 46. 2 *Mod.* 197. *Style* 131.— But where the Proceedings of an Inferior Court need not be set forth at large, but by way of *Taliter processum fuit*. Vide 2 *Lev.* 81. 3 *Lev.* 403. *Carth.* 53.

(i) 1 *Sand.* 74. 1 *Sid.* 331. Same Rule.— Whether *Hull Bridge* should be intended within the Jurisdiction of the Court of *Hull*. 1 *Lev.* 289. 1 *Vent.* 72. *dubitatur*; & vide *Style* 200. 1 *Lev.* 154.

Therefore if an Action is brought on a (a) Promise in a Court below, not only the Promise, but the Consideration must be alledged to arise within the Inferior Jurisdiction; for a Debtor who has contracted a Debt, does not, by coming into the Limits of such Jurisdiction, give such Court Authority to hold Plea thereof; nor is it sufficient to alledge the Cause of Action within the Jurisdiction of the Court; but it must be proved upon the Trial; and if the Plaintiff proves a Consideration out of the Jurisdiction, it cannot be given in Evidence; and if it be, the Defendant's Counsel (b) may propose a Bill of Exceptions, and upon such Bill of Exceptions the Judgment will appear to be erroneous.

*1 Rsl. Abr.*  
545, 546.  
Several Cases to this Purpose. (a) An Inferior Court cannot hold Plea of an Obligation, Contract, Battery, or other transitory

Action, if it was not made within the Jurisdiction of the Court. *2 Inst.* 251. (b) Where he must plead to the Jurisdiction, and if such Plea be refused, an Attachment lies. *2 Inst.* 229, 230. *2 Lev.* 230. *Raym.* 189. *1 Mod.* 81. *1 Keb.* 946.—But such Plea must be put in *Propria Persona*, and whilst the Court is sitting, and Oath must be made of the Truth thereof. *6 Mod.* 146.—But *vide Carth.* 402. That a Plea to the Jurisdiction need not be on Oath, as a Foreign Plea must.—Where upon the Statute of *Westminster 1. cap.* 35. a Prohibition will be granted. *1 Salk.* 201, 202. and by *F. N. B.* 45, 46. *2 Rol. Abr.* 317. Though the Defendant by Plea admits the Jurisdiction, yet the Superior Court may grant a Prohibition; but in *2 Mod.* 271, 272, &c. *Merdyske* and *Stint*, it is adjudged, That after Verdict and Judgment no Prohibition lies; but there said, That if any Matter appears in the Declaration, which sheweth that the Cause of Action did not arise *infra Jurisdictionem*, a Prohibition may be granted at any Time; so if the Subject Matter in the Declaration be not proper for the Judgment and Determination of such Court; or if the Defendant, who intended to plead to the Jurisdiction, is prevented by any Artifice, as by giving a short Day, or by the Attorney's refusing to plead it, &c. or if his Plea be not accepted, or is over-ruled, in all these Cases, a Prohibition will lie at any Time. *2 Mod.* 273.—Where Trover, Trespass, or false Imprisonment lies. *22 E. 4.* 31. *10 H. 6.* 13. As where in an Action of False Imprisonment, the Defendant justified the apprehending of the Plaintiff by Virtue of a Parol Command, and the Prescription being, that it must be by Precept (which must be understood in Writing) the Plaintiff had Judgment. *Hob.* 65. But an Officer may proceed in his Duty and execute a Process, though there be no Cause of Action, or though it arose out of the Jurisdiction, unless the contrary appears to him. *1 Salk.* 202.—That no Action will lie for suing in a Court that has not Jurisdiction. *Carth.* 189, 190.

But here a Distinction must be observed between Counties Palatine, and other Inferior Courts; for a County Palatine is a general Court for all the Subjects of the Palatinate, and not merely for the Causes arising within that Palatinate; for if a Debtor goes from a Foreign County into a Palatinate, his Obligations go along with him, as much as if he went from one Kingdom into another; and if it were otherwise, a Palatinate Jurisdiction would be a Shelter and *Asylum* to Debtors; for no Process but the Supreme Prerogative Process runs there; and therefore it is determined, that though the Cause of Action be out of the Palatinate, yet if the Party be a Subject of that Palatinate, as he is by coming into that Dominion, that the Action there may be brought against him.

*1 Sand.* 74.  
*Peacock* and  
*Bell*, adjudged.  
*1 Sid.* 331.  
*S. C.*

In an Action upon the Case in the Court of *Launceston in Cornubia*, if the Plaintiff declares, That whereas he was an Attorney of the Hundred Court of *Stratton in Cornubia*, the Defendant having Communication with *J. S.* of the said Office, of the Plaintiff, said these scandalous Words of him within the Jurisdiction of the said Court of *Launceston*, *T'hou art a Cheater*, &c. after Verdict for the Plaintiff, and Damages given, the Judgment was reversed upon a Writ of Error; for the Jury could not inquire whether the Plaintiff was an Attorney of the Hundred Court or not, being out of their Jurisdiction; and this was the principal Cause of the Action.

*1 Rol. Abr.*  
546. adjudged.

If in the Marshal's Court the Plaintiff declares, That in Consideration the Plaintiff, at the Request of the Defendant, had taken Pains to procure him a Lease of an House in *Holborn*; the Defendant *apud S. infra Fur*, &c. promised to pay him 10 *l.* &c. this is not sufficient to entitle the Court to a Jurisdiction; in as much as it does not appear, that *Holborn*, where the House stands, is within the Jurisdiction, and the Jury are not only to try the Promise, (c) but the Consideration also.

*1 Lev.* 50.  
*Ramsay* and  
*Akirson*, adjudged, and the Judgment in the *Marsbalsea* reversed.

(c) Judgment upon an *Assumpsit*, in Consideration that the Plaintiff would solicit a Cause in Chancery, reversed for want of Jurisdiction. *1 Vent.* 28. & *vide 1 Lev.* 289. *1 Vent.* 72.—Where in Debt against an Heir, if he pleads *riens per Discent*, the Plaintiff must reply Assets within the Jurisdiction.

*1 Sid.* 65. *S. C.*  
In

- In an *Indebitatus Assumpsit* for Money for a Cow sold, it must appear that the Sale was within the Jurisdiction; for the being indebted there, does not necessarily imply that the Sale was there, for he that is indebted in one Place is so in every Place:  
 1 Sid. 87.  
 Raym. 75.  
 1 Lev. 96,  
 105, 137,  
 208. S. P.  
 1 Vent. 2, 243. 2 Lev. 87. 1 Jones 230. S. P.
- In Debt for Rent, upon a Lease made *infra Jur'* of an Inferior Court; it must appear also, that the Lands lie within the Jurisdiction; for if Part of the Cause arises within the Inferior Jurisdiction, and Part without, the Inferior Court ought not to hold Plea.  
 1 Lev. 104.  
 1 Sid. 151.  
 1 Vent. 2.  
 S. C.  
 Drake and  
 Beare.
- In an Action for calling the Plaintiff Whore, by which she lost her Marriage, the Loss of the Marriage must be laid within the Jurisdiction; because the Words are not Actionable without Special Damage.  
 1 Sid. 85, 95.  
 Raym. 63.  
 1 Lev. 69.
- S. P. For the Loss of Marriage is the Gift of the Action, & vide 1 Sid. 342. 1 Lev. 153;  
 1 Salk. 404. S. P. For the Loss of Marriage is the Gift of the Action, & vide 1 Sid. 342. 1 Lev. 153;  
 1 Keb. 798, 837. Mar. b 48.
- But if in an Action upon the Case in the Court of Bath, in Com' Somerset, the Plaintiff declares, That he was a Taylor, and that he used the said Art for several Persons inhabiting *tam infra Civitatem Prædictâ, quam alibi infra Regnum Angliæ*, and the Defendant, to scandalize him in his said Art, said these Words of him, *Thou hast stole as much Cloth out of my Suit and Cloak which thou madest for me, as did make thy Wife a Waistcoat*; by which he lost his Customers; the Action lies in that Court, notwithstanding the Allegation *quam alibi infra Regnum Angliæ*, for that is only Matter in Aggravation of Damages.  
 1 Rol. Abr.  
 546. Howel  
 and Ireland.  
 Cro. Car. 570.  
 1 Jones 450.  
 S. C.
- So if in the Court of H. the Plaintiff declares, that he lent his Horse at H. for the Defendant to ride to B. and that the Defendant assumed at H. to re-deliver him, this is well enough; for it is not the Riding, but the Re-delivery, which is the Cause of the Action.  
 1 Sid. 151,  
 180.  
 1 Vent. 72.
- So in a Writ of Error of a Judgment in the Palace Court, in an Action on the Case, wherein the Plaintiff declared, that such a Day, in such a Parish in the County of Middlesex, he delivered to the Defendant (being an Inn-keeper) a Gelding, safely to be kept in his Inn, and that he suffered him to be taken out of his Stable, and rid so immoderately that the Gelding was spoiled; and it was objected as Error, that the Riding did not appear to be within the Jurisdiction of the Marshal's Court; but *per Cur'*, In Actions in Inferior Courts, it is necessary that every Part of that, which is the Gift of the Action, should appear to be within their Jurisdiction; otherwise of such Matters as are inserted only for Aggravation of Damages, and might be omitted, and yet the Action remain as in this Case; and therefore the Judgment was affirmed.  
 1 Salk. 404.  
 Stannian and  
 Davis.  
 6 Mod. 223.  
 S. C.

(E) What is incidental to all Courts in General.

IF the King grants a Court by Letters Patent, to a Corporation of a Town to hold Pleas, &c. in this Case, though there is not any Clause in the Patent to make a Bailiff or Serjeant to execute the Process of the Court, and to return Juries; yet it is incident to their Grant to do it; for otherways they cannot hold a Court.

1 Rol. Abr. §26.  
(a) But they cannot make a Bailiff to execute  
1 Rol. Abr. §26.

Writs of Inquiry of Damages, without a Clause in the Patent for that Purpose: 1 Rol. Abr. §26.

Every Court of Record, as incident to it, may injoin the People to keep Silence, under a Pain, and impose reasonable Fines, not only on such as shall be convicted before them of any Crime on a formal Prosecution, but also on all such as shall be guilty of any Contempt in the Face of the Court, as by giving (b) opprobrious Language to the Judge, or obstinately refusing to do their Duty as Officers of the Court, and may immediately order them into Custody.

Vide each respective Court, &  
11 H. 6. 12.  
1 Rol. Abr. 219.  
8 Co. 38. b.  
11 Co. 43. b.  
Cro. Eliz. 581.

1 Sid. 145. (b) As was the Case of one Redding, who was convicted of Tampering with Bedloe, one of the King's Witnesses in the Popish Plot, and endeavouring to make the said Bedloe deny what before he had confirmed, concerning several great Persons engaged in the said Plot; for which he was adjudged to pay 1000*l.* to stand in the Pillory, and to be imprisoned for a Year; and this Conviction being before Commissioners of Oyer and Terminer, of whom Sir Thomas Jones, and Sir William Dolben, Judges of B. R. were two; he afterwards being set at Liberty, came into B. R. with an Information against all the Commissioners of Oyer and Terminer, and after having demanded the Justice of the Court, he said, That Sir Thomas Jones, and Sir William Dolben, contrary to Magna Charta, the King's Oath, and their Oath, have ruined me; for which Words (a Record being presently made of them) he was adjudged to be fined 500*l.* and imprisoned till Payment of it, to find Surety for his good Behaviour for seven Years; and being a Barrister at Law, his Gown, by Order of Court, was pulled over his Ears by the Tipstaff.

The Courts of Record, as incident to them, have a Power of Protesting from Arrests, not only the Parties themselves, but also all Witnesses *vundo & redeundo*; for since they are obliged to appear by the Process of the Court, it would be unreasonable that any one should be molested whilst he is paying Obedience to such Process.

Lamb. 403.  
1 Lev. 159.  
1 Brownl. 15.  
Raym. 100.  
Bro. Privileg. 35.  
1 Mod. 66.  
1 Keb. 845.

## Court of Parliament.

- (A) Of the Original and Antiquity of Parliaments.  
 (B) Of the Persons of whom it consists.  
 (C) Of the Manner of their Summons and Assenting.  
 (D) Of Elections: And herein,
1. Of the Electors, and their Qualifications.
  2. Of the Elected, and their Qualifications.
  3. Of the Duty of Returning Officers, and the Remedies against them.

(E) Of the Method of Passing Bills.

(F) Of the Continuance, Adjournment, Prorogation and Dissolution of the Parliament.

Of the Privileges of Members. *Vide Tit. Privilege.*

### (A) Of the Original and Antiquity of Parliaments.

*Co. Lit.* 110.  
4 *Inst.* 36.

**T**O trace but exactly the Original and Antiquity of the Supreme Court of Parliament, whose transcendent Jurisdiction, says my Lord Coke, is such, that it maketh, inlargeth, diminisheth, abrogateth, repealeth, and reviveth Laws, Statutes, Acts and Ordinances concerning Matters Ecclesiastical, Capital, Criminal, Common, Civil, Martial, Maritime, &c. And to point out the several Alterations it met with, and how it came to be modelled into the Shape we see it at this Day, seems indeed, if not impossible, a Work of the greatest Difficulty; but this Difficulty is not to be attributed to any peculiar Defect in our Constitution, but only to Time, the Loss and Destruction of our Records, especially in the Barons Wars; nor have the Prejudices and different Views, which conducted the Pens of those who have wrote on this Subject, helped a little to obscure and perplex the Matter.

*Spelm. Gloss.*  
*in verb. Parl.*  
*Pryn's Right*  
*of the Com-*  
*mons* 99.

However, it appears by those Lights which we have still remaining, and from the Inquiries and Reasonings of our best Antiquaries, that there hath always been something of the Nature of a Parliamentary Assembly, as antient as any Thing which we know of our Constitution, in which the People shared with the Prince in the Legislative Power: This Assembly was sometimes called *Magnates Regni, omnes Regni Nobiles, Proceres & Fideles Regni, Universitas Regni, Communitas Regni, Discretio totius Regni, Generale Concilium Regni, &c.*

In the *Saxon Times*, the General Court of the whole Kingdom was the *Wittingham Mote* or *Witenagemote*, to which were summoned the Earls of each County, and the Lords of each Leet; and likewise (a) Representatives of Towns, who were chosen by the Burgessees of the Towns, and appeared on the King's Summons; this Court met once a Year at least, and generally twice, about *Easter* and *Michaelmas*.

*Robert Atkins* says, That *Spelman*, *Bede*, *Selden*, and *Camden*, prove the Commons to be Part of this Court; but they do not prove, says he, that they were elected, or that they consisted of Knights, Citizens and Burgessees. *Sir Robert Atkins of the Jurisdiction of Parliaments*, 25.—In the Preface to *Forrescue, of absolute and limited Monarchy*, 58. It is said, that by reading the *Saxon Laws*, and the Prefaces and Preambles to them, it will appear, that the Commons of *England*, always in the *Saxon Times*, made Part of that August Assembly.—*Spelm. Gloss. verb. subsidium*, the Commons attended in extraordinary Cases, as in granting of new Aids or Taxes, as *Danegelt*, &c. and *Maddox*, cap. 7, 8, 9. agrees herein, and gives us a full Account of those Aids and Taxes, which he says, were but seldom raised; the King, in those Days, being abundantly supplied by his Antient Demefne Lands, Fines, Forfeitures, &c.

Upon the coming in of *William the Conqueror*, every Person found in Arms against him forfeited his whole Estate, in which he placed his *Normans*; and he compelled all those, who were not in Arms against him, to take out Patents of their Lands to hold of himself; and in order to this he made a general Survey of the whole Kingdom, which was called *Domesday*, and changed the Nature of the Tenures, which in the *Saxon Times* was *Allodial*, into *Feudal*, to be holden of himself by Knights Service; and by this Means made the Property of their Estates depend on their Allegiance to him: And hence it is, that all Lands are said to be holden mediately or immediately from the Crown.

The Baronies and Earldoms were antiently created by granting so many Knights Fees, viz. if the Grant consisted of 13,  $\frac{1}{3}$ . (b) Knights Fees, the Party was compellable to hold *per Baroniam*; and he that had twenty Knights Fees, to hold as an Earl; but when those Grants came to be lost by Time, they held both their Honours and Estates by the Prescriptive Right of Possession; the Earls and Barons were wont to grant out Lands to other Vassals, to do certain Duties, which depended on the Bounty and Agreement of the first Grantor; and from hence came all the Fruit of the Feudal Tenure, as Wardship, Marriage, Relief, &c. but those, who held immediately from the Crown, were called his Tenants *in Capite*, and did Suit only to the King.

less than 20*l.* *per Annum*, that of a Baron 400 Marks, and that of an Earl 400*l.* But *Seld. Tit. Hon.* is of Opinion, That there was no certain Number of Knights Fees necessary to make a Baron or Earl, but that they consisted of so many Knights Fees as were contained in the Charter.

Also *William the Conqueror* erected a new Court, called *Curia* or *Aula Regis*, composed of his Principal Officers of State; to these, when any Matter of Moment was in Agitation, as levying a new War, raising an Escuage, &c. were called most of the Barons, and chief Persons who held *in Capite*, and they transacted all Business Civil and Criminal, and also that relating to the Revenue, and were the great Court-Baron of the Kingdom; where every Thing done therein, was said to be done *per concilium Regni*; it was in the Election of the King to summon which of his Attendance he pleased to this Court; and such Attendance being deemed a Burthen in former Days, the Barons were seldom called, especially when they rose to that Grandeur as to make such a Concourse formidable to the King.

In this great Assembly or Parliament, it seems plain, that in the first Reigns after the Conquest, the Commons of *England* were no Part; and therefore the Tenants in Antient Demefne, who used to maintain the King's Table, and also those who held by Burgage Tenure, as by cer-

*London's* being Tallaged, and also Decimated for Non-payment; and upon such Decimation they were obliged to swear to the Value of their Goods. *Vide Ryley* 516.

*Wilk. l. l.*  
*Saxon.* 205.  
*Lamb. Archi-*  
*on.* 57, 239,  
245.  
*Mirror*, cap. 5.  
sect. 1.

(a) *Sir Ro-*

See *Wright's*  
*Tenures.*

(b) In *Ed-*  
*ward* the  
Third's  
Time, when  
the *Mokus*  
*tenendi Par-*  
*liamentum* is  
supposed to  
be wrote,  
they thought  
the usual  
Subsistence  
of a Knight  
could not be

Of the sever-  
al Officers,  
and the Man-  
ner of Judi-  
cature in this  
Court, *vide*  
*Maddox*, cap.  
2, 3.

*Maddox* 491.  
Where there  
is a notable  
Record of  
the City of

tain Rent, setting out Ships in the Navy, &c. according to the Nature of their Patents, were wont, upon any extraordinary Expedition, besides the Duties of their Tenure, to grant an Aid to the King, which was demanded of them by the Justices Itinerant; and which, if they refused to pay, the King, at the End of the Expedition, might, with the Advice and Consent of his Council, Tallage them to a Tenth of all their Estate, but not to more; for none could be taxed at Pleasure but Villains, and those who held by base Tenure.

(a) *Petit, Sir Robert Atkins's Power and Jurisdiction of Parliaments, 14.* and others: (b) *Camden in his Britannia 13.* Dates the Original of the Commons, as Part of the Parliament, and as now elected, from 39 H. 3. and

says, he has it *ex fatis antiquo scriptore*, but does not name his Author; and herein he is followed by *Pryn*, in his Plea for the Lords, 182. *Dugdale*, in his *Orig. Jur.* 18. *Heylin's Life of Laud*, 91. *Brady*, in his Answer to *Petit*, 133, &c. *Sir Robert Filmer*, in his *Freeholders Grand Inquest*, 18. and others, who think themselves sufficiently supported in this Opinion; because the first Writ of Summons of any Knights, Citizens and Burgeffes, now extant, is no antienter than 49 H. 3.

*Spelm. Gloss.* 67. *Seld. Tit. Hon.* 692.

But as neither of these Accounts seem to be the true one, the most probable Opinion is, that the House of Commons was instituted by the Crown, as a Ballance to the Barons, who were grown very opulent and numerous, and as appears by their Wars, very uneasy to the Crown; hence we find, that upon the Excheat of any Barony for want of Issue, or by Forfeiture, the Crown parcelled it out into smaller Districts; and this begot the Distinction between the *Barones Majores* and *Barones Minores*. These *Barones Minores* held by Knight's Service, and being too numerous to be all called to Parliament, were allowed to (c) sit by Representation. Hence we have the Writ to chuse *Duos Milites Gladiis Cinctos*; to these were added Representatives of Cities and antient Boroughs, who being equally concerned with the *Barones Minores* in all Aids and Taxes, it was reasonable they should share with them in those Matters; and this Policy was set on Foot as a Matter of the greatest Service to the Crown, both for the Ballancing of the Peerage, and more conveniently taxing of the People.

(c) But at what Time they first sat, or were first digested into one House, with the Representatives of the People.

Cities and Boroughs, does not well appear. By some Opinions they at first sat with the *Barones Majores*; and hence my Lord *Coke* says, That Lords and Commons at first sat together, and made one House of Parliament. 4 *Inst.* 2. *Selden* does not determine the Point, but says, that it was attempted 17 *John*, to bring in the *Barones Minores*, as appears by the Great Charter granted by him at *Runny Mead*. *Seld. Tit. Hon.* 704. But the more received Opinion is, That it was accomplished in the victorious Reign of *Henry 3.* who, instead of grasping at the Liberties of his People upon his Conquests, confirmed the Great Charter, and established a House of Commons, as a Ballance to the Peerage, which they never would have permitted before he had vanquished them. *Camden Britt.* 13. *Dugd. Orig. Jur.* 18. *Brady's Answer to Petit* 133. It is plain, that that wise Prince *E. 1.* went into this Policy, and that in his Reign we find a Parliamentary Peerage, or House of Lords established, as also a House of Commons, consisting of Knights, Citizens and Burgeffes.

As one of the principal Reasons for establishing a House of Commons, was, for the more convenient Taxing of the People; hence we find the true Reason why all Taxation begun in that House, and why the Commons would never after suffer it to be altered; and the Reason is, that being at first instructed by their Principals, whom they represented, to

give what each Man thought he could bear ; to vary from these Instructions, or to suffer the Superior Peerage to alter it, would, as they rightly judged, be the highest Breach of Trust in them.

Hence also we find the true Reason why the Power of Judicature was reserved to the Lords House, for the *Barones Majores*, who constituted this House, were called to the antient *Curia Regis*, and sat there in their own Right, as *Pares Curtis* to the King ; and as this Court had a Jurisdiction of (a) determining in the first Instance, both in Civil and Criminal Causes, especially those relating to great Persons, and the King's Officers of State, as also by way of Appeal from the Injustice of all other Courts ; so the Lords continued to determine on Petitions exhibited by private Persons, or those exhibited by the House of Commons, called Impeachments, and were still the *Dernier Resort* to correct the Errors of Inferior Judicatures.

*Ryley Pla Par.*  
74, 156.  
*Hollis Fund of*  
*the Peers* 84.

(a) A Nobleman was tried by his Peers very antiently, as appears by the Earl of Hereford's Case, in the

Time of William the Conqueror. 2 *Inst.* 50.—This turns on the Principle of the Feudal Law, *scilicet inter Dominum & Vassalum Lis moveatur Pares curie sunt Judices*; and therefore the Peers, in the Time of Parliament, were tried by the Peers in the House of Lords, and out of Parliament by the *Juristiar*, and in his Absence by the Steward of England, who summoned some of his Peers upon the Trial, and twelve at least were obliged to appear. This Summons is set forth 3 *Inst.* 28. Where my Lord Coke says, there must be twelve or more appear.

At the first instituting a House of Commons, the Representatives of 4 *Inst.* 46. Knights, Citizens and Burgeses, were only looked upon as Trustees to manage the Affairs of their Principals; and therefore in former Days it was held reasonable, that they should be recompenced by their Principals, for the Trouble and Expence they were at in managing the Trust reposed in them. Hence the Fee of every Knight of the Shire was 4 s. *per Diem*, and that of a Citizen or Burges 2 s. *per Diem*.

## (B) Of the Persons of Whom it consists.

THIS August Assembly consists of the King sitting there in his Royal Political Capacity; of the Lords Spiritual, as Archbishops and Bishops, who sit there by Succession, in respect of their Counties or (b) Baronies, Parcel of their Bishopricks; of the Lords Temporal, as Dukes, Marquisses, Earls, Viscounts and Barons, who sit there by reason of their Dignities, which they hold by Descent or Creation; these compose one House; and when any Parliament is holden, each of them is to have a Writ of Summons *ex debito Justitiæ*; of the (c) Knights, Citizens and Burgeses, who are chosen by Force of the King's Writ, which issues *ex debito Justitiæ*, none of which ought to be omitted; these compose the House of Commons, and represent all the Commons of the Kingdom.

4 *Inst.* 1.  
*Right of Electing to Parliament* 106,  
142, 181.  
(b) *Dyer* 60.

(c) Of these in *Fortescue's* Time, *viz.* H. 6. there were 300.

*Fortescue De Laud. Leg. Ang. cap.* 18. *fol.* 4. in my Lord Coke's Time, 493. 4 *Inst.* 1. At the Time of the Union, 513. And by the 5 *Ann.* for uniting England and Scotland, 45 Scotch Members were added, which makes the Number at this Day 558.

In the Saxon Times, the Lords Spiritual held by *Frankalmoigne*, but yet made great Part of the Grand Council of the Nation, being the most learned Persons, that in those Times of Ignorance met to make Laws and Regulations; but William the Conqueror turned the *Frankalmoigne* Tenures of the Bishops, and some of the great Abbots, into Baronies; and from thence-forward they were obliged to send Persons to the Wars, or were assessed to the Escuage, and were obliged to attend in the King's Court; this Attendance they complained of as a Burthen, and insisted, that the Court took Conuzance of Treasons and Felonies, and that by

*Pryn, of the Lord's House,*  
221, 242.

the Canon of *Toledo*, the Clergy were forbid to give Judgment in Blood; to obviate this Objection, the Constitutions of *Clarendon* permitted them to withdraw in Cases of Blood; but still they were obliged to do Suit, and such Suit confirmed their Estates as Baronies, and as Barons they sit in the House of Lords at this Day.

*Wake's Authority of Christian Princes* 364.  
*Stilling. Bishop's Jurisdiction* 367.  
&c.

When a Parliamentary Peerage was established, which composed a House of Lords, as also a House of Commons, consisting of Knights, Citizens and Burgesses; *Ed. 1.* being under great Difficulties through his Wars in *Scotland*, and the Kingdom being exhausted by the Barons Civil Wars, thought from his Success in the Holy War, that he had good Pretensions to bring the Clergy, who held by *Frankalmoigne*, to contribute to the Taxes and Publick Charges of the Kingdom; and accordingly projected a Scheme, to make them a third Estate dependant on himself, for which Purpose was the *Præmunientes* Writ framed; this the Clergy strenuously opposed; for though thereby they were to have a Power of making Canons, yet they foresaw, that the principal Design of it was to make them contribute to the Publick Charges; and therefore insisted upon it, that their Power was totally derived from Heaven, and that they would not submit to any Temporal Power; but upon the King's Persevering they came to this Mean and Temper, that the King might send his Writ to the Archbishop, and if he allowed the King's Writ to be a good Motive, the Archbishop, by Virtue of his Spiritual Jurisdiction, might summon them, and then they were convened by a Spiritual Jurisdiction. From henceforward, instead of making one Estate of the Kingdom, as the King designed, they composed two Ecclesiastical Synods, under the Summons of each of the Archbishops; and being forced into this Regulation, they sat and made Canons, by which each respective Province was bound, and gave Aids and Taxes to the King; but the Archbishop of *Canterbury's* Clergy, and that of *York*, assembled each in their own Province, and the King gratified the Archbishops Vanity, by suffering this new Body of Convocation to be formed in the Nature of a Parliament; for the Archbishop assumed the State of a King, and his Suffragans sat in the Upper House, as his Peers; the Deans, Archdeacons, a Proctor for the Chapter, represented the Burgesses, and the two Proctors for the Clergy the Knights of the Shire; and so this Body, instead of being one of the Estates, as by (a) some it has been improperly called, became an Ecclesiastical Parliament to make Laws, and to tax the Possessions of the Church.

(a) *Vide 4 Inst.*  
1.  
1 *Vent.* 324.

25 *H. 8. c.* 19.  
2 *Salk.* 412.

At the Reformation, by the Act of Submission of the Clergy, these Convocations were to be assembled only by the King's Writ; whereas before, they often met on a Summons from the Archbishop, without his receiving any Writ from the King, because they looked upon him as having Authority from Heaven; and by this Act they could not make any Canon without the King's Licence, or put them in Execution without it.

During the Time of *Cromwel's* Administration, the Method of Taxing was by way of Land-Tax and Poll-Tax; and though the Clergy gave a Subsidy the 13 *Car. 2.* yet it being most advisable to continue the Method used in *Cromwel's* Time, from hence-forwards it passed, that they should have a Vote for Members in Parliament, and they were taxed as the Laity were.

4 *Inst.* 4.

Although the Judges and Masters in Chancery are summoned to attend the Parliament, yet they have no Voices; and therefore they sit round the Table in order to assist the Speaker, or the King, when present, in Matters of Law.

4 *Inst.* 266.

Nor has the Chancellor a Voice, unless he is a Peer; for antiently he was none of the Peers, unless he held *per Baroniam*, and now he is none unless created by Patent or Summons.

(C) Of the Manner of their Summons and Assembling.

THE Parliament commences by the King's Writ or Summons, agreeable to that Rule which was established before the Conquest, viz. That all Judicature proceeded from the King. *William* the Conqueror seems to have been more jealous of this Part of his Prerogative, than of any other, and from his Time this Rule has been regularly observed; antiently (a) some of the Peers only were summoned, but when a Parliamentary Peerage was established, they summoned them all. Hence my Lord Coke (b) says, 'That every Lord Spiritual and Temporal of full Age, ought to have a Writ of Summons *ex debito Jusitix.*

(a) For according to *Spelm. Gloss.* 67. *Seld. Tit. Hon.* 692. it

would have been difficult and inconvenient to have summoned them all, being so numerous, as to be at one Time about 3000. (b) 4 *Inst.* 1.—For the Form of such Summons, *vide Cotton's Records* 3, 4.

Antiently the Tenure first created the Honour, and such as held *per Baroniam* were summoned to do Suit or Service in Parliament; and as such Summons was an Evidence of such Tenure, so it has been since settled, that the Summons and Sitting in Parliament makes the (c) Baron, because when the Charters of *William* the First were lost and destroyed by Time, the Feudal Baronies had no Evidence of their Baronage, but their doing Suit and Service as Barons at the King's Court.

*Co. Lit.* 9. b; 16. b. *Vide Pryn's Plea for the Lords House* 147. Where this Matter is much controverted.

(c) But in all Degrees of Quality above a Baron, a Summons is not sufficient, because there are other Ceremonies requisite, which must be performed, unless dispensed with by Letters Patent; and these being Matters of Record must be produced. *Seld. Tit. Hon.* 495, 530. *Show. P. C.* 5. *Spelm. Gloss.* 142.

The first Summons of a Peer to Parliament differs from an ordinary Summons, because in the first Summons he is called up by his proper Christian and Surname, not having the Name and Title of Dignity in him till he has sat; but after he has sat, the Name of Dignity becomes Part of his Name; but the Writ of Creation, in all other Things, is the same with the Ordinary Writ that calls him.

*Co. Lit.* 16.

The Writ of Summons issues out of Chancery, and recites, that the King *de assensu Concilii*, resolving to have a Parliament, desires *quod Interfitis cum*, &c. each (d) Lord of Parliament is to have a distinct Summons, and such Summons is to issue at least (e) forty Days before the Parliament begins.

4 *Inst.* 4.

the Judges, Barons of the Exchequer, King's Counsel, and Civilians, Masters in Chancery, who have no Voices; and how the Writ differs from that to a Lord of Parliament, *vide Reg.* 261. *F. N. B.* 229. 4 *Inst.* 4. (e) *Vide* the 7 & 8 *W. & M. cap.* 25.

(d) Of the Manner of Summoning

Also a Writ of Summons must be directed to every (f) Sheriff of every County in *England* and *Wales*, for the Choice and Election of Knights, Citizens and Burgesses within each of their respective Counties.

4 *Inst.* 6, 10. *Co. Lit.* 109. b. (f) That the Sheriff must deliver his

Precept to the proper Officer of every City and Borough, *vide* 23 *H. 6. cap.* 15. 7 & 8 *W. & M. cap.* 25.

So a Writ of Summons must issue out to the Lord Warden of the *Cinque Ports*, for the (g) Election of the Barons for the same, who in Law are Burgesses.

4 *Inst.* 6. (g) And by the 2 *W. & M. cap.* 7. it

is enacted, That all Nominations, or Recommendations, claimed, as of Right, by the Lord Wardens of the *Cinque Ports*, to each of the said *Cinque Ports*, two ancient Towns, and their respective Members, of one Person whom the Electors ought to elect as a Baron or Member of Parliament for such respective Port, ancient Town or Member, were, and are, contrary to the Laws of this Realm, and for the Future shall be so deemed, and thereby are declared to be void.

The

- 4 *Inst.* 10. The Substance of those Writs ought to continue in their Original Essence, without any Alteration or Addition, unless it be by Act of Parliament; for, if Original Writs at the Common Law can receive no Alteration or Addition, but by Act of Parliament, a *fortiori* the Writs for the Summons of the High Court of Parliament can receive no Addition or Alteration, but by Act of Parliament.
- 4 *Inst.* 6. At the (a) Return of the Writ the Parliament cannot begin but by the Royal Presence of the King, either in Person or by Representation; by Representation two Ways; either by a Guardian of *England*, by Letters Patent under the Great Seal, when the King is *in remotis* out of the Realm; or by Commission under the Great Seal of *England*, to certain Lords of Parliament, representing the Person of the King, he being within the Realm, in respect of some Infirmity.
- 4 *Inst.* 7. Every Lord Spiritual and Temporal, and every Knight, Citizen and Burgefs, shall upon Summons come to the Parliament, except he can reasonably and honestly excuse himself; or also he shall be amerced, &c. that is respectively a Lord by the Lords, and one of the Commons by the Commons.
- 4 *Inst.* 43. & *vide* 6 *H.* 8. *cap.* 16. That every Knight, Citizen and Burgefs shall lose his Wages; also it is such an Offence that the Lords may Fine one of their Body; so of the House of Commons. 4 *Inst.* 44.

*Vide* 1 *W.* & *M.* by which the Form of the Oath is altered; and 13 & 14 *W.* 3. Which joins the Abjuration Oath with like Penalties, which is also altered in its Form by 4 *Ann.* *cap.* 5. (b) Of the Manner of chusing a Speaker, *vide* 4 *Inst.* 8, 9.

By the 30 *Car.* 2. *cap.* 1. it has been enacted, " That if any Member of the House of Commons shall vote in the House of Commons, or sit there during any Debate after the Speaker is (b) chosen, without having first taken the Oaths of Allegiance and Supremacy, &c. between the Hours of Nine and Four, in full House, he shall be adjudged a Popish Recusant convict, be incapable of any Office, &c. and shall forfeit 500 *l.* &c.

## (D) Of Elections : And herein,

### 1. Of the Electors, and their Qualifications.

AS the Right and Qualifications of Electors depend for the most part on several Acts of Parliament, it will be necessary to point out those Statutes, as the surest Rule to direct us in our Inquiries herein; but here it may be proper to observe, (c) that the Right and Qualification of Voters in Cities, Towns and Boroughs, depend on their Charters, and such Customs as have prevailed in them Time immemorial.

(c) *Hob.* 14.  
12 *Co.* 120.

Also it may be necessary to observe, that for the better ascertaining in general the Right of Voting, and for the greater Security of Returning Officers, by the 2 *Geo.* 2. *cap.* 24. it is enacted, " That such Votes shall be deemed legal, which have been so declared by the last Determination in the House of Commons; which last Determination concerning any County, Shire, City, Borough, *Cinque Port*, or Place, shall be final to all Intents and Purposes. "

As the chief Excellency of our Constitution consists in our being (d) bound only by such Laws to which we our selves consent; and as such

(d) That it is one of the greatest Privileges which a *British* Subject has; and therefore if he be hindred from Voting, an Action on the Case will lie at Common Law. 1 *Salk.* 20. 6 *Mod.* 45. *per Holt*, Ch. Jult. And accordingly adjudged

such Consent cannot be given by every individual in Person, but must in the House be by Representation; it therefore highly concerns the whole Community, of Lords, in that Elections be (a) free, and that (b) every Person claiming a Right the Case of to Vote, be duly qualified, free from Corruption; or any undue Influence *Asby and White.*

(x) By the Common

Law all Elections ought to be free; and by several Statutes it is declared, That Elections of Members of Parliament ought to be free, particularly by the 1 *W. & M. 2 S. cap. 2.* (b) In many Cases Multitudes are bound by Acts of Parliament, which are not Parties to the Elections of Knights, Citizens and Burgeffes; as all they that have no Freehold, or have Freehold in Antient Demaine; and all Women having Freehold or no Freehold, and Men within Age of twenty one Years, &c. 4 *Inft. 4, 5.*

By the 10 *H. 6. cap. 2.* it is ordained, " That the Knights of all 10 *H. 6. c. 2.* Counties within the Realm, to be chosen to come to Parliaments here- after to be holden, shall be chosen in every County by People dwelling and (c) resident in the same, whereof every Man shall have Free- hold to the Value of (d) 40 s. by the Year at the least, above all (e) By 1 *H. 5. cap. 1.* Charges, within the same County where any such Chuser shall meddle Choosers of Knights of the Shire, of any such Election.

shall be resident within the same Shires the Day of the Date of the Writ of Summons of Parliament; & vide *Crom. Juris. 3.* (d) By the Statute 8 *H. 6.* he which cannot expend 40 s. by the Year, as aforesaid, shall in no wise be Chooser of the Knights for the Parliament.

By the 5 *W. & M. cap. 20.* " No Collector, Supervisor, Gauger, or 5 *W. & M. cap. 20.* other Officer or Person whatsoever, concerned or employed in the charging, collecting, levying or managing the Duties of Excise; or any Branch or Part thereof, shall by Word, Messuage or Writing, or in any other Manner endeavour to persuade any Elector to give, or dissuade any Elector from giving his Vote for the Choice of any Person to be Knight of the Shire, Citizen, Burgeffs or Baron of any County, City, Borough or *Cinque Port*; and every Officer or other Person offending therein, shall forfeit the Sum of 100 *l.* one Moiety thereof to the Informer, the other to the Poor of the Parish where such Offence shall be committed; to be recovered by any Person that shall sue by Action of Debt, Bill, Plaint, or Information in any of their Majesty's Courts of Record, &c. and every Person convicted on such Suit, shall be for ever after incapacitated to bear any Office or Place of Trust under the Crown.

By the 12 & 13 *W. 3. cap. 10.* " No Commissioner, Collector, Search- 12 & 13 *W. 3. c. 10.* er, or other Officer or Person concerned or employed in discharging, collecting, levying or managing the Customs, or any Branch or Part thereof, shall by Word, Message or Writing, or in any other Manner endeavour to persuade any Elector to give, or dissuade any Elector from giving his Vote for the Choice of any Person to be a Knight of the Shire, Citizen, Burgeffs or Baron of any County, City, Borough or *Cinque Port*; and every Officer or other Person offending therein, shall forfeit the Sum of 100 *l.* one Moiety to the Informer, the other Moiety to the Poor of the Parish where such Offence shall be committed; to be recovered by any Person that shall sue for the same, by Action of Debt, Bill, Plaint, or Information in any of his Majesty's Courts of Record, &c. and every Person convicted on any such Suit, shall be incapable ever to bear any Office or Place of Trust under the Crown.

By the 7 *W. & M. cap. 25.* " No Person or Persons shall be allowed 7 *W. & M. cap. 25.* to have any Vote in Election of Members to serve in Parliament, for or by Reason of any Trust, Estate or Mortgage, unless such Trustee or Mortgagee be in actual Possession, or Receipt of the Rents and Profits of the same Estate, but that the Mortgagor, or *Cestui que Trust* in Possession, shall and may Vote for the same Estate, notwithstanding

“ standing such Mortgage or Trust; and that all Conveyances of any  
 “ Messuages, Lands, Tenements or Hereditaments, in any County,  
 “ City, Borough, Town Corporate, Port or Place, in order to multiply  
 “ Voices, or to split and divide the Interest in any Houses or Lands,  
 “ among several Persons, to enable them to Vote at Elections of Mem-  
 “ bers to serve in Parliament, are hereby declared to be void and of  
 “ none Effect; and that no more than one single Voice shall be admit-  
 “ ted for one and the same House and Tenement.

And by the same Act, “ No Person whatsoever, being under the Age  
 “ of twenty-one Years, shall at any Time hereafter be admitted to give  
 “ his Voice for Election of any Member or Members to serve in Parlia-  
 “ ment.

10 Ann. cap.  
23.

By the 10 Ann. cap. 23. it is enacted, “ That all Conveyances made  
 “ to any Persons in any collusive Manner, to qualify them to give their  
 “ Votes at Elections of Knights of the Shire, (Subject to Conditions to  
 “ determine or re-convey such Estate) shall be taken against those Per-  
 “ sons who executed the same, as free and absolute, and be holden by  
 “ all such Persons to whom such Conveyance shall be made, freely ac-  
 “ quitted from all manner of Trusts, Clauses of Re-entry, &c. between  
 “ the said Parties, and all Bonds, Covenants, &c. for the restoring there-  
 “ of, shall be null and void; and every Person who shall make and  
 “ execute such Conveyances, or being privy to such Purpose, shall de-  
 “ vise or prepare the same; or any Person who, by Colour thereof, shall  
 “ give any Vote at any Election of Knights of a Shire, shall forfeit  
 “ 40 l. to any one that will sue for the same; to be recovered with full  
 “ Costs of Suit, by Action of Debt, &c. in any of her Majesty’s Courts  
 “ at Westminster.

And by the said Statute, “ No Person shall vote for the Electing of a  
 “ Knight of a Shire in England, in Right of any Lands which have not  
 “ been assessed to the Publick Taxes, Church Rates and Parish Duties,  
 “ in such Proportion as other Lands of 40 s. per Annum, in the Parish  
 “ where the same shall be; and for which such Person shall not have  
 “ received the Rents, or be intitled so to do, to the Value of 40 s. or  
 “ more, to his own Use, for one Year before such Election, unless it  
 “ come by Descent, Marriage, Devise or Presentation to some Benefice,  
 “ &c. and voting contrary to the true Intent hereof, shall forfeit 40 l.  
 “ one Moiety to the Poor where the Lands lie, the other to the Per-  
 “ son suing for the same.

By the 12 Ann. it is enacted, “ That the aforesaid Act (10 Ann.)  
 “ shall not extend to restrain any Person from Voting in Right of any  
 “ Rents, Tithes, or other incorporeal Inheritances, or any Messuages  
 “ or Lands in Extraparochial Places, or any Chambers in the Inns of  
 “ Court, or Inns of Chancery, or any Messuages or Seats belonging to  
 “ any Offices, or in Right of any other Messuages or Land that have  
 “ not been usually charged and assessed to all and every the Publick  
 “ Taxes, Church-Rates and Parish Duties: Provided such Messuages  
 “ or Lands have been usually charged or assessed to some one or more of  
 “ the said Publick Taxes, Rates or Duties, in such Proportion as other  
 “ Messuages or Lands of 40 s. per Annum, within the same Parish or  
 “ Township where the same shall lie, are usually charged.

2 Geo. 2. c. 24.

By the 2 Geo. 2. cap. 24. for preventing Bribery and Corruption in the  
 “ Elections of Members of Parliament, it is enacted, “ That every Free-  
 “ holder, Citizen, Freeman, Burgefs, or Person having or claiming to  
 “ have a Right to vote, or be polled at such Election, shall, before he  
 “ is admitted to Poll at the same Election, take the (a) following Oath,  
 “ (or being of the People called Quakers, shall make the solemn Affirma-

(a) For the  
Oaths of Al-  
legiance and

Abjuration, vide those enjoined by 3 Car. 2. cap. 1. 1 W. & M. cap. 1. 7 & 8 W. & M. cap. 27.  
4 Ann. cap. 8. 10 Ann. cap. 23. 1 Geo. 1. Sess. 1. cap. 7.

“ tion appointed for *Quakers*) in Case the same shall be demanded by  
 “ either of the Candidates, or any two of the Electors, that is to say,  
 “ I A. B. do swear (or being of the People called *Quakers*) I A. B. do so-  
 “ lemnly affirm I have not received, or had, by my self, or any Person what-  
 “ soever in Trust for me, or for my Use or Benefit, directly or indirectly,  
 “ any Sum or Sums of Money, Office, Place or Employment, Gift or Re-  
 “ ward, or any Promise or Security for any Money, Office, Employment or  
 “ Gift, in order to give my Vote at this Election, and that I have not before  
 “ been Polled at this Election. Which Oath, the Officer presiding at  
 “ such Poll, is required and impowered to administer gratis, if demand-  
 “ ed, upon Pain of forfeiting 50 l. and such Officer admitting any Per-  
 “ son to vote without taking such Oath, if demanded, shall forfeit 100 l.  
 “ and the Person Voting, and refusing after Demand to take the Oath,  
 “ in like Manner to forfeit 100 l.

And it is further enacted by the said Statute, “ That if any Return-  
 “ ing Officer, Elector, or Person taking the Oath or Affirmation therein  
 “ mentioned, shall be guilty of wilful and corrupt Perjury, or of false  
 “ affirming, and be thereof convicted by due Course of Law, he shall in-  
 “ cur and suffer the Pains and Penalties which by Law are enacted or  
 “ inflicted in Cases of wilful and corrupt Perjury.

And by the said Statute it is further enacted, “ That no Person  
 “ convicted of wilful or corrupt Perjury, shall after such Conviction be  
 “ capable of Voting in any Election of any Member or Members to  
 “ serve in Parliament.

And it is further enacted, “ That if any Person, who hath, or claim-  
 “ eth to have any Right to Vote in any such Election, shall ask, re-  
 “ ceive, or take any Money or other Reward by way of Gift, Loan,  
 “ or other Device; or agree or contract for any Money, Gift, Office,  
 “ Employment, or other Reward whatsoever, to give his Vote, or to  
 “ refuse or forbear to give his Vote in any such Election; or if any Per-  
 “ son by himself, or any Person employed by him, doth or shall, by  
 “ any Gift or Reward, or by any Promise or Agreement, or Security  
 “ for any Gift or Reward, corrupt or procure any Person or Persons,  
 “ to give his, or their Vote or Votes in any such Election; such Per-  
 “ son, so offending in any of the Cases aforesaid, shall for every such  
 “ Offence forfeit the Sum of 500 l. to be recovered as by the Act di-  
 “ rected; and every Person offending in any of the Cases aforesaid,  
 “ from and after Judgment obtained against him in any such Action,  
 “ &c. or being otherwise lawfully convicted thereof, shall for ever be  
 “ disabled to Vote in any Election of any Member or Members to Par-  
 “ liament; and also shall for ever be disabled to hold, exercise or enjoy  
 “ any Franchise, to which he and they then shall, or at any Time after-  
 “ wards may be intitled, as a Member of any City, Borough, Town  
 “ Corporate, or *Cinque Port*, as if such Person was naturally dead.

“ And if any Person offending against this Act shall, within the  
 “ Space of twelve Months next after such Election, as aforesaid, dis-  
 “ cover any other Person or Persons offending against this Act, so that  
 “ such Person or Persons so discovered be thereupon convicted, such  
 “ Person so discovering, and not having been before that Time convicted  
 “ of any Offence against this Act, shall be indemnified and discharged  
 “ from all Penalties and Disabilities which he then shall have incurred  
 “ by any Offence against this Act.

“ Provided, That no Person shall be made liable to any Incapacity,  
 “ Disability, Forfeiture or Penalty by this Act laid or imposed, unless  
 “ Prosecution be commenced within two Years after such Incapacity,  
 “ Disability, Forfeiture or Penalty shall be incurred; or in Case of a  
 “ Prosecution, the same be carried on without wilful Delay.

But for the Manner of electing them, *vide* the said Statute 5 *Ann. cap. 8.* for uniting *England and Scotland*, forty-five shall be the Number of the Representatives of *Scotland*, in the House of Commons of the Parliament of *Great Britain*, and sixteen Peers to sit and vote in the Lords House.

*5 Ann. cap. 8. 6 Ann. cap. 6. 9 Ann. cap. 5. 12 Ann. and 7 Geo. 2.* Of electing Members for *Chester*, *vide* 34 and 35 *H. 8. cap. 13.* For *Wales*, 35 *H. 8. cap. 11.* For *Durham*, 25 *Car. 2. cap. 9.* And for the City of *London*, 11 *Geo. 1. cap. 18.*

## 2. Of the Elected, and their Qualifications.

- 4 *Inst. 46, 47.* A Knight Baneret, or any other under the Degree of a Baron, may be elected Knight, Citizen or Burgefs.
- Molloy 382.* An Alien, though made a Denizen, cannot sit in Parliament; for to have a Power of making Laws, it is necessary that he should be totally received into the Society, which he cannot be without the Consent of Parliament.
- 4 *Inst. 47.* See the Statutes 12 & 13 *W. 3.*  
4 *Ann. cap. 8. 1 Geo. 1.*
- 4 *Inst. 47.* One under the Age of twenty-one Years is not (a) eligible, neither (a) By the can any Lord of Parliament sit there until he be of the full Age of 7 & 8 *W. & 21 Years.*  
*M. cap. 25.*  
No Person hereafter shall be capable of being elected a Member to serve in Parliament, who is not of the Age of twenty-one Years; and every Election, or Return of any Person under that Age, is hereby declared to be null and void, and if any such Minor hereafter chosen, shall presume to sit or vote in Parliament, he shall incur such Penalties and Forfeitures, as if he had presumed to sit and vote in Parliament without being chosen and returned.
- 4 *Inst. 47.* None of the Judges of the King's Bench, Common Pleas, or Barons of the Exchequer, that have Judicial Places, can be chosen Knight, Citizen or Burgefs of Parliament; but any that have Judicial Places in the Court of Wards, Court of Dutchy, or other Courts Ecclesiastical or Civil, are eligible.
- 4 *Inst. 47.* None of the Clergy can be elected Knight, Citizen or Burgefs of Parliament, because they are of another Body, *viz.* the Convocation.  
*Moor 783. pl. 1083.*
- 4 *Inst. 48.* A Person attainted of Treason or Felony, &c. is not eligible, for he ought, according to the Writ, to be *Magis Idoneus, Discretus & sufficiens.*
- 4 *Inst. 49.* The King cannot grant a Charter of Exemption to any Man, to be freed from Election of (b) Knight, Citizen or Burgefs of the Parliament, because the Elections of them ought to be (c) free, and his Attendance is for the Service of the whole Realm, and for the Benefit of the King and his People, and the whole Commonwealth hath an Interest therein.  
*Parliament,*  
to discharge him from his Attendance in the Lord's House. 4 *Inst. 49.* (c) For the Incapacities of Sheriffs, Mayors of Towns, &c. and the Reasons why they may, or may not be elected Knights, Citizens, or Burgefses, *vide* 4 *Inst. 48. Bro. Abr. Tit. Parliament, 7. Cromp. Jur. 3, 16. Sir Symon Deewes, Jour. 38, 436, 624. Russh. Coll. Vol. 1. 684. Townsh. Coll. 185.*
- 8 *H. 6. cap. 7.* By the 8 *H. 6. cap. 7.* it is enacted, " That they that have the greatest Number of Voices that may expend 40 s. by the Year, and above, shall be returned (d) Knights of the Shire, &c. and that they which shall be chosen, shall be dwelling and (e) resident within the same Counties.
- (a) As the Writ for Election of Knights, &c.  
was *Duos Milites Gladii Cimfos, &c.* it required an Act of Parliament, *viz.* 23 *H. 6. cap. 15.* That notable Esquires might be eligible. 4 *Inst. 10.* (e) The like is enacted by 1 *H. 5. cap.* as to Knights, Citizens and Burgefses; but these Regulations seem not necessary at this Day.

And now by the 9 *Ann. cap. 5.* it is enacted, “ That no Person shall <sup>9 *Ann. cap. 5.*</sup>  
 “ be capable to sit or vote as a Member of the House of Commons, for  
 “ any County, City, &c. within that Part of *Great Britain* called *Eng-*  
 “ *land*, &c. who shall not have an Estate of Freehold or Copyhold for  
 “ his own Life, or for some greater Estate either in Law or Equity,  
 “ to his own Use, in Lands, Tenements or Hereditaments, above what  
 “ will satisfy and clear all Incumbrances within that Part of *Great Bri-*  
 “ *tain* called *England*, &c. of the Annual Value of 600*l.* above Re-  
 “ prizes, for every Knight of a Shire; and of 300*l.* above Reprizes,  
 “ for every Citizen, Burgess, &c. and if any Persons elected or return-  
 “ ed to serve in any Parliament, as a Knight of a Shire, or as a Citizen,  
 “ Burgess, &c. shall not, at the Time of such Election and Return, be  
 “ seised of, or entitled to such an Estate before required, such Election  
 “ and Return shall be void.

“ *Provided*, That nothing in this Act contained shall extend to make  
 “ the eldest Son or Heir apparent of any Peer or Lord of Parliament,  
 “ or of any Person, Qualified by this Act to serve as Knight of a Shire,  
 “ incapable of being elected and returned, and sitting and voting as a  
 “ Member of the House of Commons in any Parliament.

“ *Provided also*, That nothing in this Act contained shall extend to  
 “ either of the Universities in that Part of *Great Britain* called *England*,  
 “ but that they may elect and return Members to represent them in Par-  
 “ liament, as heretofore they have done.

Also by the said Statute, “ No Person shall be Qualified to sit in the  
 “ House of Commons, within the Meaning of this Act, by Virtue of  
 “ any Mortgage whereof the Equity of Redemption is in any other Per-  
 “ son, unless the Mortgagee shall have been in Possession of the mort-  
 “ gaged Premises for seven Years before the Time of his Election.

“ Every Person (except as aforesaid) who shall appear as a Candi-  
 “ date, or shall by himself or any others be proposed to be elected, shall  
 “ upon Request (at the Time of such Election, or before the Day to be  
 “ prefixed in the Writ of Summons for the Meeting of the Parliament)  
 “ by any Person who shall stand Candidate at such Election, or by any  
 “ two or more Persons having Right to vote at such Election, take a  
 “ Corporal Oath in the Form following, *viz.* *I A. B. do swear, that I*  
 “ *truly and bona fide have such an Estate in Law or Equity, to and for my*  
 “ *own Use and Benefit, of, or in Lands, Tenements or Hereditaments (over*  
 “ *and above what will satisfy and clear all Incumbrances that may affect the*  
 “ *same) of the Annual Value of (a) 600*l.* above Reprizes, as doth qualify*  
 “ *me to be elected and returned to serve as a Member for the County of ———*  
 “ *according to the Tenor and true Meaning of the Act of Parliament in that*  
 “ *Behalf; and that my said Lands, Tenements or Hereditaments, are lying*  
 “ *or being within the Parish, Township or Precinct of ——— or in the several*  
 “ *Parishes, Townships or Precincts of ——— or in the County of ——— or*  
 “ *in the several Counties of ——— (as the Case may be) and if any of the*  
 “ *said Candidates, &c. shall wilfully refuse to take the Oath, the Elec-*  
 “ *tion and Return of such Person shall be void.* (a) The like  
 Oath (*muta-*  
*tis mutandis*)  
 as to the an-  
 nual Value  
 of 300 *l.* per  
*Ann.* to be  
 taken by  
 Candidates  
 for a City,  
 Borough, &c.

“ By the 7 *W. & M. cap. 4.* it is enacted, “ That no Person or Per- <sup>7 *W. & M.*</sup>  
 “ sons hereafter to be elected to serve in Parliament, for any County, <sup>*cap. 4.*</sup>  
 “ City, Town, Borough, Port or Place within the Kingdom of *England*,  
 “ Dominion of *Wales*, or Town of *Berwick upon Tweed*, after the *Teste*  
 “ of the Writ of Summons to Parliament, or after the *Teste*, or the  
 “ issuing out, or ordering of the Writ or Writs of Election upon the Cal-  
 “ ling or Summoning of any Parliament hereafter, or after any such  
 “ Place becomes vacant hereafter, in the Time of this present, or of any  
 “ other Parliament, shall, or do hereafter by himself or themselves, or  
 “ by any other Ways or Means, on his, or their Behalf, or at his or  
 “ their Charge before his or their Election to serve in Parliament, for  
 “ any County, City, Town, Borough, &c. directly or indirectly give,  
 “ present,

“ present, or allow to any Person or Persons, having Voice or Vote in  
 “ such Election, any Money, Meat, Drink, Entertainment or Provi-  
 “ sion, or make any Present, Gift, Reward, or Entertainment, or shall  
 “ at any Time hereafter make any Promise, Agreement, Obligation or  
 “ Engagement, to give or allow any Money, Meat, Drink, Provision;  
 “ Present, Reward or Entertainment, to or for any such Person or Per-  
 “ sons in particular, or to any such County, City, Town, Borough,  
 “ Port or Place in general, or to or for the Use, Advantage, Benefit,  
 “ Employment, Profit or Preferment of any such Person or Persons;  
 “ Place or Places, in order to be elected to serve in Parliament for such  
 “ County, City, Town, Borough, Port or Place.

And it is further enacted, “ That every Person so giving, presenting  
 “ and allowing, making, promising or engaging, doing, acting or pro-  
 “ ceeding, shall be, and are hereby declared and enacted, disabled and  
 “ incapacitated, upon such Election, to serve in Parliament for such Coun-  
 “ ty, City, Town, Borough, Port or Place; and that such Person or  
 “ Persons shall be deemed and taken, and are hereby declared and en-  
 “ acted to be deemed and taken no Members in Parliament, and shall  
 “ not act, sit, or have any Vote or Place in Parliament, but shall be,  
 “ and are hereby declared and enacted to be to all Intents, Construc-  
 “ tions and Purposes, as if they had never been returned or elected  
 “ Members for the Parliament.

4 & 5 Ann.  
 cap. 7. Vide  
 the Statutes  
 5 & 6 W. &  
 M. cap. 7.  
 11 & 12 W.  
 3. cap. 2. 12  
 & 13 W. 3.  
 cap. 10. How  
 far they are  
 repealed by  
 this Act.

By the 4 & 5 Ann. cap. 7. it is enacted, “ That no Person who shall  
 “ have in his own Name, or in the Name of any Person or Persons in  
 “ Trust for him, or for his Benefit, any new Office or Place of Profit  
 “ whatsoever under the Crown, which at any Time hereafter shall be  
 “ created or erected; nor any Person who shall be a Commissioner, or  
 “ Sub-Commissioner of Prizes, Secretary or Receiver of the Prizes, nor  
 “ any Comptroller of the Accounts of the Army, nor any Commissioner  
 “ of Transports, nor any Commissioner of the Sick and Wounded, nor  
 “ any Agent for any Regiment, nor any Commissioner for Wine Li-  
 “ cences, nor any Governor, or Deputy Governor of any of the Plan-  
 “ tations, nor any Commissioner of the Navy employ’d in any of the  
 “ Out-Ports, nor any Person having Pension from the Crown during  
 “ Pleasure, shall be capable of being elected, or of sitting or voting as a  
 “ Member of the House of Commons, in any Parliament which shall be  
 “ hereafter summoned and holden.

“ *Provided*, That if any Person, being chosen a Member of the House  
 “ of Commons, shall at any Time after the Dissolution or Determina-  
 “ tion of this present Parliament, accept of any Office of Profit from  
 “ the Crown, during such Time as he shall continue a Member, his  
 “ Election shall be, and is hereby declared to be void, and a new Writ  
 “ shall issue for a new Election, as if such Person so accepting was natu-  
 “ rally dead: *Provided* nevertheless, that such Person shall be capable  
 “ of being again elected, as if his Place had not become void as afore-  
 “ said.

*Provided also*, and be it enacted, “ That in order to prevent for the  
 “ future too great a Number of Commissioners to be appointed or con-  
 “ stituted for the executing of any Office, that no greater Number of  
 “ Commissioners shall be made or constituted for the Execution of any  
 “ Office, than have been employed in the Execution of such respective  
 “ Office, at some Time before the first Day of this present Session of  
 “ Parliament.

“ *Provided also*, That nothing herein contained, shall extend, or be  
 “ construed to extend to any Member of the House of Commons, be-  
 “ ing an Officer in her Majesty’s Navy or Army, who shall receive any  
 “ new or other Commission in the Navy or Army respectively.

And it is further enacted, " That if any Person hereby disabled, or declared to be incapable to sit or vote in any Parliament hereafter to be holden, shall nevertheless be returned as a Member to serve for any County, City, Town or *Cinque Port*, in any such Parliament, such Election and Return are hereby enacted and declared to be void, to all Intents and Purposes whatsoever; and if any Person disabled or declared incapable by this Act to be elected, shall at any Time, after the Dissolution or Determination of this present Parliament, presume to sit or vote as a Member of the House of Commons, in any Parliament hereafter to be summoned, such Person so sitting or voting, shall forfeit the Sum of 500*l.* to be recovered by such Person as shall sue for the same, &c.

By the 2 & 3 *Ann. cap. 4.* it is enacted, " That no Register (for the See also Registering Memorials of Deeds, Conveyances and Wills) within the 6 *Ann. c. 35.* *West-Riding* in the County of *York*, or his Deputy for the Time being, be capable of being chosen a Member to serve in Parliament.

By the 1 *Geo. 1. cap. 56.* it is enacted, " That no Person having any Pension from the Crown for any Term or Number of Years, either 1 *Geo. 1. c. 4.* in his own Name, or in the Name or Names of any other Person or Persons in Trust for him, or for his Benefit, shall be capable of being elected or chosen a Member of, or for sitting or voting as a Member of this present, or any future House of Commons which shall hereafter be summoned.

" And if any Person who shall have such Pension as aforesaid, at the Time of his being so elected, or at any Time after during such Time as he shall continue or be a Member of the House of Commons; shall presume to sit or vote in that House, then, and in such Case he shall forfeit 20*l.* for every Day in which he shall sit or vote in the said House of Commons, to such Person or Persons who shall sue for the same, &c.

By the 3 *Geo. 1. cap. 18.* it is enacted, " That no Director, &c. of 3 *Geo. 1. c. 18.* the Bank of *England*, shall be disabled from being a Member of Parliament.

By the 3 *Geo. 1. cap. 9.* " No Member of the (a) *South-Sea Com-* 3 *Geo. 1. c. 9.* pany shall be disabled from being a Member of Parliament. (a) *Vide the* 7 *Geo. 1. c. 28.*

By which, the late Governor, Deputy Governor, and Directors, &c. therein named, are disabled for ever to sit or vote in either House of Parliament.

By the 6 *Geo. 1. cap. 18.* it is enacted, " That no Governor, Direc- 6 *Geo. 1. c. 18.* tor, or other Officer of the Corporations for Assurance of Ships, shall be disabled from being a Member of Parliament.

### 3. Of the Duty of Returning Officers, and the Remedies against them.

The Duty of Sheriffs, and other Officers presiding at Elections, seems to be chiefly (b) Ministerial; therefore, (c) if one be duly elected (b) If the Knight, Citizen or Burgess, and the Sheriff return another, the Return must be reformed and amended by the Sheriff, and he that is duly elected must be inserted; for the Election in these Cases is the Foundation, and not the Return. Party or the Freeholders demand the Poll, the Sheriff cannot deny the

Scrutiny; for he cannot discern who be Freeholders by the View; and though the Party would have the Poll, yet the Sheriff must proceed in the Scrutiny, 4 *Inst. 48.*—If one having a Right to Vote, is hindered by the presiding Officer, an Action on the Case lies at Common Law. 1 *Salk. 20.* 6 *Mod. 45.* *Ashby and White.*—Whether for a double or false Return any Action lay at Common Law, *vide* 2 *Lev. 114.* 3 *Keb. 365, 369.*—*Barnardiston v. Seams.* 2 *Sid. 168.* *Nevil's Case.* 2 *Vent. 37.* *Onslow's Case.* 2 *Salk. 502.* *Prideaux and Morris.* 2 *Salk. 504.* *Condell v. John.* (c) 4 *Inst. 49.*

By

(a) As 7 H. 4. cap. 15. By the 23 H. 6. cap. 15. reciting, " That the severall (a) Statutes then in Force were not found sufficiently effectual for preventing undue Elections and Returns of Knights, &c. it is ordained, that every Sheriff, after the Delivery of the Writ to him, shall make and deliver, without Fraud, a sufficient Precept under his Seal, to every Mayor and Bailiff, or to Bailiffs or Bailiff, where no Mayor is, of the Cities and Boroughs within his County, reciting the said Writ, commanding them by his Precept, if it be a City, to chuse by Citizens of the same City, Citizens; and in the same Manner and Form if it be a Borough, by Burgeses of the same, to come to the Parliament.

But now for the Duty of presiding Officers, vide the Statutes 7 & 8 W. & M. cap. 7. cap. 25. 10 & 11 W. 3. cap. 3.

7 Geo. 2. " And that the same Mayor and Bailiffs, or Bailiffs or Bailiff, where no Mayor is, shall return lawfully the Precept to the same Sheriff, by Indentures betwixt the same Sheriff and them, to be made of the said Elections, and of the Names of the said Citizens and Burgeses by them so chosen; and thereupon every Sheriff shall make a good and rightful Return of every such Writ, and of every Return by the Mayors and Bailiffs, or Bailiffs or Bailiff where no Mayor is, to him made.

" And that every Sheriff, at every Time that he doth contrary to this Statute, or any other Statutes for the Election of Knights, Citizens and Burgeses, to come to the Parliament, before this Time made, shall incur the Pain contained in the Statute made in the eighth Year of this King, (*viz.* the Penalty of 100 l. payable to our Lord the King) and moreover shall forfeit and pay to every Person hereafter chosen Knight, Citizen or Burgeses in his County, to come to any Parliament, and not duly returned, or to any other Person, which in Default of such Knight, Citizen or Burgeses, will sue, 100 l. whereof every Knight, Citizen and Burgeses so grieved, severally, or any other Person, which in their Default will sue, shall have his Action of Debt against the said Sheriff, his Executors or Administrators, with Costs, &c.

(b) In the Construction of this Statute it has been held, That the Party grieved may declare against the Bailiff, without averring that there was no Mayor; for

it shall be intended that there was no Mayor, except it be shewed; and if there were one, it should come properly on the other Side; and though the Parliament was as none, because there was no Act nor Record of it; yet the Action may lie, for there was a Return of the Writs, and many Sitings. *Hob.* 78.

And it is further enacted by the said Statute, " That every Sheriff that maketh no due Election of Knights to come to Parliament in convenient Time, *i. e.* every Sheriff in his full County, (c) betwixt the

(c) No Election can be made of any Knight of the Shire, but between 8 and 11 of the Clock in the Forenoon; but if the Election be begun within that Time, and cannot be determined within those Hours, the Election may be made after. 4 *Inst.* 48.—After the Precept of the Sheriff directed to the City or Borough for making of Election, there ought *secundum Legem & consuetudinem Parliamenti.* to be given a convenient Time for the Day of the Election, and sufficient Warning given to the Citizens or Burgeses that have Voices, that they may be present; otherwise the Election is not good. 4 *Inst.* 49.—Any Election, or Voices given before the Precept be read and published, are void and of no Force; for the same Electors, after the Precept read and published, may make a new Election, and alter their Voices *secundum Legem & consuetudinem Parliamenti.* 4 *Inst.* 49.

" Hours

“ Hours of eight and eleven before Noon, without Collusion in this Behalf, shall incur the Pain of 100 *l.* to the King, and 100 *l.* to him who will sue, &c.

“ *Provided*, That every Knight, Citizen and Burgeſſs to come to any Parliament hereafter to be holden, in due Form choſen, and not returned, as afore is ſaid, ſhall begin his Action of Debt aforeſaid, within three Months after the ſame Parliament commenced, to proceed in the ſame Suit effectually without Fraud; and if he doth not ſo, another that will ſue ſhall have the ſaid Action, &c.

### (E) Of the Method of paſſing Bills.

AN Act of Parliament muſt have the Conſent of the Lords, the Commons, and the Royal (a) Aſſent of the King; and (b) whatſoever paſſeth in Parliament by this threefold Conſent, hath the Force of an Act of Parliament.

4 *Inſt.* 25.

*Hob.* 111.

*Fortef. Laud.*

*cap.* 18.

*Dyer* 92.

(a) By the 33 *H. 8. cap.* 21. The King's Royal Aſſent by his Letters Patent under his Great Seal, and ſigned with his Hand, and declared and notified in his Abſence to the Lords Spiritual and Temporal, and to the Commons, aſſembled together in the High Houſe, is as effectual as if the King were Perſonally preſent. (b) Difference between an Ordinance and an Act of Parliament is, that an Ordinance wanteth the threefold Conſent, and is only ordained by one or two of them. 4 *Inſt.* 25.

Antiently the Manner of Proceeding in Bills, was much different from what it is at this Day; for formerly the Bill was in Nature of a Petition, and theſe Petitions were entred upon the Lords Rolls, and upon theſe Rolls the Royal Aſſent was likewiſe entred; and upon this, as a Groundwork, the Judges uſed, at the End of the Parliament, to draw up the Act of Parliament into the Form of the Statute, which was afterwards entred upon the Rolls, called the *Statute Rolls*; which was different from thoſe called the *Lords Rolls*, or the *Rolls of Parliament*: Upon which *Statute Rolls*, neither the Bill nor Petition from the Commons, nor the Anſwer of the Lords, nor the Royal Aſſent, was entred, but only the Statute, as it was drawn up and Penned by the Judges; and this was the Method till about *Henry* the Fifth's Time, and in his Time it was deſired, that the Acts of Parliament might be drawn up and Penned by the Judges before the End of Parliament; and this was by reaſon of a Complaint then made, that the Statutes were not equally and fairly drawn up and worded. After the Parliament was diſſolved or prorogued in *Henry* the Sixth's Time, the former Method was altered, and then Bills *continentes formam actus Parliamenti* were firſt uſed to be brought into the Houſe; the Bills were (before they were brought into the Houſe) ready drawn, in the Form of an Act of Parliament, and not in the Form of a Petition, as before; upon which Bills it was written by the Commons, *Soit Baile al Seigneurs*, and by the Lords, *Soit Bayle al Roy*, and by the King, *Le Roy il voit*; all this was written upon the Bill, and the Bill thus indorſed, was to remain with the Clerk of the Parliament, and he was to enter the Bill thus drawn at firſt, in the Form of an Act of Parliament, or Statute, upon the *Statute Rolls*, without entring of the Anſwer of the King, Lords or Commons, upon the *Statute Rolls*, and then iſſued out Writs to the Sheriff, with Tranſcripts of the *Statute Rolls*, *viz.* of the Bill drawn at firſt in the Form of

4 *Inſt.* 25, 26.

*Goodall* 286.

*Dyer* 131.

8 *Co.* 1.

a Statute, and without the Answer of the King, Lords and Commons, (a) Were an- to the Bill, to (a) proclaim the Statute. tiently pro- claimed by the Sheriff, but upon the Invention of Printing, this Method was discontinued; so that at this Time every Body is obliged to take Notice of an Act of Parliament at his Peril. 4 *Inst.* 26.

4 *Inst.* 34. In the Lords House, the Lords give their Voices from the *Puisne* Lord *seriatim*, by the Word of *Content*, or *Not Content*.

4 *Inst.* 35. The Commons give their Voices upon the Question by *Yea*, or *No*; and if it be doubtful, and neither Party yield, two are appointed to Number them; one for the *Yeas*, another for the *No's*, the *Yeas* going out, and the *No's* sitting; and thereof Report is made to the House at a Committee, though it be of the whole House; the *Yeas* go of one side of the House, and the *No's* on the other, whereby it will easily appear which is the greatest Number.

4 *Inst.* 12. To the passing of a Bill, the Assent of the Knights, Citizens and Burgeses, must be in Person, but the Lords may give their Votes by Proxy; and the Reason hereof is, That the Barons did always sit in Parliament in their own Right, as Part of the *Pares Curtis* of the King; and therefore, as they were allowed to serve by Proxy in the Wars, so they had Leave to make their Proxies in Parliament; but the Commons coming only as representing the *Barones Minores*, and the Socage Tenants in the County, and the Citizens and Burgeses, as representing the Men of their Cities and Boroughs, they could not constitute Proxies, because they themselves were but Proxies and Representatives of others, and therefore could not constitute a Proxy in their Place; according to that Maxim of Law, *Delegata Potestas non potest delegari*.

## (F) Of the Continuance, Adjournment, Prorogation, and Dissolution of the Parliament.

4 *Inst.* 38. THE Parliament can neither begin nor end without the King's Presence, either in Person, or by (b) Representation.

(b) *Vide* 33 H. 3. cap. 25. The Passing of any Bill or Bills, by giving the Royal Assent thereunto, or the giving any Judgment in Parliament, doth not (c) make a Session, but the Session doth continue until that Session be prorogued or dissolved.

4 *Inst.* 27. (c) That the Courts of Justice are to take Notice of the Commencements of Parliaments, and also of Prorogations and Sessions. 1 *Lev.* 296. *Raym.* 191. *Heth.* 119. *Dyer* 203.

4 *Inst.* 27. The Diversity between a Prorogation and an Adjournment, or Continuance of the Parliament, is, That by the Prorogation in open Court there is a Session, and then such Bills as passed in either House, or by both Houses, and had no Royal Assent to them, must at the next Assembly begin again, &c. for every several Session of Parliament, is in Law, a several Parliament; but if it be but adjourned or continued, then there is no Session, and consequently all Things continue still in the same State they were in before the Adjournment or Continuance.

When a Parliament is called, and doth sit, and is dissolved without any Act of Parliament passed, or Judgment given, it is (a) no Session of Parliament, but a Convention.

4 Inst. 38. (a) The Statute of Feofails, made in Oxford, 16 & 17 Car. 2. was to continue and be in Force for three Years, and from thence to the End of the next Session of Parliament; but because the Parliament convened next after the Expiration of the three Years, was prorogued without passing any Act, the Court held it no Session, at least not such a Session as was intended to determine the aforesaid Act. Rym. 187. 1 Lev. 442. 2 Keb. 529.

The House of Commons is to many Purposes a (b) distinct Court, and therefore is not prorogued or adjourned by the Prorogation or Adjournment of the Lords House; but the Speaker, upon Signification of the King's Pleasure, by the Assent of the House of Commons, doth say, This Court doth prorogue, or adjourn it self; and then it is prorogued or adjourned, and not before; but when it is dissolved, the House of Commons are sent for up to the Higher House; and there the Lord Keeper, by the King's Commandment, dissolveth the Parliament; and then it is dissolved, and not before.

4 Inst. 28. (b) Both Houses must be prorogued together, and dissolved together, for one cannot subsist without the other. Sir Robert Atkin's Argument 51.

By the Statute 4 E. 3. cap. 14. "Parliaments ought to be holden once a Year, and oftner, if Need be.

By the 16 Car. 2. cap. 1. it is enacted, "That the holding of Parliaments shall not be discontinued above three Years at the most.

By the 6 W. & M. cap. 2. it was enacted, "That the Parliament should not have Continuance longer than for three Years at the farthest, to be accounted from the Day, on which, by the Writs of Summons, the Parliament should be appointed to meet.

And now by the 1 Geo. 1. cap. 38. it is enacted, "That the then present Parliament, and all Parliaments that shall at any Time thereafter be called, assembled, or held, shall and may respectively have Continuance for seven Years, and no longer, to be accounted from the Day, on which, by the Writ of Summons, the Parliament shall be appointed to meet, unless sooner dissolved by his Majesty, his Heirs or Successors.

Of the Jurisdiction of the House of Lords.

The Lords House is the highest Court of Justice in this Kingdom; and the Jurisdiction it exerciseth at this Day, with respect to Impeachments, the Trial of its own Members, Writs of Error and Appeals, is deduced chiefly from the Jurisdiction and Power of the King's antient Court, or *Aula Regis*, established at the Conquest.

This Court, established by the Conqueror, consisted not only of the principal Officers of State, but also of such as held *per Baroniam*, whom the King had a Right to summon, as holding immediately from himself, to do Suit in his Court, and to hear Causes; these were the *Pares Curtis* to the King. And hence this Court was considered as the great Court-Baron of the Kingdom, where all Petitions against great Persons, and the Prince's Officers, were heard.

This Court had not only an original Jurisdiction of determining Causes brought before them by Petition, but was also the *Dernier Resort* to correct the Errors of Inferior Judicatures; but as Petitions began to multiply, there are several Instances where original Causes have been referred to Inferior Courts.

Every Suit commenced by Petition, containing the Grievances certainly and particularly; and Process was sent out to bring the Defendant in to answer; when these Petitions increased, Receivers and Triers of Petitions, who determined what Petitions were proper to be received or rejected,

rejected, were appointed; and afterwards upon the assembling of the Knights, Citizens and Burgeſſes, and their conſtituting a Houſe of Commons, the Commons, in Matters of great Moment, and as they were the Grand Inquiſitors of the whole Kingdom, preſented their Petitions; as thoſe Petitions came ſtronger from them than from any particular Perſon, ſo they were never rejected by the Lords: And hence the original of Impeachments by the Houſe of Commons.

(a) This turns upon a Principle of the Feudal Law, ſe inter Dominum & Peers, when this grand Aſſembly or Parliament was ſitting, but out of Parliament by the Juſticiar, and in his Abſence by the Steward of England, who ſummoned ſome of his Peers, and twelve at leaſt were obliged to appear.

*Vaſſalum liſ moreatur Pares Curie ſunt Judices*; and this as to Treafon and Felony, is confirmed by the Clause in *Magna Charta*, cap. 29. *nec ſuper eum ibimus, nec ſuper eum Mittemus niſi per Legale Judicium Parium ſuorum vel per Legem terræ*; but for all other Crimes out of Parliament, as a *Premunire*, Riot, ſeducing a young Lady from her Parents in order to debauch her, &c. a Peer at this Day ſhall be tried by a Jury. 2 Hawk. P. C. 424.

4 Inſt. 21.  
Vide Tit. Error.

As this Court was the *Dernier Reſort* to correct the Errors of Inferior Judicatures, ſo at this Day there lies a Writ of Error of a Judgment given in the *King's Bench*, before this Court, which begins by Petition to the King; whereto, when the King hath answered *ſiat Juſtitia*, then goes out a Writ directed to the Chief Juſtice of the King's Bench, for removing of the Record in (b) *Præſens Parliamentum*; and thereupon the Roll it ſelf, and a Transcript in Parchment, is to be brought by the Chief Juſtice of the King's Bench, into the Lords Houſe in Parliament; and after the Transcript is examined by the Court, with the Record, the Chief Juſtice carrieth back the Record it ſelf into the King's Bench, and then the Plaintiff is to aſſign the Errors, and thereupon to have a *Scire Facias* againſt the adverſe Party, returnable either in that Parliament or the next, and the Proceeding thereupon ſhall be *ſuper tenorem recordi & non ſuper recordum*.

(b) That Writ of Error may be returnable *ad Proximam Seſſionem Parliamenti*, vide Dyer 375.  
And ſo of a *Scire Fac.*  
Vide Fitz.  
Tit. Error, 58. Raſt. Ent. 805.

Towards the latter End of the Reign of King *Charles* the Firſt, the Houſe of Lords aſſerted their Jurisdiction of hearing Appeals from the Chancery, which they do upon a Paper Petition, without any Writ directed from the King; and for this their Foundation is, that they are the great Court of the King, and that therefore the Chancery is derived out of it, and by Conſequence, that a Petition will bring the Cauſe and the Record before them. This was much controverted by the Commons in the Reign of *Charles* the Second, but is now pretty well ſubmitted to, becauſe it has been thought too much, that the Chancellor ſhould bind the whole Property of the Kingdom without Appeal.

## Court of Chancery.

**T**OWARDS the *Norman* Period, upon the breaking the Courts into distinct Jurisdictions, the Chancellor, or Keeper of the Great Seal, retained Part of that Jurisdiction which he exercised in the great Court of the Kingdom, called *Aula Regis*: But for the better Understanding hereof, and of its Jurisdiction at this Day, we shall consider this Court,

- (A) As an *Officina Brevium*, out of which all original Writs flow.
- (B) As an ordinary and limited Court, proceeding according to Law, commonly called the *Petty-Bag*.
- (C) As an Extraordinary Court, proceeding according to Equity: And herein,
  1. Of its original Jurisdiction, and how at first it has been impugned by the Common Law Courts.
  2. What Jurisdiction it exercises at this Day.

(A) As an *Officina Brevium*, out of which all original Writs flow.

**B**Efore the Division of the Courts, the Chancellor put the Seal to all Patents, Commissions and Writs: And hence this Court is considered at this Day, as the great Shop of Justice, out of which (a) all original Writs, which give other Courts a Jurisdiction, issue, and are made returnable into such Courts on a common Return-Day, and may be sued out at any Time, as well in Vacation, as in Term-Time, from whence this Court is said to be always open.

The Reasons of the Institution of this *Officina Brevium*, were many.

1st, That it may appear that all Power of Judicature whatsoever flowed from the King, and therefore there was a Summons even to the Peers in Parliament, that sat *in Proprio Jure*; so likewise for the Lower House of Commons, the Basis of the same were made by Writs that issued out of this Court, and were returned into the same Office; and so in Judicature, there were particular Patents that shewed the Extent of the Commission, and that their Power was derived from the Crown.

2dly, That the Crown might have their proper Fines, these were anciently paid to purchase Justice from the Crown; for they would not suffer Persons to come into the King's Courts, and engage the Power of the King to do Right to private Persons, without receiving first something from the Subject towards the Charges of the Court, and the Expence of the Judicature; in as much as in the antient Times the King used to summon several of the Barons to attend the Hearing of such Causes; but

afterwards by *Magna Charta*, by reason of the Exorbitancy of Officers, and that the Crown might not be cheated, these were reduced to Fines certain.

3dly, The Writs were taken out of the Court of Chancery, returnable in the other Courts, that one Court might be a Check upon the other.

4thly, To keep an Uniformity in the Law; for whether these Writs went out to the Sheriff in the Nature of a *Justicies*, or whether they were returnable before the Justices in *Eyre*, or Justices of the Common Bench, or of Assise, they were still made in one Form, according to the Nature of the Complaint, which was both a Direction to the Judge, and Limitation of his Authority.

The Court of Chancery being thus erected to issue Process, the Chancellor, or Lord Keeper, that had the Government of that Court, had the Great Seal, by Authority of which all Process was to issue; and from hence Masters were appointed in that Court, that made out the Forms of the Writs, and entred them in a Book kept for that Purpose, thence called the Register; and such Writs were Precedents for the future, in like Cases; and Exceptions were taken to Writs in the Courts to which they were directed, for not agreeing with the Register, and divers other Informalities.

After the Masters in Chancery had settled proper Writs and Commissions, and those Things began to be of Course, they had proper Under-Officers, who made out their Writs of Course, and they only attended on the making out new Writs in extraordinary Cases, the ordinary Writs being made out by the proper Officers: Hence it came to pass, that the Officer, called the Clerk of the Crown, made out Commissions after the Form of them were settled, as Commissions for Justices Errant, and of Assises, General Gaol-Delivery, *Oyer and Terminer*, and of the Peace, Writ of Association, *Dedimus Potestatem* for taking of Oaths, and all General and Special Pardons; also Writs of Execution upon a \* Statute-Staple, which were annexed to this Office in the Time of Queen Mary, for their continual and chargeable Attendance; other Writs that were settled, were made out by the *Cursitors*, who were formerly Clerks to the Masters, but afterwards settled in a distinct Office, to make out the *Brevia de cursu*.

\* See Title  
Recognizances  
and Statutes.

At the first Division of the Courts the Chancery was tender in making out Writs in Cases, where there had been formerly no Precedents in the antient *Curia Regis*, which now are called *Actiones Nominatæ*, because they thought the antient Footsteps which were in the former Courts of Justice, were the Bounds of their Jurisdiction, and indeed of the Law; therefore, where-ever there was a new Case that seemed to require Remedy, the original Jurisdiction referred them to Petition the next Parliament; but because this multiplied Petitions to Parliament, therefore there was a particular Law made, whereby it gave the Court Power in a new Case, to invent a Writ, and this was by the Statute of (a) *Westm.*

(a) Upon  
this Statute  
(which vide  
explained  
2 Inst. 405,  
&c.) was  
formed the  
Writ of En-  
try in consi-  
mili casu, re-  
lating to Land;

2. cap. 24. *Et quotiescunque de cætero evenerit in Cancellar' quod in uno casu reperitur Breve, & in consimili casu cadente sub eodem Jure, & simili indigente remedio, non reperitur, concordent clerici de Cancellaria in brevi faciendo, vel atterminent querentes in Proximum Parliamentum, & scribantur casus in Quibus concordare non Possunt, & referant eos ad Proximum Parliamentum, & de consensu Jurisperitorum fiat Breve, ne contingat de cætero quod curia Domini Regis deficiat conquerentibus in Justitia perquirenda.*

also upon this Statute were founded Actions upon the Case upon several Trespasses, in which Cases there were not found any Writs in the Register. 2 Inst. 407.

(B) Of the ordinary and limited Court, proceeding according to Law, commonly called the Petty Bag.

TO understand the Nature of this Court, we must observe, That in antient Times the Chancellor was likewise Chaplain to the King, and it was his Business, in the Time of the *Justiciar*, to write the *Diplomata*, that is, all Charters and Commissions from the King; therefore when the Power of the *Justiciar* was broke, he obtained the *Officina Brevium & Chartarum regiarum*; from thence all the extraordinary Jurisdctions, touching granting of Charters, as likewise all Inquests of Office to intitle the Crown, were returned into this Office; and the Exchequer, in which these Things were antiently transacted, became only an ordinary Court of Revenue, to (a) set Leafes to the King's Farmers, and to get in the King's Debts; and therefore the Office in the Exchequer was only an Office of Instruction, of what Lands were in the King in particular Counties; but to vest Lands in the Crown *de novo*, it was necessary to have an Office under the Great Seal, and so to grant Lands from the Crown, unless it were meerly Farms that were granted for Years.

(a) Vide 2 Co. 16. Plow. 320. 4 Co. 93.

From hence, at this Day, this Court has a Jurisdiction to hold Plea upon a *Scire Facias*, to repeal the King's Letters Patents upon Petitions, *Monstrans de droit*, Traverses of Offices, *Scire Facias* upon Recognizances, Executions upon Statutes, &c. which being Registred in this Court, the Process thereupon issued out of the same, and were returnable there, and entred in the Office called the (b) Petty Bag; whereas the Writs, which were the Foundation of the Business of the other Courts, were put together in the Hamper, which gave the Distinction to those Names, and begat distinct Officers in the Court.

4 Inst. 80.

(b) The Proceedings in this Court were heretofore in Latin,

but were not inrolled in Rolls, but remained only in *Filiis*. 4 Inst. 80.

If in this Court the Parties descend to issue, the Chancellor cannot try it, but is to deliver the Record, with his proper Hand, into the King's Bench, where (c) Judgment is to be given, and the Reason hereof seems to be, that the Chancery being *Officina Brevium*, if it could both make Writs returnable here, and also try Issues, it would inroach too much on other Jurisdctions; besides, there was no Jury Process in the antient *Aula Regis*, but upon (d) a Demurrer the Chancellor shall give Judgment.

4 Inst. 80.

(c) That the Judgment is to be given in B. R. and that for this Purpose both Courts are but one.

*Vide All. 16, 17. Cro. Jac. 12. 2 Rol. Abr. 349.*—So if there be a Demurrer for Part, and Issue for Part, the whole Record may be transmitted into B. R. and the Judgment given there. *2 Sand. 23. 1 Lev. 283. 1 Mod. 29.* (d) So if the Issue is to be tried otherwise than by a Jury, as by the Bishop's Certificate, &c. Judgment shall be given in Chancery. *1 Jones 80. Lat. 3.*

An Inquisition was taken, and a Forfeiture of the Office of Warden of the *Fleet* found, and the Defendant pleaded to Issue, and after Issue joined, several other Persons came in by way of *Monstrans de droit*, and pleaded, and a Demurrer to them, and the Record was carried into B. R. by the Clerk of the Petty Bag, without any Order of the Court, in order to have the Issue tried; and it was resolved, 1st, That though the Clerk had committed a Fault to the Court of Chancery, in carrying the Record without any Order, yet that it was well removed; for that which is done by the proper Officer, is done by my Lord Chancellor, and may be said to be done *propria manu*. 2dly, That though there were an Issue and Demurrer both, yet the removing the whole Record

*Abr. Eq. The King and Warden of the Fleet.*

was

(a) 8 Co. the Prince's Case. 2 *Sand.* 6, 23, 157. 2 *Ke.* 621. 1 *Lev.* 283. 1 *Sid.* 436. 1 *Mod.* 29. S. C.

was proper and well enough, on the (a) Authorities cited in the Margin, by which it appears, that Judgment is most properly to be given in *B. R.* both on the Issue and the Demurrer; otherwise there might be two distinct Judgments, and consequently distinct Executions taken out.

4 *Inf.* 80. (b) But cannot hold Plea of Land. 2 *H.* 6. 32.

Also all (b) Personal Actions, by or against any Officer or Minister, in respect of their Service or Attendance, may be determined in this Court; but in these no Jury Process can issue, but the Record is to be removed *ut supra*.

### (C) Of the Extraordinary Court, proceeding according to Equity: And herein,

#### 1. Of its Original Jurisdiction, and how at first it has been impugned by the Common Law Courts.

(c) That like the other Courts of *Westminster*, it was Time out of Mind. Law.

9 *E.* 4. 53. b. 12 *Co.* 113. *Dr. and Stud. cap.* 7.—By *Lamb. Archaio n.* 62. When the King's Courts ceased to be Ambulatory, and became settled in a certain Place, then the King committed to his Chancellor, together with his Great Seal, his only legal, absolute, and extraordinary Pre-eminence of Jurisdiction, &c.—And in 1 *Lev.* 242. it is said to be established by an Act of Parliament. 36 *E.* 3. But *Q.*

(d) For which *vide* the Petitions of the Commons against this new invented Jurisdiction. 3 *H.* 4. N<sup>o</sup>. 69. 4 *H.* 4. N<sup>o</sup>. 78. 3 *H.* 5. N<sup>o</sup>. 46. 1 *Rol. Abr.* 372.

*Reg.* 25. That there were some Footsteps in the antient *Curia Regis*, which was the Foundation of this Jurisdiction, appears from the *Engliss* Jurisdiction exercised in the Court of Exchequer, where on Informations on the King's Behalf, Articles are administred, to which the Party is to answer upon Oath; as likewise by Impeachments in the House of Lords, where Articles are exhibited in *Engliss* for the Party to answer to.

But notwithstanding this, the Establishment of this Jurisdiction seems to be owing to the Statute of *Westm.* 2. *cap.* 24. above-mentioned, by which a Power was given, in new and extraordinary Cases, to invent a new Writ: Hence it was, that *John Waltham*, then Bishop of *Salisbury*, and Chancellor, as the Commons mention in their Petition, out of his Subtilty, found out, and began a Novelty against the Form of the Common Law, and that was the Invention of the Writ of (e) *Subpœna*; which Writ summoned the Party to appear under a Pain, to answer to such Things as should be objected against him, and a Petition was lodged in Chancery, containing the Articles to which he was obliged to answer; and upon such Articles this new invented Writ issued.

(e) The *Subpœna* seems to have been taken up by the Court of Chancery, in order to oblige a Man to Answer upon Oath as to the Truth of the Plaintiff's Allegations, because it came nearest the Common Law Process, called also a *Subpœna*, which issues to bring in Witnesses to attest the Truth.

By this Construction, not only a new Writ was framed, but a new Jurisdiction erected, and this was towards the Time of *R.* 2. occasioned chiefly by the Statute of *Mortmain*; for when that Statute had restrained the

the growing Riches of the Clergy, they found out this Invention to avoid it, by giving away Lands to Trustees for pious Uses, and the Feoffees of such Trust did the Duties of such Tenure in Behalf of the Trust; but if they perverted the Trust, the ordinary Jurisdiction not reaching a Thing that was against the Statute of *Mortmain*, the Chancellor exerted this extraordinary Jurisdiction, and examined them as to the several Facts alledged against them.

After the Establishment of this Court, it was thought reasonable to give Damages to such Persons as were drawn into it by false Suggestions, and therefore by the 17 R. 2. cap. 6. reciting, "For as much as People be compelled to come before the King's Council, or in the Chancery, by Writs grounded upon untrue Suggestions, it is enacted, That the Chancellor for the Time being, presently after that such Suggestions be duly found and proved untrue, shall have Power to ordain and award Damages, according to his Discretion, to him which is so troubled unduly."

For the Construction of this Statute, vide 4 Inst. 83.

The Jurisdiction of this Court was not only impugned towards its original Creation, but even in the Reign of Queen *Elizabeth* it was strongly holden by the Judges of the Common Law Courts, that the Chancellor could not by his Decree Sequester the Party's Lands, that is, could only *agere in Personam*, but not *in rem*; and agreeably hereunto it was resolved 16 *Eliz.* in the Case of *Coleston* and *Gardner*, That if a Man killed a Sequestrator in the Execution of such Process, it was no Murder.

*Cro. Eliz.* 651. *Brograve* and *Watts.* 4 *Inst.* 84. 1 *Roll. Rep.* 86, 190. *Lit. Rep.* 166. 27 *H. S.* 15.

But these were such bloody and desperate Resolutions, and so much against common Justice and Honesty, which requires, that the Decrees of this Court, which preserved Men from Deceit, should not be rendred illusory, that they could not long stand; but this Process got the better of those Resolutions, on these Grounds. 1st, That the extraordinary Jurisdiction might punish Contempts by the Loss of Estate, as well as Imprisonment of the Person, because that Liberty being a greater Benefit than Property; if they had Power to commit the Person, they might take from him his Estate till he had answered his Contempt. 2dly, To say that a Court should have Power to decree about Things, and yet should have no Jurisdiction *in Rem*, is a perfect Solecism in the Constitution of the Court it self.

Also in the Reigns of Queen *Elizabeth* and King *James* the First, there are (a) several strong Opinions, That a Court of Equity could not examine or give any Redress in a Cause after Judgment at Law, and that Suits in Equity, to Relieve against a Judgment at Law, are within the Statutes, which makes it a *Præmunire* to appeal to any Foreign Court, especially if the End thereof be to controvert the very Point determined at Law, or to seek Relief after Judgment in a Case wherein the Law may relieve, as against excessiveness of Damages, &c.

(a) As where a Person committed to the Fleet for not performing a Decree, made subsequent, and contrary

to a Judgment at Law, was, by *Habeas Corpus* out of the *King's Bench*, admitted to Bail, and afterwards discharged. *Cro. Jac.* 341. And to this Purpose, vide 4 *Inst.* 36, 91. 3 *Inst.* 123. *Dalf.* 81. *Moor* 836. *pl.* 1129, 916. *pl.* 1300. 1 *Leon.* 241. 2 *Leon.* 115. 3 *Leon.* 18. 2 *Brownl.* 97. *Godb.* 244. 1 *Roll. Rep.* 71, 72, 252. 3 *Bulst.* 118, 120. *Lit. Rep.* 37. *Cro. Jac.* 335, 344. *Marsh* 54, 83.

But as these Opinions tended to render the Justice of this Court illusory, whose peculiar Province it is to give Remedies in Cases not remedial by the ordinary Jurisdiction, and to relax and mitigate the Rigour of the Common Law; they seem now to be wholly exploded; and this seems highly reasonable, when it is considered how uncertain and doubtful the Law in many Cases is before it is determined; and consequently that before such Determination it would be impossible to relax and mitigate the Rigour thereof.

*Hard.* 125. 1 *Mod.* 59. 3 *Keble.* 221. 1 *Lev.* 241. 2 *Ch. Ca.* 97. *Abr. Eq.* 137.

## 2. What Jurisdiction it exercises at this Day.

(a) Three Things, says my Lord Coke, are to be adjudged in a Court of Equity. 1. All Covins, Frauds and Deceits, for which there is no Remedy by the ordinary Course of Law. 2. Accidents, as when a Servant, Obligor, or Mortgagor, is to pay Money on a certain Day, and they happen to be robbed in going to pay it. 3. Breaches of Trust and Confidence. 4. *Inft.* 84. (b) Therefore if Tenant for Life or Years levy a Fine, or suffer Recovery, Equity will not relieve against the Forfeiture. *Preced. Chan.* 570.—Also upon this Foundation, That a Court of Equity could not relieve against a Maxim of the Common Law; it was formerly holden, That one Executor could not compel the other to Account. 1 *Rol. Rep.* 263.—That one Jointenant could not sue his Companion. 1 *Rol. Abr.* 376.—That if an Obligee lost his Bond he was without Remedy. 1 *Rol. Abr.* 375.—So where the Lessor entred upon his Lessee, and suspended his Rent, and it was held that he had no Remedy. *Latch* 149.—So where the Party became remediless by his own Act, as by paying Money without an Acquittance. 1 *Rol. Abr.* 374.—So where one on valuable Consideration promised to make a Lease, and it was held, That the Party could not sue on this Promise in Equity, because he might have an Action on the Case. 1 *Rol. Abr.* 380. But these last Opinions are now of no Weight or Authority, as appears by daily Experience.

*Abr. Eq.* 131. *Vide Tit. Uses and Trusts.* All Matters of Trust are peculiarly within the Jurisdiction of the Court of Chancery; but if a Trustee does by Fraud and Combination with the *Cestui que Trust* endeavour to evade any Penal Law, under Pretence that a Trust is only cognizable in Equity, and that Equity should not assist a (c) Penalty, or (d) Forfeiture, yet Chancery will aid remedial Laws, and not suffer its own Notions to be made Use of to elude any beneficial Law.

(c) That a Penalty cannot be demanded in Equity. 2 *Chan. Ca.* 88. (d) That all Forfeitures must be waived, as in Waste, so in a Bill for the Recovery of Tithes. 1 *Vern.* 60. 2 *Vern.* 127. *Vide Abr. Eq.* 40, 127, &c.

## Court of King's Bench.

**T**OWARDS the latter End of the Norman Period, the *Aula Madox, c. 19.*  
*Regis*, which was before one great Court, where the *Justiciar Bract. Lib. 3.*  
 presided, was divided into four distinct Courts; *i. e.* the Court *c. 7. fol. 105.*  
 of Chancery, King's Bench, Common Pleas, and Exchequer.

The Court of King's Bench retained the greatest Similitude with the <sup>4</sup> *Inst.* 70.  
 Antient *Curia*, or *Aula Regis*, and was always ambulatory, and removed <sup>2</sup> *Inst.* 24.  
 with the King where-ever he went: Hence the Writs returnable into *Co. Lit.* 71.  
 this Court are *Coram nobis Ubicunque fuerimus in Anglia*; and all Records *Dyer* 187.  
 there are stiled *Coram Rege*, as it is still supposed to have always the *Cromp. of*  
 King himself in Person sitting in it; from whence it obtained the Name *Courts*, 78.  
 of the Court of King's Bench, and hath always retained a Supreme original <sup>1</sup> *Rol. Abr.*  
 Jurisdiction in all criminal Matters; for in these the Process both <sup>24</sup>  
 issued, and was returnable into this Court; but in Trespas it might be  
 made returnable into either the King's Bench or Common Pleas, because  
 the Plea was Criminal as well as Civil.

### (A) Of the Jurisdiction of the Court of King's Bench: And herein,

1. Of its Jurisdiction in Criminal Matters.
2. Of its Jurisdiction in Civil Causes.
3. Of its Jurisdiction in reforming and keeping Inferior Jurisdictions within their proper Bounds.

### (B) How far its Presence suspends the Power of all other Courts.

### (C) Of the Form of its Proceedings.

### (A) Of the Jurisdiction of the Court of King's Bench: And herein,

#### 1. Of its Jurisdiction in Criminal Matters.

**T**HIS Court is termed the *Custos morum* of all the Realm, and by <sup>1</sup> *Sid.* 168.  
 the Plenitude of its Power, where-ever it meets with an Offence <sup>2</sup> *Hawk. P.*  
 contrary to the first Principles of Justice, and of dangerous Consequence *C.* 6.  
 if not restrained, adapts a proper Punishment to it.

It has a peculiar Jurisdiction, not only over all Capital Offences, but  
 also over (a) all other Misdemeanors of a publick Nature, tending <sup>4</sup> *Inst.* 71.  
 either to a Breach of the Peace, or to Oppression or Faction, or any <sup>11</sup> *Co.* 98.  
 manner of Misgovernment; and it is not material whether such Offences <sup>2</sup> *Hawk. P.*  
*C.* 6.  
 (a) Nor is it  
 necessary to shew a Precedent of the like Nature formerly punished here, agreeing in all Circumstances with the Present. <sup>2</sup> *Hawk. P. C.* 7.

being

being manifestly against the Publick Good, directly injure any particular Person or not.

2 Hawk. P.  
C. 7.

And for the better restraining such Offences, it has a Discretionary Power of inflicting exemplary Punishment on Offenders, either by Fine, Imprisonment, or other infamous Punishment, as the Nature of the Crime, considered in all its Circumstances, shall require; and it may make use of any Prison which shall seem most proper; and it is said, That no other Court can remove or Bail Persons condemned to Imprisonment by this Court.

2 Inst. 549.  
2 Jones 53.  
2 Hawk. P.  
C. 7.

Also it hath so Sovereign a Jurisdiction in all Criminal Matters, that an Act of Parliament, appointing that all Crimes of a certain Denomination shall be tried before certain Judges, doth not exclude the Jurisdiction of this Court, without express negative Words; and therefore it hath been resolved, that 33 H. 8. cap. 12. which enacts, That all Treasons, &c. within the King's House, shall be determined before the Lord Steward of the King's House, &c. doth not restrain this Court from proceeding against such Offences.

1 Sid. 296.  
2 Hawk. P.  
C. 7.

But where a Statute creates a new Offence, which was not taken Notice of by the Common Law, and erects a new Jurisdiction for the Punishment of it, and prescribes a certain Method of Proceeding, it seems questionable how far this Court has an implied Jurisdiction in such a Case.

Dals. 25.  
44 E. 3. 31. b.  
Crompt. Juris-  
diction, 131.

Also this Court, by the Plenitude of its Power, may as well proceed on Indictments removed by *Certiorari* out of Inferior Courts, as on those originally commenced here, whether the Court below be determined, or still *in esse*, and whether the Proceedings be grounded on the Common Law, or on (a) a Statute making a new Law concerning an old Offence.

(a) As the  
Statutes of  
Forcible En-  
tries. 9 Co. 118. *vide* Tit. *Forcible Entry and Detainer*.— And the Statute of *Ph. & Ma.* against Persons taking away Females under the Age of sixteen Years, from their Guardians. *Cro. Car.* 465.  
2 Inst. 549. 2 Lev. 179. 2 Mod. 128. 2 Jones 53. 3 Keb. 75, 94, 106, 273.

*Carth.* 6. ad-  
judged in the  
Case of one  
Baker, who  
was convic-  
ted at *Kingston upon Hull*, for speaking seditious Words.

But the Court of King's Bench will not give Judgment on a Conviction in the Inferior Court, where the Proceedings are removed by *Certiorari*, but will allow the Party to waive the Issue below, and to plead *de novo*, and to go to a Trial upon an Issue joined in *B. R.*

2 Hawk. P.  
C. 7. and fe-  
veral Autho-  
rities there  
cited.

Nor can a Record, removed into the King's Bench from an Inferior Court, regularly be remanded after the Term in which it came in; yet if the Court perceives any Practice in endeavouring to remove such Record, or that it is intended for Delay, they may in Discretion refuse to receive it, and remand it back before it is filed.

4 Inst. 74.  
Raym. 364.

Also by the Construction of the Statutes, which give a Trial by *Nisi prius*, the King's Bench may grant such a Trial in Cases of Treason or Felony, as well as in common Cases, because for such Trial, not the Record, but only a Transcript is sent down.

(b) Extends  
not to High  
Treason.  
Raym. 367.

And by the 6 H. 8. cap. 6. it is enacted, " That the King's Bench have full Authority, by Discretion, to remand as well the Bodies of all (b) Felons removed thither, as their Indictments, into the Counties where the Felonies were done; and to command all Justices of Gaol-Delivery, Justices of the Peace, and all other Justices, to proceed thereon after the Course of the Common Law, as the said Justices might have done, if the said Indictments and Prisoners had not been brought into the said King's Bench.

(c) 4 Inst. 73.  
9 Co. 118. b.

The Judges of this Court, are the (c) Sovereign Justices of *Oyer and Terminer*, Gaol-Delivery, Conservators of the Peace, &c. as also the

(d) 4 Inst. 73.

(d) Sovereign Coroners; and therefore, where the Sheriff and Coroners may

may receive Appeals by Bill, *a fortiori* they may; also this Court may  
(a) admit Persons to Bail in all Cases according to their Discretion.

(a) 4 *Inst.* 74.  
*Vaugh.* 157.

2. Of its Jurisdiction in Civil Causes.

At the first Division of the Courts, the Original Intention appears plainly to have been, to confine the Jurisdiction of the Court of King's Bench to Matters merely Criminal; and accordingly soon afterwards it was enacted by (b) *Magna Charta*, cap. 11. (c) *That Common Pleas shall not follow (d) our Court, but be held in a certain Place*: Hence it is, that at this Day this Court cannot determine a meer Real Action.

(b) For the Exposition of this Statute, and

what shall be said a Common Plea, *vide* 2 *Inst.* 21, 22. 1 *Rol. Abr.* 536, 537. (c) But these general Words bind not the King, for he may bring an Action there for a Common Plea. 2 *Inst.* 23. 2 *Rol. Rep.* 290. (d) This extends both to the King's Bench and Court of Exchequer. 2 *Inst.* 23, 550. But *vide* 4 *Inst.* 113.

But notwithstanding Common Pleas cannot be immediately holden *in Banco Regis*, yet where there is a Defect in the Court, where by Law they may be holden originally, they may be holden in *B. R.* As if a Record come out of the Common Pleas by Writ of Error, there they may hold Plea to the End; so where the Plea in a Writ of Right is removed out of the County by a *Pone* in *B. R.* so on a Writ of *Mesne*, *Replevin*, &c.

2 *Inst.* 23.  
4 *Inst.* 72,  
113. & *vide*  
2 *Sand.* 256.  
2 *Show. P. C.*

So any Action *Vi & Armis*, where the King is to have a Fine, as Ejectment, Trespafs, Forcible Entry, &c. being of a mixed Nature, may be commenced in *B. R.*

2 *Inst.* 23.

Also any Officer or Minister of the Court, entitled to the Privilege thereof, may be there sued by Bill in Debt, Covenant, or other Personal Action; for the Act takes not away the Privilege of the Court.

2 *Inst.* 23.  
4 *Inst.* 71.  
2 *Balf.* 123.

And this begat the Notion, That if a Man were taken up as a Trespasser in the King's Bench, and there in Custody, they might declare against him in Debt, Covenant, or Account; for this likewise was a Case of Privilege, since the Common Pleas could not procure the Prisoners of the King's Bench to appear in their Court; and therefore it was an Exception out of the Statute of *Magna Charta*.

4 *Inst.* 71.  
Cro. Car. 330.

(e) By the Statute of *Gloucester*, cap. 8. None shall have Writs of Trespafs before Justices, unless he swear by his Faith that the Goods taken away were worth forty Shillings.

(e) It was a Maxim of the Common Law quod

*placita de Catallis, Debitis, &c. quæ summam 40 s. attingant, vel eam excedunt secundum Legem & consuetudinem Angliæ sine Brevi Regis placitare non Debent.* 2 *Inst.* 312. 6 *E.* 1. For Exposition whereof, *vide* 2 *Inst.* 310, &c. put but for an Example; for so it is in Debt, Detinue, Covenant, &c. 2 *Inst.* 391. Secus in Trespafs *Vi & Armis*, where the King is to have a Fine, for a Fine cannot be assessed but by a Court of Record. 2 *Inst.* 391. *F. N. B.* 47. 3 *Mod.* 275.— So in Trespafs for taking Charters concerning a Freehold; for it is a Maxim in Law, that such Pleas shall not be in any Court but of Record. 2 *Inst.* 391. *F. N. B.* 47. *Raym.* 293. This Course of making an Affidavit, by Experience, was so dangerous and troublesome, that it was forborn, and the Defendant left to take such Exceptions as the Common Law gave him. 2 *Inst.* 391. If upon a Nonsuit in an Inferior Court 16 s. is given for Costs, by 23 *H. 8.* Debt lies for it in *B. R.* because given by a subsequent Statute. *Cro. Eliz.* 96. 1 *Leon.* 316. For as the Inferior Courts, which are not of Record, regularly cannot hold Plea of Debt, &c. or Damage, unless under 40 s. So the Superior, which are of Record, cannot unless above 40 s. 2 *Inst.* 391.

### 3. Of its Jurisdiction, in reforming and keeping Inferior Jurisdictions within their proper Bounds.

*Hawk. P. C. 8.* The Court of King's Bench, as it is the Highest Court of Common Law, hath not only Power to reverse erroneous Judgments for such Errors as appear the Defect of the Understanding; but also to punish all Inferior Magistrates, and all Officers of Justice, for wilful and corrupt Abuses of their Authority against the obvious Principles of Natural Justice; the Instances of which are so numerous, and so (a) various in the Court of their Kinds, that it seems needless to attempt to insert them. King's Bench called the Sheriff of *Middlesex*, and appointed that Watches should be strictly kept in the Suburbs, and about the New Building, as a Thing belonging to the Care of this Court. *1 Sid. 213.*

*Buxton v. Singleton. Hill. 26 Car 2. 3 Keb. 432. S. C.* Judgment was given in an Action in the Sheriff's Court of *London*, and after it was removed to the Mayor's Court by a *Levata Querela*, within which Court there are four Attornies, and by exclusive Custom no other can be Attorney there; and one of the Attornies there was assigned to the Plaintiff by the Recorder; but because the present Mayor was concerned in the Cause, the said Attorney, and all others refused to act for him: And by *Maynard*, No Person can withdraw himself out of the Jurisdiction of this Court, which hath superintendant Power, if an Officer refuses to do his Duty; and he mentioned a Case cited by *Noy*, where the Bishop of *Exon* refused to allow Chrism, or Baptismal Oyl, to the Parishioners of *D.* and a *Mandamus* was directed to him out of this Court: So in all Cases, as where the Ordinary refuses to grant Probate of Writs, &c. *Wild* was of the same Opinion, That if any Court refuses to do Justice, this Court may Command him; and in this Case, it will be in the Power of the Attornies to delay Justice; and therefore the Court sent for the Recorder and informed him of the Matter, and declared, that this was good Cause to fore-judge the Attorney, and that it was a dangerous Matter to deny Justice in such a Manner, and mentioned the Abbot of *Crowland's* Case, *20 E. 4.* where the Liberties were seized because he had not Officers.

### (B) How far its Presence suspends the Power of all other Courts.

*H. P. C. 156. 9 Co. 118. 27 Aff. pl. 1. 3 Inst. 27. 2 Hawk. P. C. 8.* THIS Court being the Supreme Court of *Oyer and Terminer*, *Gaol-Delivery* and *Eyre*, its Presence suspends the Power, and avoids the Proceedings of all other Courts of the same Nature in the County wherein it sits, during its Sitting there, (b) especially if the Justices of such Courts have Notice of its sitting.

(b) Or without Notice. *Per 4 Inst. 73.*

*4 Inst. 73.* But if an Indictment in a Foreign County be removed before Commissioners of *Oyer and Terminer*, into the County where the King's Bench sits, they may proceed; for that the King's Bench not having the Indictment before them cannot proceed for this Offence.

*4 Inst. 73.* But if an Indictment is found in the Vacation Time in the same County in which the King's Bench sits, and in Term-time the King's Bench

(c) That it is adjourned, there may be (c) a Special Commission to hear and determine it. best if such Commission bear *Tesse* in Term-Time. *3 Inst. 27. & vide Keilw. 152. Dyer 286. pl. 45. 2 Hawk. P. C. 8.*

(C) Of the Form of its Proceedings.

THE Civil Side in the King's Bench commences on a Supposition of *Vide Head of Proefs.* a Trespass committed by the Defendant in the County where it resides, and he is took up by Procefs of that Court, as the Sovereign Eyre, and being committed to the Marshal, he may be declared against in any Civil Action whatsoever.

The first Procefs, therefore, is a Bill either Real or Feigned, and so called, because its Foundation was the Bill of Complaint in Court, touching the Trespass; on this is founded the *Latitat*, which supposes that the Defendant had escaped, and therefore issues in the King's Name, to apprehend the Party where-ever he may be found; for the King has an universal Jurisdiction over all his Subjects, and consequently may call any of them that fled from the Justice of his own Court.

All Procefs on Writs of Appeal, and all Procefs on Indictments removed hither by *Certiorari* from a (a) Foreign County, ought to be returnable *Coram nobis ubicunque fuerimus.* *2 Hawk. P. C. 8, 9.*

Bills of Appeal against one in *Custodia Marefballi*, ought to be returnable *Coram nobis apud Westmonasterium.* *2 Hawk. P. C. 8, 9.* Of Indictments commenced in the King's Bench. *2 Hawk. P. C. 9. Q.*

Also it hath been resolved, That where the Court proceeds on an Offence committed in the same County wherein it sits, the Procefs may be made returnable immediately; but that where it proceeds on an Offence removed by *Certiorari* from another, there must be fifteen Days between the *Teste* and Return of every Procefs. *9 Co. 118. Co. Lit. 134. 1 Lev. 61. 1 Sid. 72. 2 Rol. Abr. 626. 2 Inst. 550.*

Court of Common Pleas.

TOWARDS the Norman Period, the Power of the *Justiciar* was broken, and the *Aula Regis*, which was one great Court, divided into four distinct Courts, as we have them at this Day in *Westminster-Hall*; the Common Pleas was established for the Determination of (b) Pleas meerly Civil, and was at first ambulatory, and removed with the King where-ever he went; but by (c) *Magna Charta*, *cap. 11. Communia placita non sequantur in aliquo certo Loco.* (d) *Curiam nostram sed teneantur*

be there determined, therefore the Stile of this Court was *Placita coram, &c.* or *Common Pleas*; the Word *Pleas*, antiently signifying the Convention of the States *in Campis*, viz. Germanice in *Placts*; and because in those Conventions of the States all Causes were heard, debated and determined, therefore by Corruption they got the Name of *Pleas* from the Court where they were decided: Hence the Court that was particularly erected to hear and determine such and such Causes, was called the Court of Pleas. *Dufr. 395.* (c) That this Court was not created by, or soon after the making of *Magna Charta*, *vide Co. Lit. 71. b. 2 Inst. 22.* And for my Lord Coke's Opinion of the Antiquity of it, *vide the Prefaces to the 8 and 9 Rep. and 8 Co. 145.* (d) Before this Act Common Pleas might have been held in B. R. and all Original Writs were returnable there. *2 Inst. 21.*

4 *Inst.* 99. The Jurisdiction of this Court is founded on (a) Original Writs issuing out of the Chancery, which are the King's Mandates for them to proceed on, to determine such and such Causes; these Writs issue out of Chancery, because when the King's Court was but one, the Chancellor had the Seal; and therefore, when they were divided, he sealed all Original Writs. By this Method, the Seal was a Check on the other Courts, to know what Cause was there, and likewise, that the (b) Fines for having Justice in the King's Court should be answered incontinently before there were any Proceedings.

(a) *Bracton*, lib. 3. fol. 105. says, *Sine Warranto Jurisdictionem non habent*; and to the same Purpose is *Fleta* 58. *Britton* 26. says, On the Establishment of this Court, that they shall plead such Common Pleas as we shall Command them by our Writ, so that the Proceedings on our Writs may be recorded. (b) In *Maddox* 293 to 314. there are Variety of Instances of Fines recorded for having Justice in the King's Courts.

4 *Inst.* 99. But this is to be understood when the Cause is between common Persons; for when an Attorney, or any Person belonging to the Court is Plaintiff, he sues by Writ of Privilege, and is sued by Bill, which is in Nature of a Petition; both which originally commence in the Common Pleas, and have no Foundation in the Chancery.

4 *Inst.* 99. This Court, my Lord *Coke* says, is the Lock and Key of the Common Law in Common Pleas; for herein are Real Actions, whereupon Fines and Recoveries do pass; as also all other Real Actions by original Writs; also Common Pleas Mixt or Personal, in divers of which the *King's Bench* has a (c) concurrent Jurisdiction with this Court.

(c) But the Jurisdiction of each Court is so well established, that at this Day the Court of King's Bench cannot be authorized to determine a meer Real Action; so neither can the Court of Common Pleas, to inquire of Felony or Treason. 2 *Hawk. P. C.* 2. *Vide Tit. Court of King's Bench.*

4 *Inst.* 99. This Court, without any Writ, may upon a Suggestion grant Prohibitions, to keep as well Temporal, as Ecclesiastical Courts within their adjudged by (d) Bounds and Jurisdiction, without any Original or Plea depending; all the Judges of England, for the Common Law, which in these Cases is a Prohibition of it self, *Mich. 7 Jac. 1.* stands instead of an Original.

And that there were several Precedents to this Purpose. (d) All Prohibitions for inroaching Jurisdiction issue as well out of the Common Pleas as King's Bench. *Vaugh. 157. per Vaughan, Ch. Just.*

*Vaugh. 154. &c. & vide 2 Jones 14.* This Court, in Term-Time, may award a *Habeas Corpus* by the Common Law, for any Person committed for any Cause under Treason or Felony, and thereupon discharge him, if it shall clearly appear by the Return, that the Commitment was against Law, as being made by one who had no Jurisdiction of the Cause, or for a Matter, for which, by Law, no Man ought to be punished.

4 *Inst.* 100. This Court, upon an Adjournment, upon a Foreign Voucher may hold Plea likewise upon other Foreign Pleas, and upon general Bastardy, *Ne unques accouple in Loiale Matrimony, &c.* for none but the King's Courts, and no Inferior Court, shall write to the Bishop; so likewise upon Antient Demesne pleaded.

# Court of Exchequer.

- (A) Of the Nature and Antiquity of this Court.  
 (B) In what Cases it has a Jurisdiction.  
 (C) Of the Manner of its Proceedings.

## (A) Of the Nature and Antiquity of this Court.

THE Court of (a) Exchequer is an (b) antient Court of Record, <sup>4 Inst. 103.</sup>  
 for all Matters relating to the Revenue of the Crown. <sup>(a) The com-</sup>  
<sup>mon Deriva-</sup>

tion of the Word, is from the old *Fren.h* Word *Eschequier*, which signifies a *Chefs-Board*, or *Chequer-Work*; and because a Cloth of that Kind was laid upon the Table, upon which the Accountant's telled out the King's Money, and set forth their Accounts in the same artificial Manner as is done in the Cofferer's Account at this Day, it was called the Court of Exchequer. *Maddox* 109. *Spelm. Gloss. Tit. Scacc'. Fortesc. on Monarchy*, the Notes there, 117, 118. (b) It was formed from the Exchequer in *Normandy*, which was a Court of Sovereign Jurisdiction, and superintended all manner of Complaints, by, and against the Sheriffs and Bailiffs who exercised an Ordinary Jurisdiction, and whose Duty it was to gather the Duke's Rents in each Bailiwick, and to Account for the same in this great Court; and as in the Court of *Normandy*, the great Officers of State sat as Judges; so with us, before the Division of the Courts, the great Ministers, as the *Justiciar*, Constable, Senechal, Chancellor and Treasurer, sat in this Court; but the Treasurer usually presided, as best acquainted with all Matters relating to the Revenue. *Maddox* 109. *Vide* also for the Antiquity of this Court, and of its several Officers, and their Duty, 4 *Inst.* 103. *Sav.* 48. 2 *Inst.* 104, 105, 551.

In the (c) Exchequer there are seven Courts, 1. The Court of Pleas. (c) The Court  
 2. The Court of Accounts. 3. The Court of (d) Receipt. 4. The of First  
 Court of Exchequer (e) Chamber, being the (f) Assembly of all the Fruits and  
 Judges of *England*, for Matters in Law. 5. (g) The Court of Exchequer- Tents, e-  
 Chamber, for Errors in the Court of Exchequer. 6. (h) The Court of rrected ten-  
 Exchequer-Chamber, for Errors in the King's Bench. 7. (i) The Court fore H. 8. was  
 of Equity in the Exchequer-Chamber. dissolved by  
 Queen *Mary*,  
*Parl.* 1. *Seff.*

2. *cap.* 10. And the Clergy discharged thereof by 2 and 3 *Pb. & Ma. cap.* But by the First of *Eliz.*  
*cap.* 4. the First Fruits and Tenths are re-united to the Crown, but no Court is revived, but the same  
 to be within the Rule, Survey and Government of the Exchequer, &c. 4 *Inst.* 120. — The Court of  
 Augmentations was erected by 33 *H. 8. cap.* 39. But Queen *Mary*, according to the Power given her  
 by the Statute 1 *Ma. cap.* 10. by Letters Patents, Dated 23 *January* in the same Year, dissolved the  
 same Court; and the next Day, by other Letters Patents, united the same to the Exchequer, which  
 was utterly void, because she had dissolved the same before. 4 *Inst.* 118. *Moor* 289. But *vide Plow.* 377,  
 542. and the Bankers Case, where, by the Opinion of Lord *Somers*, the Uniting of the Court of  
 Augmentations to the Court of Exchequer was not absurd, nor an impracticable Thing. (d) This is  
 the true Center, into which all the King's Revenue and Profit ought to fall. 2 *Inst.* 197. (e) What  
 Causes are to be adjourned thither, and the Method there, as to the Arguing of them by the Judges.  
 2 *Bullst.* 146. 1 *Lev.* 7. (f) 4 *Inst.* 68, 110. (g) Erected by 31 *Ed.* 3. *cap.* 12. (h) Erected by 27  
*Eliz.* *cap.* 8. (i) The Lord Treasurer, Chancellor, and Barons of the Exchequer, are the Judges of  
 this Court, and their Jurisdiction is as large, for Matters of Equity, as that of the Barons in the Court  
 of Exchequer, for the Benefit of the King, by the Common Law. 4 *Inst.* 118.

## (B) In what Cases it has a Jurisdiction.

(a) It hath **B**Y the (a) Statute of *Rutland*, made 10 E. 1. (b) "No Plea shall be held in the Exchequer, unless it specially concern the King or his Ministers.

this is an Act

of Parliament or an Ordinance only, made by the King for the better Order of this Court. *Plow.* 209. 4 *Inst.* 113.—But 2 *Inst.* 551. It is said there is a Writ in the Register under Title *Brevia de Statut'*, which recites the Words of this Statute; and in the Margent of the Writ *Statut' de Rutland* is quoted; so that without Question this Statute was made by Authority of Parliament. And 4 *Inst.* 113. it is said it is entered in the Parliament Rolls, & vide 8 Co. 20.—But 4 *Inst.* 114. it is said, the Writ is founded upon the Common Law and Custom of the Realm. (b) This is only in Affirmance of the Common Law.

38 *Aff.* 20. The King's (c) Farmer may sue one that detains from him Part of the  
1 *Rol. Abr.* Possessions that he hath from the King, out of which the Farm is to be  
538. paid, by which he cannot pay his Farm to the King.

(c) So of his

Debtor. 2 *Inst.* 551.

4 *Inst.* 112. The Debtor (d) of the King's Debtor may Sue here by *Quo minus*.  
(d) That the  
Lessee of the King's Lessee is not intitled to the Privilege of the Court of Exchequer. *Owen* 38.

*Sav.* 154. An Information for the Queen and Party, upon the Statute of *Liveries*,  
*Agard* and 8 E. 4. cap. 2. was brought in the Exchequer, though by the express  
*Cavendish* ad- Words of the Statute it ought to be in the *King's Bench*, or *Common Pleas*,  
judged. before Justices of the Peace, &c. but the Exchequer is not mentioned;  
*Cro. Eliz.* 326. and it was adjudged it lay in this Court, because the Queen was Party,  
S. C. *adjoinatur.* and there were no Negative Words, without which (c) this being a Su-  
*Moor* 564. perior Court shall have Jurisdiction.  
S. C. upon a  
Writ of Error in *Cam' Scacc'*, reversed as to the Informer; for the Penalty was given to him only  
that informed in the Courts specially named. 2 *And.* 127. S. C. reversed accordingly. (e) *Plow.*  
*Com.* 208.

38 *Aff.* 20. If the King's Farmer sues in the Exchequer, against a Person for de-  
1 *Rol. Abr.* taining of Tithes, Parcel of the Possessions to him leased in Farm by the  
538. King, though the Right of Tithes comes in Debate between them, yet  
the Court shall not be ousted of Jurisdiction.

*Lane* 100. If *J. S.* be Parson impropriate of *D.* and *B.* Vicar there, and the  
1 *Rol. Abr.* King Patron of the Vicarage, and there is a Debate between the Parson  
538. S. C. and Vicar for Tithes, the Suit for these Tithes ought to be in the Ex-  
chequer.

*Lane* 39. If (f) a Copyholder of the King's Manor be sued in the Ecclesiastical  
1 *Rol. Abr.* Courts for Tithes, upon a Suggestion in *Scaccario*, that he prescribed to  
539. S. C. pay a certain *Modus decimandi*, he shall have a Prohibition there, and  
(f) So of this *Modus* shall be tried there.  
the King's  
Farmer. *Lit. Rep.* 525.

*Lane* 55. If a Man be amerced in the King's Leet, and upon Process out of the  
1 *Rol. Abr.* Exchequer the Bailiff distrains him for the Amercement, and he brings  
539. S. C. Trespas, he ought to bring this Action of Trespas in the Office of Pleas  
of the Exchequer; for the Bailiff levied it as an Officer of this Court.

1 *Rol. Abr.* If an erroneous Judgment be given in a *Formedon* in a Copyhold  
539. Court, in the County where the King is Lord, the Party, against whom  
*Lane* 98. S. the Judgment is given, may sue by Petition or Bill to the King in the  
C. *adjoinatur.* *Exchequer-Chamber*, in the Nature of a Writ of False Judgment, for the  
Reversal of this Judgment; for as in the Court of a common Person,  
the proper Suit for Reversal thereof is to the Lord, by Petition; so it

is here to the King; and the Exchequer-Chamber is the more proper to sue to the King by Petition than the Chancery, because it concerns the King's Manor.

An Action of False Imprisonment, or other Action, may be brought against the Under-Sheriff, in the Exchequer, though the Sheriff be the Officer of the Court, for the Court takes Notice of the Under-Sheriff also. *Rel. Abr. 559. Lane 53. S.C. Vide Tit. Sheriff.*

If *A.* holds Lands of the King by Fealty and Rent, and makes a Lease thereof for Years to *B.* and *C.* pretends a prior Lease to him by *A.* though there is a Rent issuing out of those Lands to the King, yet neither *B.* nor *C.* can sue in this Court by any Privilege, in respect of the Rent; for that the King can have no Prejudice or Benefit thereby; for whether *B.* or *C.* prevails, the Rent must be paid. *4 Inf. 118.*

But if the King extends Lands, as the Lands of *A.* for the Debt of *A.* and Leases the same to *B.* for Years, reserving Rent, and *C.* pretends that *A.* had nothing in the Land, but that he was seised thereof, &c. this is within the Privilege of the Court; (*a*) for if *C.* prevails the King loses his Rent. *(a) The King brought Debt against*

a Prior Alien, and the Prior had Process against *A.* who detained Goods from him, without which he could not answer the King; and *A.* came and claimed the Goods as his Tithe as Parson of *B.* and thereupon Issue was taken for the King triable in the Exchequer. *4 Inf. 111.*

If the King Leases to *A.* for Years, rendering Rent, the King may distrain in all other the Lands of *A.* for his Rent, yet *A.* hath no Privilege for his other Lands, to bring them within the Jurisdiction of this Court. *4 Inf. 119.*

If a Man files a Cross Bill in this Court, he need not intitle himself to the Jurisdiction of the Court, because the Cross-Bill is grounded upon another Bill in Court. *Hard. 160.*

So if a Man be sued in the Office of Pleas, he may have an *English* Bill to be relieved against that Suit, without setting forth Matter of Jurisdiction. *Hard. 160.*

If *A.* is outlawed at the Suit of *B.* and Lands in the Possession of *A.* extended, and *C.* claims Title to them, and pleads to the Inquisition, if *C.* will bring an Ejectment for them, it must be in this Court, because the King's Revenue is concerned. *Hard. 176.*

If *A.* hath Title to Lands under an Extent out of the Exchequer, for Debts in Aid, he must bring his Ejectment for them in this Court, and having brought his Ejectment for them in the (*b*) Common Pleas, upon Motion he was ordered to prosecute here. *(b) Where not allowed to prosecute*

in Chancery. *2 Vern. 426. & vide 1 Vern. 220, 469.*

By the 33 *H. 8. cap. 39.* the Court of Exchequer has Power to discharge all Debts and Duties due to the King, upon any Equity disclosed; and it is by Virtue of this Act that they discharge Recognizances; and it seems by the said Act, they may discharge Penal Laws made before this Statute; but all Penal Laws made after the Statute cannot be discharged, but must be compounded. *Sav. 22. Hard. 334.*

## (C) Of the Manner of its Proceedings.

- Sav.* 10. **I**F prohibited Goods are seized, and Proclamation made according to the Course of the Court, the Owner shall not have them (a) delivered unto him upon Security, without putting in (b) a Plea, shewing Cause why he should have them.
- (a) By 13 & 14 *Car.* 2. *cap.* 11. No Writ of Delivery shall be granted but upon good Security, and for Goods perishable, or where the Informer shall delay the Trial. (b) Upon a Bill in Equity to discover the Value of Cordage seized to the King's Use, the Defendant, in his Answer, made Title to it as his own, and upon giving Security had a Writ of Delivery, though the King claimed the Property as his own Goods, and not as Goods forfeited. *Hard.* 191. But it was said, it would have been otherwise if the King's Title had appeared by Inquisition or other Record.
- 4 *Inst.* 110. Before the 5 R. 2. so great Care was taken of the King's Revenue, that no Man might sue or plead for their Discharge of any Debt, Account or Demand in this Court, without express Command, or Letter of the Great Seal.
- 4 *Inst.* 110. But by 5 R. 2. *cap.* 9. this Practice was declared illegal, and ordained, That the Barons should have Power to hear every Answer of every Demand in this Court; so that every Person, &c. may plead, sue, &c. without suing any Writ or other Commandment.
- 1 *Mod.* 90. *Per Hale, Ch. Just.* In Case of an Outlawry, it is the Course of the Exchequer, to prefer an Information in Nature of a Trover and Conversion, against him that hath the Goods of the Party outlawed.

## Court of the Constable and Earl Marshal.

**I**N the King's own Court, established by *William* the Conqueror, there were High Officers, called the (a) Constable and (b) Marshal, to whom chiefly belonged the Conuzance of Matters of Honour, War, and Peace; and therefore all Foreign Facts committed by the King's Subjects were referred to them to determine, according to the Law of Nations and of Arms.

*Maddox 27. Fleta, lib. 2. c. 31. Spelm. Gloss. (a) The Name is of Norman Extraction, and came from*

their *Comes Stabuli*; there was the like Officer in *France*, called *Le Constable de Franc*, who was the Great General of the Army, whose Power was confined to Matters of War only: But it seems, the Constable of *England* had a Civil, as well as a Military Jurisdiction, especially as to Matters transacted in Foreign Parts; this Officer was first created in *William* the Conqueror's Time, and was anciently Hereditary, and went to Females; but being an Office of such high Power and Dignity, it became formidable to the Crown; and therefore *H. 8.* got rid of it, since which, there has been no such Officer for a Constancy, but only one created *pro hac vice*. Vide the Notes to *Fortes. on Monarchy. 130. 48 E. 3. 3. 13 H. 4. 4, 5. 4 Inst. 127. Dyer 285.* (b) Of the several Kinds of Marshals that were Attendants on the King's Court, and the Nature of their Offices, vide *Maddox 31, 32, 33.* And that the Marshal that was joined with the Constable, sat as Judge with him, and was called the Earl Marshal, or Marshal of *England*, vide *Fleta, lib. 2. cap. 3. Maddox 33. Skow. P. C. 60. Co. Lit. 74. 4 Inst. 123.*

But to understand the Nature and Jurisdiction of this Court, at present I shall consider,

- (A) Of the Manner of holding this Court, and therein, whether it can be held by Commission, by the Earl Marshal only; and whether it may be prohibited if it exceeds its Jurisdiction.
- (B) In what Cases it has a Jurisdiction.
- (C) Of the Form and Manner of its Proceedings.

(A) Of the Manner of holding this Court, and therein, whether it can be held by Commission, by the Earl Marshal only; and whether it may be prohibited if it exceed its Jurisdiction.

**I**T seems (c) agreed, that during the Lunacy of the Earl Marshal, this Court may be holden before Commissioners deputed to exercise his Office.

(c) So resolved in *Parker's Case.*

*1 Lev. 230. and 1 Sid. 353. S. C. cont' Twisslen, who held such Commission illegal, and against the Petition of Right. 3 Car. 1. But per 2 Hawk. P. C. 14. such Commissions, founded on the plain Necessity of the Case, and intended to prevent a Failure of Justice, as to Cases of which no other Court hath Conuzance, seem not against the Purview of the Petition, which complains, that Commissions had been granted for the Trial of certain Capital Offences, and other Outrages, by the Martial Law, &c.*

(a) To this Purpose are 13 H. 4. 46. 37 H. 3. 5. a. 48 E. 3. 3. 37 H. 6. 20. 30 H. 6. 6. 13 H. 4. 5. It has been a Matter greatly debated, whether this Court can be holden before the Lord Marshal only, without a Constable; and those, who are for the Negative, ground their Opinions chiefly on the Statutes, (a) ancient Law Books and Records, which seem to mention the Constable as the only, or at least, as the principal Judge of this Court.

Rushworth's Coll. Vol. 1. 107. S. P. C. 65. 2 Inst. 51. 3 Inst. 123. Co. Lit. 74. b. Crompt. Fur. 82.

Hob. 121. But notwithstanding this, the constant Practice, especially since the  
 1 Rol Rep. 87. Extinguishment of the Hereditary Office of Constable in Henry the Eighth's  
 2 Lev. 134. Time, of holding this Court by the Earl Marshal only, and the general  
 1 Show. 153. Notions of our (b) Judges and Lawyers, of the Legality of such Court,  
 1 Sid. 353. seem in a great Measure to establish a contrary Opinion, and that at this  
 1 Lev. 230. Day it may be holden before the Earl Marshal only.  
 Show. P. C. 60, 61.

(b) That in the Reigns of Queen Elizabeth, and James the First, the Judges assisted in this Court, when holden before the Earl Marshal only. Show. P. C. 60. 4 Inst. 126.— & vide 2 Hawk. P. C. 12, 13. That according to the common Usage of other Courts, which generally may be holden before one Judge, in the Absence of the rest, it seems a reasonable Construction to allow this Court to be so holden.

2 Hawk. P. C. 13. But it is agreed, that Appeals of Capital Matters cannot be brought before the Marshal alone, because 1 H. 4. which shews how such Appeals shall be brought, is express, that they shall be tried and determined before the Constable and Marshal of England.

(c) But if before the Constable and Marshal Q. If this Court, holden before the Earl Marshal (c) only, exceed its Jurisdiction, it has been (d) resolved, that it may be prohibited by the Common Law Courts.

& vide Show. P. C. 60, 61. (d) In Oldis's Case. Show. P. C. 61, 65. 2 Hawk. P. C. 14.

## (B) In What Cases it has a Jurisdiction.

Vide 8 R. 2. cap. 5. 2 Hawk. P. C. 10. THE Jurisdiction of this Court is declared by the 13 R. 2. cap. 2. by which it is recited, " That the Commons made grievous Complaints, That the Court of the Constable and Marshal daily incroached Contracts and Trespasses, and many other Actions at the Common Law; and thereupon it is declared, That to the Constable it appertaineth to have Conuzance of Contracts touching Deeds of Arms, and of War out of the Realm, and also of Things which touch War within the Realm, which cannot be determined nor discussed by the Common Law; with other Usages to the same Matters appertaining, which other Constables before have reasonably used; joining to the same, that every Plaintiff shall declare plainly his Matter in his Petition, before that any Man be sent to answer thereto; and if any will complain that any Plea is commenced before the Constable and Marshal, that might be tried by the Common Law, he shall have a Privy Seal to the said Constable and Marshal, to Surcease till it be discussed by the King's Counsel, if the Matter of Right pertain to that Court, &c.

Vide the several Statutes 26 H. 8. c. 13. 35 H. 8. c. 2. 5 & 6 E. 6. cap. 11. 1 & 2 Ph. & Ma. cap. 10. and 2 Hawk. P. C. 14. as to its Jurisdiction at this Day, as to Things done beyond Sea.

“ the Realm shall be tried and determined before the Constable and  
 “ Marshal, and that no Appeal be made or pursued in Parliament.

As the Jurisdiction of this Court is restrained to Things touching War *Russworth's*  
 within the Realm, it can have no Jurisdiction as to a Civil Matter, and *Coll. Part 2.*  
 therefore cannot proceed against a Person for bare scandalous Words, re- *Vol. 2. 1055.*  
 flecting on the Honour or Gentility of Families. *2 Hawk. P.*  
*C. 11.*

Also, though the Marshaling of Publick Funerals belong to the He- *1 Lev. 250.*  
 ralds, who are the Attendants of this Court, and no other Persons, *1 Sid 553.*  
 without their Licence, can lawfully intermeddle in it; yet it seems to *1 Show. Rep.*  
 be settled, that this Court cannot punish those who shall be guilty of *355.*  
 such an Incroachment, because it is a proper Ground for an Action on *Show. P. C.*  
 the Case; and by the above Statutes, this Court has nothing to do with *58.*  
 Matters which may be determined by the Common Law.

But by the constant Practice, and the general Opinion of Lawyers, *2 Hawk P.*  
 it seems at this Day to have a Jurisdiction as to Disputes concerning *C. 11.*  
 Precedency and Points of Honour, and Satisfaction therein; and may  
 proceed against Persons for falsely assuming the Name and Arms of Ho-  
 nourable Persons, &c.

### (C) Of the Form and Manner of its Pro- ceedings.

**T**HIS Court is to be governed by its own Usages, as far as they go, *3 Inst. 125.*  
 and in other Cases, by the Civil Law; but since it is no Court of *2 Hawk. P.*  
 Common Law, no Condemnation in it causes any Forfeiture of Lands, *C. 13.*  
 or Corruption of Blood; neither can an Error in it be remedied by  
 Writ of Error, but only by Appeal to the King; yet the Judges of  
 the Common Law take Notice of its Jurisdiction, and give Credit to a  
 Certificate of its Judges.

It is made a Doubt, whether the King hath any Remedy in this *Hutton 3.*  
 Court against an Offender, by way of Indictment or Information by  
 the Attorney General.

## Of the Court of the Justices of Oyer and Terminer, and Gaol-Delivery.

*Co. Lit.* 293.  
*4 Inst.* 184.  
*Bacon's Elem.*  
 15, 16.

**J**USTICES of Assize, *Oyer and Terminer*, and Gaol-Delivery, were appointed in the Room of the Justices in *Eyre*, who formerly went their Circuits once in Seven Years, and superseded the Power of the Sheriffs Torn where-ever they came; and transacted all manner of Civil and Criminal Business; these were Part of the King's Court, who exercised their Jurisdiction in the several Counties of the Kingdom, and by communicating with the King's Court, kept an Uniformity in the Law.

- (A) Of the Manner of authorizing Commissioners of Oyer and Terminer, and Gaol-Delivery: And herein of the Determination of their Power.
- (B) Of their Jurisdiction, when appointed.
- (C) Of the Form of their Proceedings and holding their Courts.

### (A) Of the Manner of authorizing Commissioners of Oyer and Terminer, and Gaol-Delivery: And herein of the Determination of their Power.

**A**S all Justice proceeds from the King, so these Commissions must receive their Authority from the (a) Prerogative of the Crown; and this the Common Law requires, and is also expressly enacted by the *1 Lev.* 219. *27 H. 8. cap. 24.*

(a) That the King is the proper Judge, and may determine to whom, and upon what Occasions such Commissions may be granted. *2 Inst.* 419. *2 Hawk. P. C.* 22, 23.

The common (b) Form of these Commissions is to authorize the Commissioners, or three or four of them, of which Number such or such a Person is to be one, to inquire by the Oaths of twelve Men, of all Treasons, Felonies, and Misdemeanors, &c. in such and such Place, and to hear and determine the same at such Times and Places as such Commissioners shall appoint, &c. for which Purpose the King acquaints them, (b) Whether such Justices may be appointed as well by Writ as by Commission; and for the Difference, *vide 2 Hawk. P. C.* 15, 16. —That the Court of Sessions in London does not differ from other Commissions of *Oyer and Terminer*, &c. *Vaugh.* 140.

that he has sent a Writ to the Sheriffs of such Counties, commanding them to return Juries before them at such Days and Places as shall be notified by them, &c.

The Validity of such Commissions must be determined according to their Conformity to antient Precedents; and therefore a Commission to a Corporation, appointing some of its principal Members to be Justices of Gaol-Delivery, together with those whom the King should appoint from Time to Time, was adjudged void; for such an Authority depending on the precarious Appointment of other Justices, is not agreeable to the known Forms of such Commissions. But new Commissioners of *Oyer and Terminer* may be added to the former by a Writ, or Commission of Association, which setting forth the Purport of the former Commission, adds new Commissioners to those appointed by it; provided such new Commissioners attend at the Times and Places appointed by the former; and it is usual to direct another Writ to the former Justices, commanding them to admit such new Justices as their Associates; but such Writ (a) binds not such Justices to admit the new ones, unless they also produce one directed to themselves; and such Writ to the Persons associated is always Patent, but that to the others to admit them is Close.

*1 And. 296.*  
*2 Hawk. P. C. 16.*  
*Reg. 124.*  
*F. N. B. 111.*  
*H. P. C. 159.*  
*2 Hawk. P. C. 19.*

(a) The King can grant but one Patent of Association to one Commission.

*2 Hawk. P. C. 19.* And *Q*, whether a Commission of Association, relating only to a Special Cause, can associate the Persons named in it to those appointed by a general Commission. *2 Hawk. P. C. 19.*

Upon the Death of such Commissioners, after an Indictment taken before them, and Process thereupon, a new Commission may authorize others to proceed, and a Writ shall go to the Executors of the first Commissioners, to send the Records and Processess before the new ones.

*Reg. 128.*  
*F. N. B. 111.*  
*2 Hawk. P. C. 19.*

After a Writ of Association, it is usual to make out a Writ of *Si non omnes*, which authorizes such a Number of the Justices appointed by the former Commissions to proceed, if all of them cannot conveniently be present.

*Reg. 124.*  
*F. N. B. 111.*  
*2 Hawk. P. C. 19.*

There are several antient Precedents of Special Commissions of *Oyer and Terminer*, as those for inquiring and determining of some particular enormous Violence done to the Party who sues it out, &c.

But for these *vide 2 Hawk. P. C. 20; 21.*

As to the Difference between a Commission of *Oyer and Terminer* and Gaol-Delivery, it may be proper to observe, that where the same Persons at the same Time are both Commissioners of *Oyer*, and also of Gaol-Delivery, they may proceed by Virtue of the one Commission, in such Cases wherein they have no Jurisdiction by the other, and execute both at the same Time, and make up their Records accordingly.

*2 Hawk. P. C. 20.* and several Authorities there cited.

These Commissions may be suspended by the Court of King's Bench sitting in the same County; but the Jurisdiction of the Justices is revived of Course, when the said Court no longer sits there; also their Authority may be suspended by a Writ of *Superfedcas*, which is grantable on Proof that their Commission was unduly granted; in which Case their Power may be restored by a Writ of *Procedendo*; but a Commission once (b) determined cannot be revived, nor can the Justices be authorized a-new without another Commission.

*4 Inst. 163.*  
*H. P. C. 162.*  
(b) That such Commission may be determined

expressly or impliedly, and for the several Ways it may be done, *vide 2 Hawk. P. C. 16, 17.*

## (B) Of their Jurisdiction When appointed.

H. P. C. 158. **J**ustices of Gaol-Delivery may, by the (a) Common Law, proceed on  
 4 Inst. 164. any Indictment of Felony or Trespass, found before any (b) other  
 Bro. Coron. Justices, against any Person in the Gaol, mentioned in their Commission,  
 179. and not determined.

12 Co. 32. (a) And by 4 E. 3. cap. 2. that the Justices assigned to deliver Gaols shall have Power to deliver  
 the same Gaols of those that shall be indicted before the Justices of the Peace. (b) But Justices  
 of Oyer and Terminer have regularly no such Power. 2 Hawk. P. C. 21.

Cro. Eliz. 90. It seems the better Opinion, that Justices of Gaol-Delivery may take  
 179. Indictments against any Persons within their Commission.

1 And. 111.

2 Hawk. P. C. 24. H. P. C. 158. 4 Inst. 168.

Vide 2 Hawk. P. C. 24. Also, that they may, by Virtue of a general Commission, deliver the  
 Gaol of Persons committed for Treason.

Vide 2 Hawk. P. C. 25. But Justices of Gaol-Delivery have no Power to proceed against any,  
 except those who are in actual Custody; and therefore they have no  
 more to do with one let to Mainprize, than if he were at Large.

2 Hawk. P. C. 25. Justices of Gaol-Delivery have not only Power to discharge Prisoners  
 acquitted before them on a Trial, but also (c) all such against whom,  
 on Proclamation, no Evidence shall appear to indict them: Also Justices  
 of Gaol-Delivery may award Execution against Prisoners outlawed for  
 Felony before Justices of Peace; and though their Commission be in  
 Strictness determined after the End of their Session, yet may they, after  
 their Session, order the Reprieve or Execution of the Persons condemned  
 before them.

C. 25. By the 4 E. 3. cap. 2. it is enacted, " That Justices assigned to deliver  
 Gaols shall have Power to inquire of those in-whose Ward Persons in-  
 dicted before Wardens of the Peace shall be, if they make Delive-  
 rance, or let to Mainprize any so indicted which be not mainpernable,  
 and to punish them if they do any Thing against this Act.

That by the Common Law they may punish those who un-  
 duly bail Prisoners. 2 Hawk. P. C. 25. By the 1 & 2 Ph. & M. " If any Justice of Peace of the *Quorum*, or  
 Coroner, shall offend against that Statute, either as to bailing Prisoners  
 or taking their Examinations, or the Information of those that bring them  
 before them, or not putting the same in Writing, or not certifying  
 them to the next Gaol-Delivery, or not putting in Writing the Evi-  
 dence to a Jury on a Coroner's Inquest of Murder or Manslaughter,  
 or not binding over material Witnesses, or not certifying such Evi-  
 dence and such Recognizances, the Justices of Gaol-Delivery shall, on  
 due Proof by Examination, set such Fine for every such Offence as  
 shall seem meet.

By the 4 E. 3. cap. 5. " Justices of Gaol-Delivery shall punish Sheriffs  
 and Gaolers refusing to take Felons into their Custody from Constables  
 and Townships, without being paid for such Receipt.

" By the 1 E. 6. cap. 7. " Where any Persons shall be found guilty  
 of Treason or Felony, for which Judgment of Death may ensue, and  
 shall be reprieved to Prison (d) without Judgment at that Time, those  
 Persons, who shall at any (e) Time after be assigned Justices to (f) de-  
 liver the Gaol where such Persons shall remain, shall have Authority  
 to give Judgment of Death against such Persons, as the same Justices

(d) But such subsequent Justices have no Power to award the

Execution of Persons condemned by former Justices, and reprieved by them. *Dalf.* 20. *Dyer* 165.  
 2 Hawk. P. C. 27. (e) Extends to subsequent Commissioners authorized by a Successor, as well as  
 to those authorized by the same King, 7 Co. 31. *Dalf.* 20. (f) Extends not to Justices of Oyer and  
 Terminer. 12 Co. 33.

“ before whom they were found guilty might have done, if their Com-  
 “ mission of Gaol-Delivery had continued.

### (C) Of the Form of their Proceedings and holding their Courts.

**I**F a Commission of Oyer and Terminer be awarded to certain Persons <sup>2 Hawk. P. C. 18. and several Authorities there cited.</sup> to inquire, &c. at such a Place, they can neither open it at another, nor (a) adjourn it thither, nor give Judgment there; and if they do, their Proceedings will be *coram non Judice*; yet Justices appointed *pro hac vice* may adjourn from one Day to another, though their Commission have no Words to that Purpose. <sup>(a) That it is most proper to enter</sup>

their Adjournments in the present *Tense*; but by the Multitude of Precedents the Entry of them in the *Prater Tense* is good. *Raym.* 115. *2 Hawk. P. C.* 18. But an Adjournment, of which no Entry appears, shall not be intended to have been made. *1 Sid.* 348. *2 Keb.* 284, 292.

By the *9 E. 3. cap. 5.* “ Justices of Assize, Gaol-Delivery, and of Oyer, shall send their Records and Processess determined and put in Execution, to the Exchequer at Michaelmas every Year; and the Treasurer and Chamberlains for the Time being, having the Sight of the Commissions of such Justices, shall receive the same Records and Processess of the said Justices under their Seals, and keep them in the Treasury as the Manner is; so that the Justices first take out the Estreats of the said Records and Processess, to send to the Exchequer, as they were wont before.

By the *6 R. 2. cap. 9.* “ Justices assigned to take Assizes, and deliver Gaols, shall hold their Sessions in the principal Towns of the Counties where the Shire Courts were then holden, or after should be holden.

## Of the Court of the Justices of Assize and Nisi prius.

**J**USTICES of (b) Assize derive their Authority from the Commission, by which they are empowered to inquire of all Disseisins, and to restore such, as have been disseised of their Lands or Tenements, to the Possession of them, by Trial at one Assizes. <sup>4 Inst. 158. Cromp. Jur. 204.</sup>

<sup>(b) Are so called from</sup> the Writ of Assize; but for this *vide* Title Assize, and *4 Inst.* 158. *Co. Lit.* 153.

To these, by Writ of *Nisi prius*, directed to the Judges or Commissioners of Assize, and Clerk of Assize, is annexed an Authority and Jurisdiction of trying such Issues as are joined in the Courts of *Westminster*, in their

their proper Counties; and this Method was introduced after the Laying aside the Justices Itinerants, and was contrived for the Ease of the Subject, that the Jury and Witnesses might not be obliged to come out of their proper Counties.

4 Inst. 159.

The Manner of contriving it was, to direct the *Venire* to return the Jury at some Day the next Term, unless the Justices *Prius tali die & loco Venerint*, there were no Issues returned on the *Venire* to make them appear at *Nisi prius*; yet it was so much a greater Difficulty on them to appear afterwards at *Westminster*, which if they did not, the *Distringas* issued, that it had its Effect to convene them in their proper Counties; the Writ was contrived to command them to come into Court, because it would have been improper for the Court to have commanded them to come into any other Place; so that their Appearance before the Justices of Assize, is an Excuse for their Non-appearance in *Bank*; but if they did not appear at the Assize, nor at *Westminster*, then issued a *Habeas Corpus* and *Distringas* to bring them up.

6 Mod. 9.

The Day at *Nisi prius* and in *Bank* are in Consideration of Law the same, because the Writ of *Nisi prius*, which gives Authority to the Judge to try the Cause in the County, is instead of the Court; and therefore the *Posica* certified by him on the Day of *Bank* is the same as if the Jury had come up to the Court, and the Trial had been had in open Court.

The Justices have large Jurisdiction, by several Statutes, as to all Criminal Matters, and may punish Offences in Sheriffs, Gaolers, and other Officers, &c. which see in 2 *Hawk. P. C.* 28 to 32.

## Of the Court of Sessions of Justices of Peace.

Lamb. Book 4.  
cap. 2. Vide  
Tit. Justices  
of the Peace.

(a) Pursuant

to the Statute 34 E. 3. cap. 1. by which it is enacted, That two or three of the best Reputation in the Counties shall be assigned Keepers of the Peace by the King's Commission, and at what Time Need shall be, the same with other Wise and Learned in the Law shall be assigned by the King's Commission, to hear and determine Felonies and Trespasses done against the Peace in the same Counties, and to inflict Punishment reasonably, according to Law and Reason, and the Manner of the Deed.

Lamb. B. 4.  
cap. 20.

(b) That such  
Precept can  
only be su-  
perseded by

Writ out of Chancery. Lamb. B. 4. cap. 2. *Crompt. Jurif.* 122. (c) That a Sessions may be holden without any Summons, as to Proceedings on Indictments, or on other particular Occasions which need no Attendance of Grand Jurors or Officers. Lamb. Book 4. cap. 2. 2 *Hawk. P. C.* 41.

(a) Who

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all (a) Stewards, Constables, and Bailiffs of Liberties, to be present before them or their Fellow Justices, at such a Day and Place, and also to attend there himself, and to proclaim in proper Places that such Sessions will be holden.

(a) Who are all obliged to attend; on Pain of being amerced

at the Discretion of the Justices. 2 Hawk. P. C. 41. As is the Keeper of the House of Correction. Vide 7 Jac. 1. cap. 4.

Justices of the Peace, in their Sessions, have no Jurisdiction one over the other, according to that Rule *inter Pares non est Potestas*, therefore they cannot amerce a Justice for his Non-attendance, nor bind a Brother Justice to his good Behaviour for using such Expressions (b) in Court, for which, if he were a private Person, he might be committed, or bound to his good Behaviour.

Lamb. B. 4. cap. 3.

Crompt. 122. 2 Hawk. P. C. 41.

(b) But in other Instances, any Ju-

stice of Peace may require his Fellow to find Sureties of the Peace; for Matters of this Kind require an immediate Remedy. 2 Hawk. P. C. 41.

Sessions holden for the general Execution of the Authority of Justices of Peace, and which are usually holden in the four Quarters of the Year, are called General Sessions; and a Sessions holden on a Special Occasion, for the Execution of some particular Branch of the Authority of Justices of Peace, is called a Special Sessions.

Lamb. B. 4. cap. 19, 20.

Salk. 474. 2 Hawk. P. C. 42.

## Of the Ecclesiastical Courts.

THE Church, before the Conversion of *Constantine*, was a distinct and independent Society from the State, and as such, it was necessary they should have Rules and Orders among themselves; for the better Government of the Body of Christians, the Power of Judicature was placed in the Bishops, who had by their Wisdom and Gravity obtained an Authority in the Church, and who used to send abroad their Ministers to propagate the Gospel in their several Precincts; and therefore they determined all Controversies among them which could not be carried into a Heathen Court, without great Scandal to the quiet and peaceable Way of Living, which was the Glory of the Primitive Christians; and this they founded on the Direction of *St. Paul* himself, *Dare any of you, having a Matter against another, go to Law before the Unjust, and not before the Saints.* After the Conversion of the Emperors, their Zeal for Christianity made them allow the Bishops the same Jurisdiction; but then those Bishops, in their Sentences, followed the Laws of their Country; but when the Pope afterwards pretended to Infallibility, he would no more conform his Decrees to the Laws of particular States and Kingdoms; and therefore those States were under a Necessity of exerting their Original Right and Power of Judicature: Hence it is truly said, That (c) the Spiritual Jurisdiction within these Kingdoms, is derived from the King, and that such Jurisdiction, when exceeded, is subject to the Controul of the King's Temporal Courts.

Godolph. Repert. 129 to 133. 5 Co. 1. *Cawdry's Case.*

(c) 1 Rol. Abr. 361. Dav. 97.

But for the better understanding the Jurisdiction allowed the Spiritual Courts at this Day, we shall consider,

(A) The several Ecclesiastical Courts which exercise a Jurisdiction: And herein,

1. Of the Court of Convocation.
2. Of the Court of Arches.
3. Of the Prerogative Court.
4. Of the Court of Audience.
5. Of the Court of Faculties.
6. Of the Court of Peculiars.
7. Of the Consistory Courts.
8. Of the Court of the Archdeacon.
9. Of the Court of Delegates.
10. Of the Court of Commissioners of Review.

(B) Of appealing from an Inferior to a Superior Court.

(C) Of citing one out of his own Diocese: And therein of the Boundaries of their Jurisdiction.

(D) In what Cases the Ecclesiastical Courts are allowed to have a Jurisdiction.

(E) How they are to proceed as to those Matters in which they have a Jurisdiction, otherwise will be controuled by the Temporal Courts.

(A) The several Courts which exercise a Jurisdiction: And herein,

1. Of the Court of Convocation.

(a) That they were always assembled by the King's Writ, vide 4 Inst. 323. Godolp. Repert. 99.  
**T**HE *Convocation* is commonly called a National Synod, convened by the King's (a) Writ, directed to the Archbishops of *Canterbury* and *York*, requiring them to Summon every Bishop, Dean, and Archdeacon, a Proctor for the Chapter, and two Proctors for the Clergy of each Diocese in the Province of (b) *Canterbury*; but in *York*, two Proctors for each Archdeaconry.

and the 25 H. 8. cap. 19. The Act of Submission of the Clergy, by which it is expressly declared, that they can only Assemble by Virtue of the King's Writ, &c. (b) The Provincial Synod of *Canterbury* consists of twenty-two Bishops, twenty two Deacons, twenty-four Prebendaries, fifty-four Archdeacons, and forty-four Clerks, representing the Diocesan Clergy. *Godolp. Repert.* 98.— The Archbishop of *York*, at the same Time and like Manner, holds a Convocation of all his Province, constantly corresponding, debating and concluding the same Matters with the Provincial Synod of *Canterbury*. *Godolp. Repert.* 98.

4 Inst. 322.

This Assembly are to meet at the Time and Place appointed by the King's Writ, and constitute an Ecclesiastical Parliament, the Archbishop and his Suffragans as his Peers sitting together, and composing one House, called the Upper House of Convocation; the Deans, Archdeacons, a Proctor

Proctor for the Chapter, and two Proctors for the Clergy, the Lower House; in which they chuse a Prolocutor in the Nature of a Speaker of the House of Commons.

Their Jurisdiction is in Matters of (a) Heresy, Schisms, and other meer Spiritual and Ecclesiastical Causes; but they cannot meddle with any Matters relating to the Laws of the Land, or the King's Crown or Dignity; and in those in which they have a Jurisdiction they are to proceed *Juxta Legem Divinam & Canones Sanctæ Ecclesiæ.*

whether at this Day they have Power to convene the Heretick, *2, & cit. 2 Rol. Abr. 226. 1 Hawk. P. C. 4.*

Also by 25 H. 8. cap. 19. it was enacted that no Canons, Constitution, or Ordinance should be made or put in Execution within this Realm by Authority of the Convocation of the Clergy, which were contrariant or repugnant to the King's Prerogative Royal, or the Customs, Laws or Statutes of this Realm: And by this Act the Court of Convocation, as to the making of new Canons, is to have the King's Licence, as also his Royal Assent for the putting the same in Execution, with this Proviso, that such Canons as were made before that Act, which be not contrariant nor repugnant to the King's Prerogative, the Laws, Statutes, or Customs of the Realm, should be still used and executed, as they were before the making of the Act.

*4 Inst. 322. (a) That the Convocation may declare what Opinions are Heretical; but*  
*Vide 4 Inst. 323. That this Statute is only Declaratory of the Common Law, & Vide 1 Co. 72. 2 Rol. Abr. 226. Moor 783. Vaugh. 327. 2 Vent. 44. 2 Salk. 412.*

“ By 8 H. 6. cap. 1. the Clerks of the Convocation, their Servants,  
 “ and Families shall have such Privilege in coming, tarrying, and go-  
 “ ing, as the Commons called to Parliament.

2. Of the Court of Arches.

The Archbishop of *Canterbury* hath a peculiar Jurisdiction in 13 Parishes within *London*, which are (b) exempt from the Jurisdiction of the Bishop of *London*; the Chief of these is *Bow*; and as this Court was anciently held in the Church of *Bow*, it was called the Court of Arches from the Fashion of the Pillars of the Steeple bent *Arch-wise.*

and Bishop of *London* remit their Courts to each other, so that for Matters arising within the Diocese of *London*, the Suit may be either in the Arches, or in the Consistory Court of *London*. *Cra. Car. 339. 456.* But whether such Composition be good, and out of the Statute 23 H. 8. cap. 19. which prohibits the Citing a Person out of his own Diocese, *vide 13 Co. 4. Raym. 3. 1 Syd. 65, 178. 1 Lev. 225. 1 Keb. 597.*

*(b) That by Agreement the Archbishop of Canterbury*

The Jurisdiction of this Court extends not only to Ecclesiastical Causes arising within these 13 Parishes, of which it may take Cognizance in the first Instance, but also by Way of Appeal may examine affirm or reverse the Sentences and Decrees of all inferior Ecclesiastical Courts within the Province of *Canterbury.*

*4 Inst. 337. 13 Co. 4, &c. Godolp. Repert. 100. Dier 241.*

3. Of the Prerogative Court of the Archbishop of Canterbury.

In this Court all Testaments are to be proved, and all Administrations granted, where the Party dying within the Province of the Archbishop of *Canterbury* hath *bona Notabilia* in some other Diocese than where he died, which regularly is to be to the Value of 5 *l.* but in the Diocese of *London* it is 10 *l.* By Composition, the Archbishop of *York* hath the like Court.

The *Probat* of every Bishop's Testament, or granting of Administration of his Goods, altho' he hath not Goods but within his own Jurisdiction, doth belong to the Archbishop.

*4 Inst. 335. vide Head of Executors and Administrators.*

## 4. Of the Court of Audience.

4 *Inst.* 337. This Court is kept by the Archbishop in his Palace, in which are transacted Matters of Form only, as Confirmations of Bishops, Elections, Consecrations, the Granting of the Guardianship of the Spiritualities, *sede vacante* of Bishops, Admissions and Institutions to Benefices, dispensing that meddles with Banns of Matrimony, and such like.  
For the original Institution of this Court, and that meddles with Banns of Matrimony, and such like. not with contentious Matters, *vide Godolph. Repert.* 106.

## 5. Of the Court of Faculties.

4 *Inst.* 337. This is a Court which belongeth to the Archbishop, in which his Officer, called *Magister ad Facultates*, grants Dispensations, as to (a) Marry, to eat Flesh on Days prohibited, to ordain a Deacon under Age, that the Son may succeed the Father in a Benefice, that one may have two or more Benefices incompatible, &c.  
(a) That every Diocefan may do the same.

4 *Inst.* 337. This Authority was raised and given to the Archbishop of *Canterbury* by the Statute of 25 *H. 8. cap.* 21. whereby Authority is given to the said Archbishop and his Successors, to grant Dispensations, Faculties, &c. by himself, or his sufficient and substantial Commissary or Deputy for any such Matter, whereof heretofore such Dispensations, Faculties, &c. then had been accustomed to be had at the See of *Rome*, as by Authority thereof.

## 6. Of the Court of Peculiars.

4 *Inst.* 338. These Courts which exercise an Ecclesiastical Jurisdiction, and are exempt from, and not subject to the Controul of the Ordinary of the Diocese, are called Peculiars, and must be either Regal, (b) Archiepiscopal, Episcopal, or Archidiaconal; and in every one of these the Owner has (c) a Power of common Right to grant Administration, &c. on Supposition of an original Composition between him and the Ordinary of the Diocese for that Purpose.  
(b) Within the Province of the Archbishop of *Canterbury* there are 57 Peculiars, all which belong to the Archbishop. *Godolph. Repert.* 119. (c) 1 *Salk.* 40, 41. 6 *Mod.* 241.

## 7. Of the Consistory Courts.

4 *Inst.* 338. The Consistory Court of each Archbishop, and every Bishop of every Diocese, within this Realm, is holden before the Bishop's Chancellor in the Cathedral Church, or before his Commissary in Places of his Diocese, far remote and distant from the Bishop's Consistory, so as the Chancellor cannot call them to Consistory with any Conveniency, or without great Travel and Vexation, for which Reason such Commissary is called *Commissarius Foraneus*.  
*Godolph. Repert.* 83.

## 8. The Court of the Archdeacon.

4 *Inst.* 339. This Court is holden by the Archdeacon in such Places as the Archdeacon, either by Prescription or Composition, hath Jurisdiction in Spiritual Causes within his Archdeaconry; he is called *Oculus Episcopi*, and exercises an Ecclesiastical Jurisdiction, either concurrently with the Bishop or exclusively.  
*Godolph. Repert.* 60, &c.

## 9. Of the Court of Delegates.

This Court is erected by Virtue of the King's Commission, which issues <sup>4 Inf. 329.</sup> out of Chancery upon an Appeal or Petition directed to him, complaining of some Grievance or Injury the Party has suffered by the Sentence or Proceedings of the Ecclesiastical Court.

On such Appeal the King appoints (a) Commissioners called (b) Delegates, who are to hear the Grievances complained of, and who by Force of such Delegation have Power (c) to reverse or affirm the Sentence of the inferior Court; and this the King, as is said, may do by Virtue of an original Jurisdiction, which was always inherent in the Crown. <sup>(a) These Commissioners may be as well Laymen as Ecclesiasticks, Comp. Incumb. 56.</sup>

But by *Gibson's Codex* 1082, they were formerly only Ecclesiasticks. (b) The Commission being drawn by the Clerks in Chancery, who were usually Civilians; or by the Chancellor, who was usually a Bishop; they obtained the Name of Delegates; being a Name peculiar to that Profession, *Comp. Incumb. 57.* (c) They have Power only to affirm or reverse, but have no Jurisdiction in the first Instance, as to grant Administration, &c. *Litch 85.*

And by 25 H. 8. cap. 19. for restraining Appeals to Rome, it is enacted, "That for lack of Justice, at or in any Courts of the Archbishops of this Realm, or in any of the King's Dominions, it shall be lawful to the Party grieved to appeal to the King's Majesty in the King's Court of Chancery, and that upon every such Appeal a Commission shall be directed under the Great Seal to such Persons as shall be named by the King's Highness, his Heirs or Successors, like as in Cases of Appeal from the Admiral's Court, to hear and definitely determine such Appeals, and the Causes concerning the same, which Commissioners, so by the King's Highness, his Heirs and Successors, to be named or appointed, shall have full Power and Authority to hear and determine every such Appeal, with the Causes and all Circumstances concerning the same; and that such Judgment and Sentence, as the said Commissioners shall make and decree in and upon any such Appeal, shall be good and effectual, and also definitive, and no further Appeals to be had or made from the said Commissioners for the same.

No Appeal lies to them from a local Visitor, nor in any Case of a Temporal Nature, nor did it lie from the High Commission Court, when in Being, because they themselves were only Delegates acting by immediate Commission from the King. <sup>4 Inf. 340. Moor 782.</sup>

A Suit commenced before the Delegates does not abate by the Death of either of the Parties, <sup>1 Vent. 133. Et vide 2 Lev. 6.</sup>

<sup>2 Keb. 768, 778. Hetley 107. Cro. Car. 483. 1 Leon 117, 178.</sup>

If the Delegates exceed their Authority, or proceed in Matters not properly within their Conuzance, they may be prohibited by the King's Temporal Courts. <sup>Moor 460, 463. Litch 85, 86, 229.</sup>

## 10. Court of Commissioners of Review.

After a Sentence by the Delegates the King may grant a Commission of Review, and such Commissioners may reverse the Sentence of the Delegates, for the King's Power is not restrained by the Statute 25 H. 8. cap. 19. *supra*, which says that such Sentence shall be definitive; also the Pope after a definitive Sentence by the Canon Law used to grant a Commission *ad revidendum*, and such Authority as the Pope had, claiming as supreme Head, doth of Right belong to the Crown, and is annexed thereto by the Statutes of 26 H. 8. cap. 1. <sup>1 Eliz. cap. 1.</sup> <sup>But for this vide 4 Inf. 341. Moor 463, 781. Dyer 273. Lit. Rep. 252.</sup>

## (B) Of appealing from an inferior to a superior Court.

4 *Inst.* 340.

EVERY Subject has a Right to appeal, and every superior Court enabled by Law to hear and determine such Appeal, is obliged to receive the same, and after such Appeal duly made, the inferior Court is tied up from proceeding any farther in the Cause.

“ By 24 *H. 8. cap. 12.* from the Archdeacon’s Court the Appeal is to the Bishop of the Diocese; but when the Cause is commenced before an Archdeacon of any Archbishop, or his Commissary, the Appeal must be to the Court of Arches.

“ And by the said Statute, from the Bishop of the Diocese, his Chancellor, or Commissary, the Appeal is to the Archbishop of either Province respectively.

“ By 25 *H. 8. cap.* The Appeal from the Prerogative Court is to the King in Chancery, who appoints Delegates by Commission to hear and determine the Appeal.

(a) But by 24 *H. 8. cap. 12.* such Appeal is to be to the Archbishop; and so is 4 *Inst.* 341. But *vide Carth.* 169. That an Appeal does not lie from the Dean of the Arches to the Archbishop as Visitor, because they are one and the same; at least it would be but appealing from the Deputy to the Principal.

And it seems by the said Statute that an Appeal from the Arches is to be to the (a) King in Chancery.

“ Also by 25 *H. 8. cap. 19.* Appeals from the Court of Peculiars, or Places exempt, which were before to the See of Rome, shall be henceforth into the Chancery, and shall be there determined before Commissioners of Delegates under the Great Seal, &c.

4 *Inst.* 339, 340.

If the Matter concerns the King, the Appeal must be to the higher House of Convocation of that Province.

4 *Inst.* 339.

By 24 *H. 8. cap. 12.* and 25 *H. 8. cap. 19.* all Appeals from a definitive Sentence must be within 15 Days.

4 *Inst.* 340. *Vide Title Præmunire.*

“ By 25 *H. 8. cap. 19,* there shall be no Appeal to the See of Rome, under Pain of a *Præmunire.*

## (C) Of citing one out of his own Diocese, and therein of the Boundaries of their Jurisdiction.

BY 23 *H. 8. cap. 9.* it is enacted, “ That no Manner of Person shall be from henceforth cited, or summoned, or otherwise called to appear by himself, or herself, or by any Procurator before any Ordinary, Archdeacon, Commissary, Official, or any other Judge Spiritual, out of the Diocese or Peculiar Jurisdiction, where the Person which shall be cited, summoned, or otherwise (as is aforesaid) called, shall be inhabiting and dwelling at the Time of awarding or going forth of the same Citation or Summons, except that it shall be for, in, or upon any of the Cases or Causes hereafter written, that is to say for any Spiritual Offence or Cause, committed, or done, or omitted, followed, or neglected to be done, contrary to Right or Duty by the Bishop, Archdeacon, Commissary, Official, or other Person, having  
Spiritual

“ Spiritual Jurisdiction, or being a Spiritual Judge, or by any other Per-  
 “ son or Persons within the Dioceſe, or other Jurisdiction whereunto he  
 “ or ſhe ſhall be cited, or otherwiſe lawfully called to appear and answer ;  
 “ and except alſo it ſhall be by or upon Matter or Cauſe of Appeal, or  
 “ for other lawful Cauſe, wherein any Party ſhall find himſelf or herſelf  
 “ grieved or wronged by the Ordinary, Judge, or Judges of the Dioceſe  
 “ or Jurisdiction, or by any of his Subſtitutes, Officers, or Miniſters  
 “ after the Matter or Cauſe there firſt commenced, or begun to be  
 “ ſhewed unto the Archbiſhop or Biſhop, or any other having Peculiar  
 “ Jurisdiction, within whoſe Province the Dioceſe or Place Peculiar is ;  
 “ or in Caſe that the Biſhop, or other immediate Judge or Ordinary  
 “ dare not, nor will not convent the Party to be ſued before him ; or in  
 “ Caſe that the Biſhop of the Dioceſe, or the Judge of the Place,  
 “ within whoſe Jurisdiction, or before whom the Suit by this Act ſhall  
 “ be commenced and proſecuted, be Party directly or indirectly to the  
 “ Matter or Cauſe of the ſame Suit ; or in Caſe that any Biſhop, or any in-  
 “ ferior Judge having under him Jurisdiction in his own Right and Title,  
 “ or by Commiſſion make Requeſt or Inſtance to the Archbiſhop, Biſhop,  
 “ or other ſuperior Ordinary or Judge, to take, treat, examine, or de-  
 “ termine the Matter before him or his Subſtitutes, and that to be done  
 “ in Caſes only where the Law Civil, or Canon doth affirm Execution of  
 “ ſuch Requeſt or Inſtance of Jurisdiction to be lawful or tolerable, upon  
 “ Pain of Forfeiture to every Perſon, by any Ordinary, Commiſſary,  
 “ Official, or Subſtitute by Virtue of his Office, or at the Suit of any  
 “ Perſon, to be cited or otherwiſe ſummoned or called, contrary to this  
 “ Act, of double Damages and Coſts, for the Vexation in that Behalf  
 “ ſuſtained, to be recovered againſt any ſuch Ordinary, Commiſſary,  
 “ Archdeacon, Official, or other Judge, as ſhall award or make Proceſs,  
 “ or otherwiſe attempt or procure to do any Thing contrary to this Act,  
 “ by Action of Debt or Action upon the Caſe, according to the Courſe  
 “ of the Common Law of this Realm in any of the King’s High Courts,  
 “ or in any other competent Temporal Court of Record, by original  
 “ Writ of Debt, Bill or Plaint, in which, &c. and upon Pain of Forfeit-  
 “ ure for every Perſon ſo ſummoned, cited, or otherwiſe called, (as is  
 “ aboveſaid) to answer before any Spiritual Judge out of the Dioceſe, or  
 “ other Jurisdiction, where the ſaid Perſon ſo dwelleth, or is reſident,  
 “ or abiding, 10*l.* the one Half thereof to be to the King ; and the other  
 “ Half to any Perſon that will ſue for the ſame in any of the King’s ſaid  
 “ Courts.

“ Provided that it ſhall be lawful to every Archbiſhop of this Realm  
 “ to call, cite, and ſummon any Perſon or Perſons inhabiting or dwell-  
 “ ing in any Biſhop’s Dioceſe within his Province for Cauſes of Hereſy,  
 “ if the Biſhop or other Ordinary immediate thereunto conſent, or if  
 “ that the ſame Biſhop, or other immediate Ordinary, or Judge do not  
 “ his Duty in Punishment of the ſame.

“ Provided alſo that this Act ſhall not extend in any wiſe to the Pre-  
 “ rogative of the moſt Reverend Father in God the Archbiſhop of  
 “ *Canterbury*, or any of his Succeſſors, of or for calling any Perſon or  
 “ Perſons out of the Dioceſe where he or they be inhabiting, dwell-  
 “ ing, or reſident, for (a) Probate of any Teſtament or Teſtaments, any  
 “ Thing in this Act contained to the contrary.

2 4.

Extends only to the Probate of Wills.

“ Provided alſo that this Act be not any Way hurtful or prejudi-  
 “ cial to the Archbiſhop of *York*, nor to his Succeſſors of, for or concern-  
 “ ing the Probate of Teſtaments within his Province and Jurisdiction,  
 “ by Reaſon of any Prerogative, any Thing in this Act to the con-  
 “ trary notwithstanding.

In

13 Co. 4, 5, In the Construction of this Statute the following Opinions have been  
 Esp. holden, that the Archbishop of *Canterbury* cannot cite a Person for Sub-  
 straction of Tithes living in *Essex* into the Court of Arches holden in  
*London*, altho' *Essex* be within the Diocese of *London*, and that this Sta-  
 tute like all other Acts of Parliament shall be expounded by the Judges  
 of the Common Law, altho' they relate to Spiritual Persons and Affairs,  
 and that where-ever an Act of Parliament prohibits the doing a Thing,  
 any Court acting contrary may be restrained by Prohibition.

1 Lev. 96. Esp. If a Person inhabiting within one Diocese doth substract and withhold  
 Godb. 191. his Tithes within another Diocese, a Suit may be commenced and profes-  
 2 Brownl. cuted in the Court of the Bishop, in whose Diocese the Tithes are so sub-  
 12, 27. stracted, and the Party so substracting his Tithes may be there cited and  
 Harv. 421. summoned, altho' inhabiting within another Diocese.  
 Winch Ent.

570. a.  
 Cro. Car. 97. 1 Rol. Rep. 329. Carth. 476. Machin and Moulton, S. P. adjudged, for Diocese in this  
 Statute signifies Jurisdiction, and it is the Locality of the Lands which gives Jurisdiction, altho' the  
 Maxim in the Civil Law is *forum sequitur reum*. 5 Mod. 450. S. C. 2 Salk. 549. S. C.

1 Vent. 233. So a Suit for a Legacy may be in the Diocese where the Will is proved,  
 3 Keb. 619. altho' the Defendant lives in another Diocese, and the Citing of him out  
 Cro. Car. 97. of such Diocese is not within the Statute.  
 Like point.

1 Salk. 164. So where *A.* and others, who lived in the Diocese of *Litchfield* and *Co-*  
*ventry*, but occupied Lands in the Diocese of *Peterborough*, were taxed in  
 the Parish where they occupied Lands for the new casting of the Bells of  
 the Church; and upon Refusal to pay, a Suit was commenced against  
 them in the Diocese of *Peterborough*; and it was held that occupying  
 Lands made them Inhabitants, and that the citing of them into the Dio-  
 cese where the Lands lay, and in Respect to which they were chargeable,  
 was not within the Statute; also (a) that Bells were more than a meer  
 Ornament, which the Inhabitants were bound to repair.

(a) 3 Mod  
 211. S. C.

And there said that a Prohibition was granted, because but a personal Charge, and not like the Repairing of  
 the Church, which is a real Charge upon the Land, let the Owner live where he will.

13 Co. 4. My Lord *Coke* says that by this Statute the Archbishop is reduced to  
 Porter and a proper Diocese, or Peculiar Jurisdiction, unless it be in five Cases; as 1<sup>st</sup>,  
 Rochester's In Default of the Ordinary. 2<sup>dly</sup>, In Case of Appeal. 3<sup>dly</sup>, Or in Case  
 Case. the Ordinary dares not, or will not convent the Party. 4<sup>thly</sup>, Or if the  
 Ordinary be Party to the Suit below. 5<sup>thly</sup>, In Case (b) of Instance and  
 Request by the Ordinary.

(b) On Sug-  
 gession that  
 the Party is

sued out of the Diocese, the Court grants a Prohibition; but if it appears upon Proof that it was up-  
 on Request to the Archbishop, according to the Exception, the Prohibition will be stayed. 5 Mod.  
 71. Godb. 214. Latch 180. —The Party in alledging such Request need not shew the Matter  
 specially, that it might appear to have been of a spiritual Nature, nor that the Request was under  
 Seal. Cro. Car. 162. —The Request may be from a Peculiar to the Ordinary of the Diocese. Cro.  
 Car. 162. —But whether from a Peculiar Court, or from Archdeacon's Court immediately to the  
 Archbishop, vide *Hob.* 16, 186. 1 *Syd.* 90. 5 *Mod.* 238, 239.

12 Co. 76. The Party who is cited out of his Diocese must move for a Prohibition  
 Holt. 19. before Sentence, for by litigating the Matter in that Court he submits  
 Cro. Car. 97. to the Jurisdiction.

Carth. 34, 33. But if upon the Face of the Libel it appears that the Party is an In-  
 habitant at a Place out of the Diocese, there the Libel is *Felo de se*, and  
 in such Case the Sentence makes no Alteration.

Carth. 34. Yet in a Case where *A.* in the Libel was named of *D.* in *Hampshire*,  
 which is known to be within the Diocese of *Winchester*, into the Diocese of  
*London*, and tho' Affidavits were offered of that Matter, yet being after  
 Sentence, the Court held that they could not take any Notice within what  
 Diocese *D.* in *Hampshire* was, for they could not *ex Officio* take Notice of  
 the Limits of Bishopricks, but they should not take it to be within the  
 proper Diocese.

The Boundaries of all Jurisdictions shall be determined in the King's Temporal Courts; so if the Question be, Whether in such a Place there be a peculiar Jurisdiction exempt from the Ordinary, this shall be determined by the King's Temporal Courts; for it would be unreasonable that the Archbishop, or Bishop, should be Judge in his own Cause, and if they take upon them to determine any of those Matters, a Prohibition will be granted.

*2 Rel. Abr. 291. Several Cases to this Purpose*

(D) In what Cases the Ecclesiastical Courts are allowed to have Jurisdiction.

THE Statute 13 E. 1. called the Statute of *Circumspecte Agatis*, and 9 E. 2. called *Articuli Cleri*, are the most antient, as well as the principal Statutes, which declare in what Cases the Ecclesiastical Courts shall have Jurisdiction.

The Words of the first are, "The King to his Judges sendeth Greeting: Use your selves circumspectly in all Matters concerning the Bishop of (a) *Norwich* and his Clergy, not punishing them if they hold Plea in Court Christian, of such Things as be (b) meerly Spiritual, that is, to wit, of Penance enjoined by Prelates for deadly Sin, as Fornication, Adultery, and (c) such like, for the which, sometimes Corporal Penance, and sometimes (d) Pecuniary is enjoined, especially if a Freeman be convict of such Things; also if Prelates do punish for leaving the Church-yard unclosed, or, for that the Church is (e) uncovered, or not conveniently decked; in which Cases none other Penance can be enjoined but Pecuniary. Item, If a Parson demand of his Parishioners, Oblations, or (f) Tithes due or accustomed, or if any Parson do sue against another Parson for Tithes, greater or smaller; so that the fourth Part of the Value of the Benefice be not demanded. Item, If a Parson demand Mortuaries in Places where a Mortuary hath been used to be given. Item, If a Prelate of a Church, or Patron, demand of a Parson a Pension due to him, all such Demands are to be made in a Spiritual Court, and for laying (g) violent Hands on a Clerk; and in Cause of Defamation it hath been granted already, that it shall be tried in the Spiritual Court when Money is not demanded; but a Thing done for Punishment of Sin, and likewise for breaking an Oath, in all Cases afore rehearsed, the Spiritual Judge shall have Power to take Knowledge, notwithstanding the King's Prohibition.

(a) The Bishop of *Norwich* is only put for an Example, for it extendeth to all the Bishops within the Realm.  
 (b) As Heresy, Schism, Holy Orders, and such like.  
 (c) As Incest, Solicitation of Chastity.  
 (d) Must be intended by way of Commutation of Penance.  
 (e) This doth not extend to a private

Chapel which a Man has to his own Use, nor to the Chancel, which is to be repaired by the Parson. *2 Inst. 489.* (f) For this *vide Title Tithes.* (g) The Suit must be *pro salute Anima*; and therefore if the Clerk sue in the Court Christian for Damages for the Battery, he incurs a *Premunire*, for the Ecclesiastical Judge ought to proceed only to correct the Sin. *2 Inst. 492.*— If a Clerk be arrested by Process of Law, he cannot for this sue in the Ecclesiastical Court. *2 Inst. 492.*— If a Clergyman be only assaulted, no Remedy is to be had in the Spiritual Court, but in the Common Law Courts. *Cro. Eliz. 753. Fryn's Case.*

The Statute *Articuli Cleri*, or 9 E. 2. enumerates several Cases in which the Spiritual Courts shall have Jurisdiction; particularly as to Tithes, Obventions, Oblations, Mortuaries, Redemption of Penance, violent laying of Hands on Clerks, Defamation; in which Cases the King's Prohibition shall be of no Force.

For the Exposition of this Statute, *vide 2 Inst. 599 to 639.*

(a) Matters Testamentary, as the granting Probate of Wills, granting Administration, &c. are of Ecclesiastical (a) Conuzance, and in these they may proceed according to the Ecclesiastical Law, and their Sentences shall be presumed just and agreeable to such Law, though (b) contrary to the Rule and Reason of the Common Law.

by the Custom of England, and not by the Ecclesiastical Law. *Lynwood* 174. *Verbo Approbatis*, vide 1 *Salk.* 37.—Antiently the Probate of Testaments was in the County Courts. *Lamb. Saxon Laws* 111. Where the Bishop and Sheriff sat together. *Wilkins* 78. *Lamb. Saxon Laws* 64. *William* the Conqueror first separated the Ecclesiastical from the Civil Jurisdiction; yet his Charter does not mention Matters Testamentary, or the Probate of Wills, to be of Ecclesiastical Conuzance, but only says, that the Crimes that were to be prosecuted *pro salute Animæ* were to be of that Conuzance. *Selden Eadm.* 167. But afterwards the Ecclesiastical Courts obtained a Jurisdiction herein, the Clergy having persuaded the People that every Disposition of the Testator was Gratuitous and Charitable, and to be disposed of by the Executor, for the Good of the Soul of the Party deceased. *Selden Eadm.* 168. 9 *Co.* 38. (b) 4 *Co.* 29. 7 *Co.* 47.

5 *Co.* 73. b. Although the Spiritual Court hath Conuzance of the Probate of Testaments, yet if (c) a Court-Baron hath had Probate of Wills Time out of Mind, and hath always continued that Usage, every Will within the Precincts thereof must be proved there; and if the Spiritual Courts take upon them to grant the Probate of any such Will, a Prohibition lies.

(c) So by the Custom of London, the Government of Orphans, and Effects of Persons dying in London, belongs to the Mayor and Aldermen of London; and if any Suit be commenced, or Proceedings had in the Ecclesiastical Court, for any Matter within such Regulation, a Prohibition lies. 5 *Co.* 734. 2 *Inst.* 249, 660. *March* 107.

9 *Co.* 38. If the Will is proved in the Ecclesiastical Court, that Court has executed its Authority, and the (d) Executors must sue in the Temporal Courts to get in the Estate of the Deceased.

(d) An Administrator must sue for the Goods of the Intestate in the Temporal Courts, for the Ecclesiastical Courts cannot try the Property of Goods. 2 *Rot. Abr.* 287. *Say* and *Harwood*; and a Prohibition granted for such a Suit.

As the Ecclesiastical Courts have now the Probate of Testaments, they, as incident to such Jurisdiction, have Power to determine all those Matters that are necessary to the Authenticating every such Testament; therefore, (e) if the Seal of the Ordinary appears, it cannot be suggested or given in (f) Evidence in the Common Law Courts, that the Will was forged, or that the Testator was *Non compos*, or that another Person was Executor; for of these they had a proper Jurisdiction, and the Remedy must be by Appeal.

(e) *Raym.* 406, 407. 2 *Rot. Abr.* 299. *Hard.* 131. (f) But it may be given in Evidence, that the Seal was forged, or the Will repealed, or that there were *bonæ Notabilia*, because that is not in Contradiction to the real Seal of the Courts, but admits the Seal and avoids it. 1 *Lev.* 235, 236. *Vaugh.* 207. 1 *Skow.* 293.

2 *Rot. Abr.* 298, 299. Although regularly, where the Spiritual Courts have Conuzance of the Principal, they shall have Conuzance of the Incidents and Accessaries; yet if the Incident is a Matter meerly Temporal, or if a Temporal Matter be pleaded in Bar of an Ecclesiastical Demand, they must proceed in the Ecclesiastical Court according to the Temporal Law; otherwise they will be prohibited.

As if Payment be pleaded in Bar of a Legacy, and there is but one Witness, which the Ecclesiastical Court will not admit, because their Law requires two Witnessess; there the Temporal Courts will prohibit them, because it is a Matter Temporal, that bars the Ecclesiastical Demand.

1 *Sid.* 161. *Cro. Eliz.* 88, 666. 1 *Show.* 158, 173. 1 *Vent.* 291. *Richardson* and *Desborow* adjudged. 4 *Mod.* 285. 2 *Salk.* 547. *Shotter* and *Friend* adjudged. *Carth.* 142. S. C. adjudged.—But it is not sufficient Ground for a Prohibition, to suggest that the Spiritual Court objected to the Credibility of a Witness, nor to suggest that the Plaintiff had only one Witness to prove the Fact, unless that he alledge that he offered such Proof, and it was refused for Insufficiency. *Carth.* 143, 144.

But if there be but one Witness to prove a Nuncupative Will, and the Ecclesiastical Court refuse the (a) Probate thereof, because to every such Will their Law requires two Witnesses, no Prohibition lies; because there is no other Way of authenticating such Will but in the Spiritual Court, and this being the principal Matter, they had Conuzance thereof. Carth. 143. per Cur. (a) Yet if a Revocation of such Will is pleaded, and proved will go; because the Revocation is a Temporal Matter. Felw. 92. by three Judges against two, & vide 2 Rol. Abr. 299. Carth. 143. S. C. cited.

If the Spiritual Court do admit a Will, but yet will not give the Probate to the Executor because he cannot give Security for a just Administration, the Temporal Courts will grant a *Mandamus*; for though they are to determine whether there be a Will or not, yet if there be a Will, the Executor has a Temporal Right, and they cannot put any Terms upon him but what are mentioned in the Will. For this vide Tit. Executors and Administrators, and there, that in certain Cases the Court of

Chancery will compel Executors to give Security.

If an Executor, after Probate, becomes (b) a Bankrupt, yet the Spiritual Court cannot revoke the Administration; for he is intrusted by the Testator, who was the proper Judge of his Fitness and Sufficiency. Skin. 299. 1 Salk. 36. (b) But if an Executor becomes Non compos, the Spiritual Court may commit Administration to another, because that is a Natural Disability. 1 Salk. 36.

But the Jurisdiction of the Ecclesiastical Courts is confined to Wills relating to Goods and Chattels only; and therefore (c) if a Man gives Lands to be sold for the Payment of Debts, and disposes of the Money to several Persons, that cannot be sued for in the Ecclesiastical Courts, but only in a Court of Equity; because that is not a Legacy meerly of Goods and Chattels, but it arises originally out of Lands and Tenements. (c) Hob. 265. Cro. Jac. 279. 364. Cro. Car. 16. 2 Rol. Abr. 285. 2 Mod. 90.

But if a Rent be devised out of a Term for Years, the Ecclesiastical Courts may hold Plea thereof; for the Term for Years being only a Chattel is Testamentary, and consequently the Rent devised thereout. 1 Lev. 179. 1 Sid. 279. 2 Keb. 8. S. C.

If a Man makes a Will, and appoints A. and B. his Executors, to each of whom he gives five Pounds, but makes no Disposition of the Residue of his Estate, the Ecclesiastical Courts cannot compel a Distribution of (d) such Residue, for they have only a Jurisdiction to order a Distribution where the Party dies Intestate. 5 Mod. 247. Petit and Smith, and a Prohibition granted accordingly.

(d) Where the Courts of Equity in such Case will consider the Executors as Trustees only, and compel a Distribution, vide Tit. Executors and Administrators, and where they have a concurrent Jurisdiction with the Ecclesiastical Courts, vide 1 Chan. Ca. 200. 2 Chan. Ca. 85, 95. 2 Vent. 362. 2 Vern. 47, 76. Preced. Chan. 546.

Matrimonial Causes, as Marriage Contracts, Consanguinity, Divorces, Alimony, &c. are within the Jurisdiction of the Spiritual Court. But for this vide Tit. Marriage.

Tithes, Oblations, Mortuaries and Pensions, are of Ecclesiastical Conuzance; but if to a Demand of Tithes the Party pleads a *Modus Decimandi*, such Custom, like all (e) others, must be determined in the Temporal Courts; and if the Ecclesiastical Courts take upon them to determine it, a Prohibition will lie. Vide Head of Tithes. (e) As if the Church-wardens Libel against J. S.

for not repairing Part of the Church-Wall; wherein he sets forth, That J. S. was seised of such a Manor, &c. and that the Lords thereof for the Time being, were by Custom Immemorial bound to repair Part of the Wall *ratione tenure*; if this Custom be denied, a Prohibition will be granted, although after Sentence, for on the Face of it, it appears that the Spiritual Court had not Jurisdiction. Carth. 33. Vide Carth. 151.

But

*Carth.* 70. But if *A.* sues for Substraction of Tithes in the Spiritual Court, and *Bradshaw* and *Sewanton* ad-  
judged. the Defendant pleads a verbal Composition for two Years, no Prohibition will be granted; and where the Ecclesiastical Courts refuse a Plea of Composition for Life or Years, there is no Remedy but by Appeal to the Arches.

*2 Rol. Abr.* 307. The Ecclesiastical Courts have no Jurisdiction to hold Plea of a Matter of Record; therefore if the Parson of a Church be outlawed, and the Benefit of the Outlawry be granted to *J. S.* who receives the Tithes from the Parishioners, and afterwards the Parson sues the Parishioners for Tithes, who plead the Outlawry and the Grant to *J. S.* a Prohibition lies; for the Outlawry is a Matter of Record, of which they have not Conuzance.

The Spiritual Courts cannot hold Plea *pro reformatione Morum*, in a Cause that is Criminal and (a) triable at our Law; and therefore they cannot hold Plea *pro reformatione Morum* for a legal Perjury, but for Perjury (a) But they may punish in their own Courts they may punish for a Temporal Crime. *Dyer* 293. But not after the Crime is pardoned. *Hob. Searl's Case. Comp. Incumb.* 53.

*Comb.* 71. So if the Spiritual Court proceed against a Man for writing a Libel, a Prohibition lies; for this is an Offence indictable at Common Law.

If the Goods of a Church be stolen, it is Sacrilege and Robbery, and the Church-wardens shall have an (b) Appeal of Robbery; also (c) the Offender may be libelled against in the Spiritual Court *pro salute Animæ* (c) *1 Sid.* 281. & *reformatione Morum*, but not to recover Damages.

*2 Keb.* 23. *2 Inst.* 492. *1 Keb.* 743. An Action at Law lies for a Battery on a Spiritual Person, as also a Suit in the Spiritual Court for Irreverence to his Character. *6 Mod.* 156. *Vide Cro. Eliz.* 655.

### (E) How they are to proceed, as to those Matters in which they have a Jurisdiction, otherwise will be controuled by the Temporal Courts.

*4 Co.* 29. a. *7 Co.* 42. b. *1 Rol. Abr.* 530. *2 Rol. Abr.* 298, 299. THE Ecclesiastical Jurisdiction is derived from the Common Law, but the Form of the Proceedings, and the coercive Power exercised in the Ecclesiastical Courts, is after the Form of the Canon or Civil Law; and therefore the Judges of the Common Law will give Credit to their Proceedings and Sentences, in Matters in which they have a Jurisdiction, and believe them consonant to the Law of Holy Church, although against the Reason of the Common Law; and if there be a *Gravamen* it must be redressed by Appeal.

*Skin.* 27, 28. They may cite the Members of a Corporation by their Christian Names, and Names of Baptism, for a Duty due from them in their Corporate Capacity, as a Rate for not repairing a Church; for they have no *Disfringas* as at Common Law, by which they may take their Lands or Goods, and therefore must proceed against them in their Natural Capacity.

*5 Mod.* 449. A Citation may be served on a Sunday, or according to the Custom of the Ecclesiastical Court, it may be fixed to the Church-Door on a Sunday; and this shall not be said to be restrained by the *29 Car. 2.* which prohibits the Serving of any Process whatsoever upon a Sunday, except in Cases of Treason, Felony, or Breach of the Peace.

By the 13 Car. 2. cap. 12. it is enacted, " That it shall not be lawful  
 " for any Archbishop, Bishop, Vicar General, Chancellor, Commis-  
 " sary, or any other Spiritual or Ecclesiastical Judge, Officer or Mini-  
 " ster, or any other Person, having or exercising Spiritual or Ecclesi-  
 " astical Jurisdiction, to tender or administer unto any Person whatso-  
 " ever, the Oath usually called the Oath *ex Officio*, or any other Oath,  
 " whereby such Person to whom the same is tendred or administred,  
 " may be charged or compelled to confes, or accuse, or to purge him  
 " or her self, of any Criminal Matter or Thing, whereby he or she may  
 " be liable to any Censure or Punishment.

For the Pro-  
 ceedings *ex*  
*Officio* before  
 this Statute,  
*vide Cro. Eliz.*  
 201.  
*Cro. Car.* 291.  
*Moor* 755.  
*pl.* 1342.  
*Cro. Jac.* 37.  
*Jones* 257.  
 And for the  
 Construction

of this Statute *vide* 1 Sid. 232. 1 Mod. 185. 2 Mod. 118. 1 Vent. 41.

If a Man is proceeded against in the Spiritual Court for Defamation,  
 and the Libel charges that he spoke such and such Words *aut in effectu*  
*confimilia*, although a Declaration at Law, in this Form, would be  
 naught for Incertainty; yet the Libel is good, being according to the  
 Course of the Ecclesiastical Court.

2 Rol. Abr.  
 298. Palmer's  
 Case.

If one sues in the Spiritual Court for a Legacy, and the Executor  
 (a) pleads that he hath not Affets beyond the Debts due from the Testa-  
 tor, and the Plea (b) is refused, a Prohibition lies.

2 Rol. Abr.  
 292.  
 (a) But where  
 an Executor

pleaded *Plenement Administer*, and the Plea being refused, a Prohibition was moved for, but denied,  
 being a Matter of Ecclesiastical Conuzance. 1 Sid. 274. 1 Keb. 939. *Sanderfon's Case*, & *vide Noy* 77.  
*Latch* 114. *Golsb.* 4. (b) That there must be an Affidavit of such Refusal. *Skin.* 20.

If the Spiritual Court refuses to give a Copy of the Libel, a Prohibi-  
 tion will be granted *quousque*; but there must be an Affidavit that such  
 Copy was demanded and refused.

1 Vent. 252.  
 6 Mod. 308.

The Ecclesiastical Court can (c) neither Fine, Imprison, nor Amerce;  
 for their Jurisdiction being founded on the Canon or Civil Law, their  
 Proceedings are only by Ecclesiastical Censures.

11 Co. 44. a.  
 4 Inst. 324.  
*Noy* 17.  
 (c) They

have but two Sorts of Punishment, Penance and Costs, which first may be commuted  
 with for Money. 5 Mod. 70. or dispensed

If a Man be sued in the Ecclesiastical Court, and the Judge take an  
 Obligation from him that he will perform the Sentence, a Prohibition  
 lies; for if it be in a Matter within his Jurisdiction, there are lawful  
 Means of compelling him to perform the Sentence.

2 Rol. Abr.  
 302.

## Of the Court of Admiralty.

**T**HE Court of Admiralty is a Court for all Maritime Causes or Matters arising upon the High Sea, and its Jurisdiction is derived from the King, who (a) protects his Subjects from Pirates, &c. and who has (b) a Dominion over all the *British* Seas; this (c) For the Jurisdiction he exercises by the (c) Lord High Admiral, or those law-  
 Antiquity of fully deputed for that Purpose.  
 this high Of-  
 ficer, *vide Co. Lit.* 260. 12 Co. 80. And for antient Records relating to his Jurisdiction, *vide 4 Inst.* 142. — By the 2 *W. & M. Sess.* 2. *cap.* 2. Commissioners of the Admiralty have the like Authority and Jurisdiction as the Lord High Admiral. — By the 2 *H.* 5. *Stat.* 1. *cap.* 6. in every Port there shall be a Conservator of the Truce, worth 40 *l.* *per Ann.* in Land; who by the King's Patent, and the Admiral's Commission, shall inquire of Offences against Truce and Safe Conduct, &c. as the Admirals have done, &c. saving the Determination of the Death of a Man, and the Execution thereupon, to the Admiral. The Lord Warden of the *Cinque Ports* is also Admiral there, and hath the Jurisdiction of the Admiralty exempt from the Admiralty of *England.* 4 *Inst.* 223. 2 *Fones* 66, 67. — Which Jurisdiction is saved to him by several Acts of Parliament, as 2 *H.* 5. *Stat.* 1. *cap.* 6. 27 *H.* 8. *cap.* 4. 28 *H.* 8. *cap.* 15. 5 *Eliz.* *cap.* 11 & 12 *W.* 3. *cap.* 7. *Vide, &c.*

For the better bringing together the several Cases and Resolutions that have been in the Temporal Courts, relating to the Jurisdiction of the Court of Admiralty, I shall consider,

- (A) To what Places the Jurisdiction of the Admiralty is confined.
- (B) To what Things its Jurisdiction extends; and therein of such Matters as arise, partly on Sea, and partly on Land.
- (C) To what Contracts its Jurisdiction extends: And therein of Contracts made on Sea.
- (D) To what Crimes and Offences its Jurisdiction extends.
- (E) By what Law it proceeds, and the form of such Proceedings.

(A) To what Places the Jurisdiction of the Admiralty is confined.

IT is laid down as a general Rule in our Common Law Books, That (a) As 4 *Inst.* the Admiral's Jurisdiction is confined to Matters arising on the (a) High 137, 138, Seas only, and that he cannot take Conuzance of Contracts, &c. made 139, 140. or done in any River, Haven or Creek within any County; and that all 12 Co. 29. Matters arising within these are triable by the Common Law. *Moor* 122, 892. *Godb* 261.

2 *Sid.* 81. *Hob.* 79, 212. 13 Co. 52. 2 *Brownl.* 10, 37. 2 *Bulst.* 322. 1 *Rol. Rep.* 133. But our Books seem not to be agreed what shall be counted *Altum Mare*, or the High Sea; by some, it is no Part of the Sea where one may see what is done of the other Side of the Water. 4 *Inst.* 140, 141. 12 Co. 80. *Moor* 892.—That what is within the Body of the County is no Part of the Sea. 4 *Inst.* 140.—That the Admiralty Court cannot hold Plea of a Thing done upon the River *Thames*, because within the Body of the County. 1 *Rol. Abr.* 531. *Owen* 122. 2 *Brownl.* 37. S. C. adjudged. 1 *Leon.* 106. *Moor* 916. 2 *Rol. Rep.* 413. S. P. adjudged.—Nor of a Matter arising at *Limehouse*. *Cro. Jac.* 514. 2 *Rol. Rep.* 49. *Moor* 891. S. P. adjudged.—But by *Owen* 123. Such Place as is covered with Salt Water is *altum Mare*.—And 1 *Rol. Rep.* 250. By *Coke*, the Admiralty Court hath Conuzance of a Matter done in a Ship, riding in a Port that is not within the Body of a County.—But it seems agreed, that tho' in a Libel in the Court of Admiralty the Fact is laid to be done *super altum Mare*; yet it may be surmized that it was done in *Corpore Com'*, &c. and thereupon a Prohibition will be granted, for the Surmise is traversable. *Moor* 891. *pl.* 1255. *Lath* 11.

But it hath been resolved, That between the High and Low Water 5 Co. 107. Mark, the Common Law and Admiralty have *Imperium divisum*, *scilicet*, Sir Henry the one when it is not, and the other when it is covered with Water; *Constable's* and that (b) the Soil upon which the Sea flows and reflows, may be 1 *And.* 89. Parcel of a Manor. S. C. 3 *Inst.* 113.

S. P. (b) If a Man's Lands lie to the Sea, if they are increased by insensible Degrees, they belong to the Soil adjoining; but if the Sea leaves any Shore by a sudden falling off of the Water, then such derelict Lands belong to the King. *Dyer* 326. 2 *Rol. Abr.* 170.—If a River, as far as there is a Flux of the Sea, leaves its Chanel, it belongs to the King; for the *English* Sea and Channels belong to the King, and he hath the Property in the Soil, having never distributed them out to his Subjects. 2 *Rol. Abr.* 170.—But if a River, in which there is no Tide, should leave its Bed, it belongs to the Owners on both Sides; for they have, in that Case, the Property in the Soil, being no original Part or Appendix to the Sea, but distributed out as other Lands. 2 *Rol. Abr.* 170.—If the Sea overflow my Land for forty Years, and after reflow, yet I shall have my Land again; for the Act of Nature cannot alter the Property. 2 *Rol. Abr.* 1168.

By the 13 R. 2. cap. 5. "Upon Complaint of Inroachments made by the Admirals and their Deputies, it is enacted, " That the Admirals and their Deputies shall (c) meddle with nothing done within the Realm; " but only with Things done upon the Sea. For the Construction of this Statute, vide 3 *Bulst.* 205.

(c) This must be intended of holding Pleas; and not of awarding Execution; for notwithstanding this Statute, the Judge of the Admiralty may do Execution in the Body of the County. 13 Co. 52.

By the 15 R. 2. cap. 3. upon the like Complaint, it is declared, " That all Contracts, Pleas and Quarrels, and other Things done within the Bodies of Counties by Land or Water, and of Wreck, the Admiral shall have no Conuzance, but they shall be tried, &c. by the Law of the Land; but (d) of the Death of a Man, and of Mayhem done in great Ships, being in the main Stream of great Rivers beneath the (d) By the Resolution of the Judges in *Cro. Car.* 297. by the Equity of this Statute he may redress all Annoyances and Obstructions in those Rivers, which are an Impediment to Navigation, and may try Contracts and Injuries done there which concern Navigation at Sea; but Q. (e) In *Owen* 122. it is said *per Cur'*, That the Translator mistook *Bridges* for *Points*, as the Land's End.

By

(a) The Action may be brought by one Part-Owner, for it is grounded merely on a Tort. By the 2 H. 4. cap. 11. reciting the 13 R. 2. cap. 13. it is enacted, "That he that (a) finds himself aggrieved (b) against the Form of the Statute, shall have his Action by Writ grounded upon the Case against (c) him that so pursues in the Admiralty, and recover his double Damages against him, and he shall incur the Pain of 10 l. if he be attainted."

Carth. 295. (b) If upon Petition to the Judge of the Admiralty, a Ship is stopped in the Harbour till Caution given not to Trade within the Limits of the East-India Company, this is a Prosecution within the Statute, tho' there is no formal Plaintiff or Defendant; and in many Cases the Suits there are against the Ship it self. Carth. 294. Skin. 361. 4 Mod. 176. 1 Salk. 31. 3 Lev. 353. S. C. between Child and Sands. (c) Though the Prosecution be by the Command of the King, and in the Name of his Procter, yet if it was upon the Solicitation, and by the Procuration of the Parties, and they pay the Fees, they pursue within the Intention of the Act. 3 Lev. 353.

## (B) To What Things its Jurisdiction extends: And therein of such Matters as arise partly on Sea, and partly on Land.

THE Admiralty Court has Jurisdiction, where a Ship founders, or is split at Sea, over the Goods which become (c) *Flotsam*, *Jetsam*, or *Ligam*; and a Suit for these must be in that Court; but for Goods wreck'd they (d) must be claimed by Action at Common Law.

5 Co. 107.  
2 Inst. 167.  
4 Inst. 154.  
Palm. 96.  
1 Sid. 178.  
1 Rol. Abr. 531. (c) There are four Sorts of Shipwreck'd Goods, viz. *Flotsam*, *Jetsam*, *Ligam*, and *Wreck*. *Flotsam* is when the Ship is split, and the Goods float upon the Water between High and Low Water Mark; *Jetsam* is when the Ship is in Danger to be drowned, and for saving the Ship the Goods are cast into the Sea; *Ligam*, *Lagan*, or *Ligan*, is when the heavy Goods are cast into the Sea with a Buoy, that the Mariners may know where to retake them; *Wreck* is, where Goods Shipwreckt are cast upon the Land; these, when all the Crew are drowned, belong to the King, or the Lord of the Manor, to whom, it is presumed, the King has granted them: But by *Westm. 1. cap. 4.* if a Dog or a Cat (which are put for Instances) escape alive, the right Owner shall have them again, if he claim them within a Year and a Day after the Seizure. 2 Inst. 167. 5 Co. 106. *Bract. lib. 3. fol. 120. Molloy 237.* (d) By the express Words of 15 R. 2. they have no Conuzance of Goods wrecked.

1 Sid. 178.  
1 Keb. 657. And although the Admiralty Court has Jurisdiction of *Flotsam*, &c. and shall determine what it is by the Rules of the Civil Law, yet that must be understood where the Thing is *super altum mare*; and therefore if a Ship, which becomes *Flotsam* and derelict, comes into the Body of a County, they have no Jurisdiction.

2 Mod. 294. So if *Flotsam* comes to Land, and is taken by one that hath no Title, an Action lies at Common Law, but there shall be no Proceedings thereon in the Admiralty; for it need not be condemned as a Prize.

4 Inst. 148.  
(e) But by Light-Houses, and Sea-Marks, but of later Times, by Letters Patents granted to the Lord Admiral, he hath Power to erect (f) Beacons, the Master, Sea-Marks, and Signs for the Sea.

Wardens, Assistants of the *Trinity-House* at *Deptford Strand* had Power given them to erect Beacons, Marks and Signs for the Sea, &c. vide 4 Inst. 149. (f) A Suit for the Profits of the Beaconage of a Rock in the Sea, near — in *Cornwall*, may be in the Court of Admiralty. *Cross* and *Diggs*, 1 Sid. 158. adjudged; and it was said, as the Profits of the Beacons belong to the Admiral, so the Suit for them ought to be in his Court, though the Rock be the Freehold of another, and Part of his Inheritance.

1 Vent. 173.  
2 Lev. 25.  
1 Sid. 320. If the Original Cause arises upon the Sea, and other Matters happen upon the Land depending thereupon, yet the Trial shall be in the Court of Admiralty.

As if a Man takes a Thing upon the Sea, and brings it to the Land, and afterwards carries it away, the Suit for this shall be in the Admiralty Court, for this is a continued Act. 1 Rol. Abr. 533.  
4 Inst. 130.  
12 Co. 97. Like Point.

So if Goods are taken Piratically out of a Ship, and afterwards sold upon Land, a Suit may be commenced in this Case in the Admiralty Court against the Vendee. March 110.  
2 Sand. 259.  
1 Vent. 173.  
Cro. Eliz. 685.

S. P. adjudged; unless the Sale had been in a Market-Overt: But *vide* Hob. 78. 1 Rol. Abr. 531, 532. And that in such Case the Party may have an Action of Trover and Conversion at Common Law.

So if a Ship be taken by Pirates, and carried to *Tunis*, and there sold, it being originally within the Jurisdiction of the Admiral, it so continues, notwithstanding the Sale afterwards upon the Land. 1 Vent. 308.

But if the Owner of a Ship sends her to the *Indies* to Merchandize, and the Crew commit Piracy, by which, according to the Admiral Law, the Ship becomes forfeited, and the Admiral seizes her accordingly, if afterwards the Owner takes the Sails and Tackling out of the Ship, lying *infra Corpus Com'*, no Suit for this can be in the Admiralty Court; for the Admiral hath his Remedy by Action at Common Law. 1 Rol. Abr. 532.  
1 Rol. Rep. 285. S. C. adjudged.  
3 Bulst. 148.

If a Suit be in the Admiralty Court for making a Lighter for the Carriage of Mud, or the like, within the Body of the County upon the *Tbames*, and not for Navigation, a Prohibition lies. 1 Rol. Abr. 533.

If a Ship is taken by Pirates upon the Sea, and the Master, to redeem the Ship, contracts with the Pirates to pay them 50 *l.* and pawns his Person for it, and the Pirates carry him to the Isle of *S.* and there he pays it with Money borrowed, and gives Bond for the Money, he may sue in the Admiralty for the 50 *l.* because the Original Cause arose upon the Sea, and what followed was but Accessory and Consequential. Hard. 183.  
Spark and Stafford, adjudged.

If there be Wars with the *Dutch*, and one having Letters of Marque, takes an *Offender* for a *Dutch* Ship, and brings it into an Haven, and Libels against it to have it condemned as a Prize; but Sentence is given that it was no Prize; the *Offender* may libel in the Admiralty against the Captain, for the Damage the Ship received while it lay in the Port; for the original Taking being at Sea, the Bringing it into the Port, in order to have it condemned, is but a Consequence thereof. 1 Lev. 243.  
Turner and Neal.  
1 Sid. 367.  
S. C. adjudged.

If an *English* Ship takes a *French* Ship richly laden, the *French* being in Enmity with us, and such Ship is libelled against, and after due Notice on the *Exchange*, &c. declared a (a) lawful Prize, the King's Proctor may exhibit a Libel in the Admiralty Court, to compel the Taker (who sent the Ship to *Barbadoes*, and converted the Lading to his own Use) to answer the Value of the Prize to the King; although it was objected, that by the first Sentence the Property was vested in the King, and that this second Libel was in Nature of an Action of Trover, of which the Court of Admiralty cannot hold Plea. Carth. 399.  
Rex v. Broom, adjudged; being fully debated; and that the second Libel was but a Continuance of the first Suit, and a

Charge grounded upon the first Sentence by way of Execution thereof. 1 Salk. 32. S. C. *vide* Carth. 423. (a) That Prize or no Prize is a Matter altogether appropriated to the Jurisdiction of the Admiralty, and not triable at Common Law, *vide* Carth. 475, 476.

(C) To what Contracts its Jurisdiction extends; and therein of Contracts made on Sea.

4 *Inst.* 134, 139. THE Court of Admiralty hath no Jurisdiction as to Contracts made at (a) Land, whether such Contract be made here or in Foreign Parts.

12 *Co.* 103. *Hob.* 79, 212.

(a) If a Contract be made upon the Sea, which is afterwards sealed upon the Land, the Court of Admiralty cannot hold Plea thereof. *Hob.* 79, 212.

*Latch* 11. *per Dod.* If a Ship lying at Anchor wants Victuals, and sends to Land to *J. S.* to bring Victuals, and so the Contract is made in the Ship, the Admiralty shall have Conuzance; *secus* if the Contract is made intirely at Land, and the Victuals after sent to the Ship.

*Hob.* 12. If a Contract or Obligation be made upon the Sea, yet if it be not for a Marine Cause, the Suit upon this Contract or Obligation shall be at Common Law, and not in the Admiralty Court; for if a Man makes an Obligation for the Security of a Debt growing before upon the Land, or if he makes a Promise to pay it, this cannot be sued in the Court of Admiralty, but at Common Law.

1 *Rol. Abr.* 532. If a Man contracts with me in *London*, in Consideration of 100 *l.* to transport certain Commodities into *Turkey*, if he does not perform it, I cannot sue him in the Court of Admiralty, because the Contract was here, and nothing done upon the Sea.

1 *Rol. Abr.* 532, 533. If a Charter-Party be made in *England*, to do certain Things in several Places upon the Sea, though no Act is to be done in *England*, but all upon the Sea, yet no Suit can be in the Admiralty Court for the Non-performance of the Agreement; for the Contract is the Original, (b) without which no Cause of Suit can be, and this Contract is out of their Jurisdiction; and where Part is triable by the Common Law, and Part by the Admiral Law, the Common Law shall be preferred.

(b) Both the Contract and Breach must concur to make the Cause of Suit, which is intire; therefore, &c. *Hob.* 212.

1 *Rol. Abr.* 530. In Cases of Necessity, the Master may Hypothecate or Pledge the Ship or Goods, and (c) such Contract is cognizable in the Admiralty Court.

*Hob.* 11. *Moor* 918.

(c) That such Hypothecation is allowed, because no other Remedy at Common Law; but where *A.* contracted with *B.* for a Cable, which he delivered at *Ratcliff* upon *Thames*, and *B.* sued in the Admiralty, a Prohibition was granted; though it was insisted, that the Want of the Cable was occasioned by the Stress of Weather at Sea; for here the Contract was at Land, and a Remedy for the Breach at Common Law; but had the Hypothecation been at *Rotterdam*, or any other Foreign Part, the Remedy had been proper in the Admiralty Court. 1 *Salk.* 34. 3 *Mod.* 244. 6 *Mod.* 12, 25.

*Winch* 8.

4 *Inst.* 141.

1 *Vent.* 146,

343.

3 *Mod.* 244,

245.

1 *Salk.* 33, 31.

& vide 4 &

5 *Ann.* c. 16.

(d) 1 *Salk.* 33.

(e) *Raym.* 3.

The Mariners may sue in the Admiralty Court for their Wages, although the Hiring was by the Master on Land; and this is allowed of in Favour of Navigation, for here they may all join in the same Libel; also by the Admiral Law they have Remedy against the Ship and Owners, as well as against the Master; and it would be a great Discouragement to Seafaring Men, to oblige them to bring separate Actions, and those against a Master who may happen to be insolvent.

So of the other Officers under the Master, as the (d) Mate, (e) Purfer, Boatswain, &c. for though they contract with the Master, yet it is on the Credit of the Ship, &c.

So a Shipwright may sue in the Admiralty Court for the (a) making (a) 1 *Rel. Abr.*  
 a Ship (b) for Navigation upon the Sea. 533.

ing a Ship. *Cro. Car.* 296. (b) If a Contract be with Seamen to go on a Voyage, and they, in order  
 thereunto, work in a Harbour, and after, the Voyage is intercepted through the Owner's Fault; as  
 if the Ship be arrested for his Debt, &c. the Seamen shall sue for their Wages for the Work done in  
 the Harbour, in Pursuance of the Contract to go on a Voyage, in the Admiralty, as much as if they  
 had gone the Voyage; *secus*, if the Retainer of them had been only to do the Work in the Harbour.  
 6 *Mod.* 238.

But if there be any Special Agreement, by which the Mariners are to receive their Wages in any other Manner than is usual, or if the Agreement is under Seal, the Mariners cannot sue in the Admiralty Court. 1 *Salk.* 31. *Opy and Ad-*  
*dison.*

Nor can the Master sue in the Admiralty Court; for his Contract is on the Credit of the Owners, and not like that of the Mariners, which is on the Credit of the Ship. 4 *Inst.* 141. *Rayn.* 3. 1 *Salk.* 33. *Carth.* 518.

S. P. although the Owner was beyond Sea, and the Ship lay here, & *vide* 2 *Salk.* 548.

If a Contract is made at *Malaga*, concerning the Lading of a Ship, and for Breach thereof upon the Sea, *viz.* That he would not receive forty Buts of Wine into the Ship, according to Agreement, there is a Libel in a Foreign Admiralty, and Sentence that the Wine shall be received into the Ship, which is refused; yet there can be no Suit in the Admiralty here, reciting the former Sentence, and charging the Defendant with the Breach thereof; for though one may Libel here upon a Sentence in a Foreign Admiralty, for the Execution of it, yet there being no compleat Sentence in the Foreign Admiralty, but an Award only, that the Wine should be received; this Suit for Breach thereof is in Nature of an original Suit, which ought not to be, though the Breach was at Sea, because upon a Contract made at Land. 1 *Vent.* 32. *Furado* and *Gregory.* 1 *Sid.* 418. 1 *Lev.* 267. S. C.

If there are several Partners of a Ship, and the major Part of them are for sending her a Voyage to Sea, to which the Rest disagree; whereupon, according to the (c) common Usage in such Cases, the greater Number suggest in the Admiralty Court, the Disagreement of their Partners; and then, according to their Usage there, they order certain Persons to Appraise the Ship, who accordingly set a Value thereon; and then the major Part, who agreed to the Voyage, enter into a Recognizance, wherein they bind themselves jointly and severally to the disagreeing Parties, in a Sum proportionable to their Shares, according to the Value set by the Appraisers, to secure the Shares in the Ship of those who disagree to the Voyage, against all Adventures; there can be no Suit on this Agreement or Stipulation in the Admiralty Court; for the Contract was made on Land, and therefore the Temporal Courts must have Conuzance of it. *Carth.* 26. *Knight and Berry,* adjudged, and Prohibition to such a Suit granted, tho' after Sentence and Appeal to the Delegates; & *per Holt,* The Part-owners, who are the major Part, are not without Remedy in

such Case; for a Special Action on the Case may be framed at the Common Law. *Hard.* 473. S. P. but no Resolution. 6 *Mod.* 162. S. P. but no Resolution. (c) For this *vide* *Skin.* 230. 2 *Chan. Ca.* 36.

## (D) To what Crimes and Offences its Jurisdiction extends.

How Piracy and Offences committed on the Sea were punished before this Statute, *vide* 4 *Aff.* 25. 3 *Inst.* 115. S. P. C. 10. b. H. P. C. 77. 3 *Inst.* 112. (a) This must be intended between the High Water and Low Water Mark, where there is *divisum Imperium* at several Times. 3 *Inst.* 113. But if done in such Creek or Haven where the Admiral hath no Jurisdiction, the Commissioners cannot meddle with it.

BY the 28 *H. 8. cap. 15.* it is enacted, " That all Felonies and Robberies, &c. upon the Sea, or in any Haven, River, Creek or Place, where the Admiral or Admirals have, or (a) pretend to have Power, Authority or Jurisdiction, shall be inquired, tried, heard, determined and judged in such Shires and Places in the Realm, as shall be limited by the King's Commission or Commissions, to be directed for the same, in like Form and Condition as if any such Offence or Offences had been committed or done in or upon the Land; and such Commissions shall be had under the King's Great Seal, directed to the Admiral or Admirals, or to his or their Lieutenant, Deputy or Deputies, and to three or four such other substantial Persons as shall be named or appointed by the Lord (b) Chancellor of *England*, for the Time being, from Time to Time, and as oft as Need shall require, to hear and determine such Offences after the (c) common Course of the Laws of this Land, used for Felonies and Robberies, &c. done and committed upon the Land within this Realm: *And it is further enacted,* That if any Person or Persons happen to be indicted for any such Offence done, or hereafter to be done upon the Seas, or in any other Place above limited, that then such Order, Process, Judgment and Execution, shall be used, had, done, and made to and against every such Person and Persons so being indicted, as against Felons, &c. for any Felony, &c. upon the Land, by the Laws of the Land is accustomed; and such as shall be convicted of any such Offence, by Verdict, Confession or Process, by Authority of any such Commission, shall have and suffer such Pains of Death, Losses of Lands, Goods and Chattels, as if they had been attainted and convicted of such Offence done upon the Land; and also, that they shall be excluded from the Benefit of the Clergy.

Owen 122. *Moor* 756. 1 *Rol. Rep.* 175. H. P. C. 77. (b) *Hob.* 146. (c) Yet it still remains an Offence of a special Nature; and therefore the Indictment must alledge the Fact to be done upon the Sea, and must have both the Words *Felonice* and *Piraticæ*; and no Offence is punishable by Virtue of this Act, as Piracy, which would not have been Felony if done on the Land; consequently the Taking of an Enemy's Ship by an Enemy is not within the Statute. 3 *Inst.* 112. S. P. C. 114. 1 *Rol. Rep.* 175.—And although the Statute ordains, that it shall have the like Trial and Punishment as are used for Felony at Common Law, yet this shall not be carried so far as to make it also agree with it in other Particulars which are not mentioned; and therefore it shall not be included in a general Pardon of all Felonies. *Moor* 756. 3 *Inst.* 112. *Co. Lit.* 391. H. P. C. 77.—Nor shall an Attainder for this Offence work any Corruption of Blood. 3 *Inst.* 112. H. P. C. 77.—But it hath been resolved, that an Offender standing mute on an Arraignment, by Force of this Statute, shall have Judgment of *Pain fort & dure.* 3 *Inst.* 114. *Dyer* 241.

(d) *Vide Yelv.* 134. It was (d) held, that by Force of this Statute Accessories to this Offence could not be tried; but this is remedied by 11 & 12 *W. 3. cap. 5.* by which their Aiders and Comforters, and the Receivers of their Goods, are made Accessories, and to be tried as Pirates, by 28 *H. 8. cap. 15.* also the said Statute 11 & 12 *W. 3.* directs how Pirates may be tried beyond Sea, according to the Civil Law, by Commission under the Great Seal of *England.*

By the 5 *Eliz. cap. 5.* several Offences in the Act mentioned, if done on the main Sea, or Coasts of the Sea, being no Part of the Body of any County, and out of any Haven and Pier, shall be tried before the Admiral or his Deputy, and other Justices of *Oyer and Terminer*, according to the Statute of 28 *H. 8.*

By 1 *Ann. cap. 9.* Captains and Mariners belonging to Ships, and destroying the same at Sea, shall be tried in such Places as shall be limited by the King's Commission, and according to 28 *H. 8.*

The 10 *Ann. cap. 10.* directs how the Trial of Officers and Soldiers, that either upon Land out of *Great Britain*, or at Sea hold Correspondence with a Rebel Enemy.

And by 4 *Geo. 1. cap. 11.* all Persons who shall commit any Offence for which they ought to be adjudged Pirates, Felons, or Robbers by 11 and 12 *W. 3.* may be tried and judged for every such Offence according to the Form of 28 *H. 8.* and shall be excluded from their Clergy.

(E) By What Law it proceeds, and the Form of such Proceedings.

ALL Maritime Affairs are regulated chiefly by the Civil Law, the Rhodian Laws, the Laws of (a) *Oleron*, or by certain Peculiar and Municipal Laws and Constitutions appropriated to certain Cities, Towns and Countries bordering on the Sea.

*Godolp. Adm. Juris 40.*  
(a) So called for that they were made

by King *Richard 1.* when he was there. *Co. Lit. 11. b. 260. b.*

If the Owner of a Ship victuals it and furnishes it to Sea, with Letters of Reprisal, and the Master and Mariners when they are at Sea commit Piracy upon a Friend of the King, without the Notice or Assent of the Owner, yet by this the Owner shall lose his Ship by the Admiral Law, and our Law ought to take Notice thereof.

1 *Rol. Abr. 530.*  
but vide 1 *Rol. Rep. 285.*

By the Civil Law and Custom of Merchants, if the Ship be (b) cast away, or perish through the Mariners Default, they lose their Wages; so (c) if taken by Pirates, or if they run away; for if it were not for this Policy they would forsake the Ship in a Storm, and yield her up to Enemies in any Danger.

1 *Syd. 179.*  
1 *Mod. 93.*  
1 *Vent. 146.*  
(b) But whether the Executors of those Mari-

ners who died before the Casting away of the Ship may recover the Wages due to their Testators, Q. & vid. 1 *Syd. 179.* 1 *Keb. 684.* (c) For refusing to fight when commanded by the Master, vide 22 & 23 *Car. 2. cap. 11.*

If a Man of *Friesland* sues an *Englishman* in *Friesland* before the Governor there, and there recovers against him a certain Sum, upon which the *Englishman* not having sufficient to satisfy it, comes into *England*, (d) upon which the Governor sends his Letters missive into *England*, *omnes Magistratus infra Regnum Angliæ rogans* to make Execution of the said Judgment, the Judge of the Admiralty may execute this Judgment by Imprisonment of the Party, and he shall not be delivered by the Common Law; for this is by the Law of Nations, that the Justice of one Nation shall be aiding to the Justice of another Nation, and for one to execute the Judgment of the other; and the Law of *England* (b) takes Notice of

1 *Rol. Abr. 530.*  
*Wier's Case.*  
(d) So upon a Judgment given in a Court of Admiralty, Execution may be sued in Foreign Parts.

7 X

this *Godh. 260. Arguendo.*

--- If a Ship is condemned as the King's Prize in a Foreign Admiralty, such Sentence may be executed here. 1 *Salk 32, 33.* (b) If a Ship is sold by Virtue of a Sentence in the Court of Admiralty of *France* (being then in Amity with *England*) the Sentence shall not be examined in an Action at Common Law; for we ought to give Credit to their Sentences, else they will not give Credit to the Sentences of our Court of Admiralty; but the Way to be relieved is to petition the King, who will examine the Case, and, if he finds Cause of Complaint, send to his Ambassador residing there, and upon Failure of Redress will grant Letters of Mark and Reprisal. *Raym. 473. Skin. 59. & vid. 1 Vent. 32.* —But where the Court said they would give no Regard to a Sentence in the Court of Admiralty of *Scotland*, vide *Rudly and Eggesfield. 2 Sand. 259, 260. 1 Vent. 174.* —But it was agreed the Sentence in *Scotland* was pleadable in

in



in this Case, as the Loss of the Oils did not save the Silks, nor the saving of the Silks lose the Oils, the Bill was dismissed.

By the Civil Law the Admiralty Court may take a Recognizance in  
 (a) Nature of a Stipulation from the Defendant to answer the Action; 1 Rol. Abr. 531.  
 and if he does not obey, they may take his Body; for it is necessary that Cro. Eliz. 685.  
 every Court should have a compulsory Power of enforcing Obedience to Ny 24.  
 its Decrees, and this Course having prevailed there Time out of Mind Hurl. 475.  
 cannot be altered without an Act of Parliament. 13 Co. 52.

2 Inst. 51. Yelv. 135. Godb. 193, 260. (a) But being in Court of Record they cannot take a Recognizance. 4 Inst. 135, 137. —Yet such a Stipulation is good. Raym. 78. adjudged.

So they may require *Fidejussores* to enter into such Stipulation, and such Stipulation, if the Party has been so, may be good, though entered into (b) for a Sum certain, and the Bail taken in Execution thereupon; 1 Rol. Abr. 531.  
 and if they had not this Power, the Party might be obliged to lie in Goal (b) Raym. 78.  
 during the whole Suit. 1 Keb. 489.

Though the Court of Admiralty is no Court of Record, because they proceed there according to the Civil Law, yet by the Custom of the Court they may (c) amerce the Defendant for his (d) Default by their 13 Co. 53. adjudged.  
 Discretion, and may make Execution for the same of the (e) Goods of (c) But not Fine as  
 the Defendant *in Corpore Com.* and if he hath no Goods take his Judges of a Court of Record may do.  
 Body. 12 Co. 104.

—But they may Fine and Imprison for a Contempt in the Face of the Court. 1 Vent. 1. (d) They may punish one that resists the Execution of the Process of the Court, but not give Damages to the Party. 1 Vent. 1. But because they had no Cognizance of the original Matter, upon which the Process was grounded, a Prohibition was granted, Err. Stil. 171, 340. (e) But they can in no Case take Land in Execution. Godb. 193, 260. Said by Coke that the Process of the Admiralty Court is to imprison according to 19 H. 6. vide Hard. 474. Noy 24. Godb. 260. 1 Syd. 148.

When a (f) Provisionate Decree, as they call it, or *primum Decretum*, is given for the Possession of a Ship, and she is seised upon Security given by the Course of the Admiralty, she may be hired out. 1 Vent. 174.  
(f) That upon such Interlocutory

Decree no Appeal lies to the Delegates. 1 Vent. 174. yet vid. Moor 814. cont.

“ By 8 *Eliz. cap. 5.* A definitive Sentence in a Civil or Marine Cause, by Delegates by Commission upon an (a) Appeal in Chancery, shall be final. (g) For in such Case no Writ of

Error lies. 4 Inst. 135, 339, 341.

## Of the Marshalsea and Palace Court.

*Fleta Lib. 2.  
cap. 3.  
Spelm. Tit.  
Justic. Gren.*

**A**T the Time of the Justiciar, the Squabbles and Disputes between the King's Servants were determined before the Steward and Marshal, and for that Purpose the Court was held within the King's Verge, that his Servants might not be drawn away from their Attendance on him; the Proceedings were by Plaint without any original Writ.

*Crompt. Juvris.  
102.*

*2 Inst. 548.*

*4 Inst. 130.*

This Court hath still a Continuance, being holden in *Southwark*, and is a Court of Record, exercising a Jurisdiction within 12 Miles of the King's Palace, or where his (a) ordinary Residence is.

(a) The King's going out of the Household for his Recreation is not such a Removing as changes his ordinary Residence. 10 Co. 74.

For the Con-  
struction

hereof *vide*

*2 Inst. 548.*

*10 Co. 71.*

The Mar-  
shallers Case.

*6 Co. 20, 21.*

*4 Co. 46.*

(b) Does not extend to Trespass *Quare clausum fregit*, Ejectment, for they cannot hold Plea of any real or mix'd Action. 10 Co. 75.

*6 Co. 20.*

*Michelborn's*

Case.

(c) *1 Syd. 105.*

*6 Co. 20.*

*1 So. where*

by *Keeling* it

is said that

such Let-  
ters Patent

were void.

In every Action of Debt, or Covenant, both the Parties must be within the Jurisdiction of the Court, (a) also the Contract and Consideration must be laid to have arisen within the Jurisdiction; but in Trespass it is said to be sufficient if one of the Parties be within the Precincts or Jurisdiction of the Court.

King *Charles* the First, by Letters Patent, granted to the Marshalsea or Palace-Court, Jurisdiction of holding Plea of all Manner of Personal Actions whatsoever, as Debt, Trespass, Battery, Slander, Trover, Actions on the Case, which shall arise within 12 Miles of the Palace of *Whitehall*.

## Courts Palatinate.

**T**HE Palatinate Courts are superior Courts of Record, which exercise a Jurisdiction within their own Precincts in as ample a Manner as the Courts of *Westminster*, into which the King's ordinary Writs do not run; and altho' they have *Jura Regalia*, yet they derive their Authority but (d) at this Day no Palatinate Jurisdiction can be erected without an Act of Parliament.

Palatinate, and not merely for Causes arising within the Palatinate; and therefore if a Debtor goes from a Foreign into a Palatinate Jurisdiction, his Obligations go along with him as much as if he removed from one Kingdom into another, and he may be sued there, tho' the Cause of Action arose not within such Palatinate Jurisdiction. 1 *Sand.* 74. *Peacock and Best* resolved. (b) Might formerly pardon Treasons, Murder, Felonies, &c. but their Power as to many Things is now restrained, for which *vide* 4 *Inst.* 205. 27 *H. 8. cap.* 24. (c) And were probably erected at first as being adjacent to those Countries, which were generally in Enmity with *England*, viz. that the People of *Lanaster* and *Durham*, which lie towards *Scotland*, and *Chester* that lies towards *Wales*, might have Justice administered to them at Home, and they not be obliged to any Attendance elsewhere, which might render them less able to defend themselves against their Neighbours Excursions. 1 *Vent.* 155. *Arguendo.* (d) *Vide* 4 *Inst.* 204. *Crompt. Juris.* 139.

By 27 *H. 8. cap.* 24. *Secl.* 3. It is enacted, "That all original Writs and judicial Writs, and all Manner of Indictments of Treason, Felony and Trespass, and all Manner of Procefs to be made upon the same in every County Palatine, and other Liberty within this Realm of *England* and *Wales*, shall be made only in the Name of our Sovereign Lord the King and his Heirs, Kings of *England*, and that every Person or Persons having such County Palatine, or any other such Liberty to make such Originals, Judicials, or other Procefs of Justice, shall make the *Teste* in the said original Writs and Judicial in the Name of that same Person or Persons that have such County Palatine or Liberty.

By 11 and 12 *W. 3. cap.* 9. reciting 23 *Car.* 2. and its Reference to 43 *Eliz.* and that the Clause, *That in Actions of Trespass, Assault, and Battery, and other Personal Actions, the Plaintiff in such Actions, in Case the Jury shall find the Damages to be under the Value of 40 Shillings, shall not recover or obtain more Costs of Suit than the Damage so found shall amount unto,* relates only to the Courts at *Westminster*, It is enacted, "That as well the said Clause and all the Powers and Provisions thereby, or by any other Law now in Force, made for Prevention of frivolous and vexatious Suits, commenced in the Courts of *Westminster*, shall be extended to, and be of the same Force and Efficacy in all such Suits, to be commenced or prosecuted in the Court of Great Sessions for the Principality of *Wales*, the Court of Great Sessions for the County Palatine of *Chester*, the Court of Common Pleas for the County Palatine of *Lan-caster*, and the Court of Pleas for the County Palatine of *Durham*, as fully and amply as if the said Court had been mentioned therein.

"And it is further enacted by the said last mentioned Statute, that no Sheriff or other Officers within the said Principality or Counties Palatine, upon any Writ or Procefs issuing out of any of his Majesty's Courts of Record at *Westminster*, shall hold any Person to special Bail, unless an Affidavit be first made in Writing, and filed in that Court, out of which such Writ or Procefs is to issue, signifying the Cause of Action, and that the same is 20 *l.* or upwards, and where the Cause of

“ Action is 20 *l.* and upwards, Bail shall not be taken for more than the  
 “ Sum expressed in such Affidavit.

The Palatinate Courts are at this Day three, *viz.* *Chester, Durham, and Lancaster.*

### I. Of the County Palatine of Chester.

4 *Inst.* 211. This is a County Palatine by Prescription, and according to my Lord  
*Crompt. Juris.* *Coke* is the most Ancient and Honourable remaining at this Day.

137.  
 4 *Inst.* 211. Within this County Palatine, and the County of the City of *Chester*,  
 there is and anciently hath been a principal Officer, called the Chamberlain of *Chester*, who hath, and Time out of Mind hath had the Jurisdiction of a Chancellor, and that the Court of Exchequer at *Chester* is, and Time out of Mind hath been the Chancery Court for the said County Palatine, whereof the Chamberlain of *Chester* is Judge in Equity; he is also Judge of Matters at the Common Law within the said County, as in the Court of Chancery at *Westminster*, for this Court of Chancery is a mixt Court.

4 *Inst.* 212. There is also, within the said County Palatine, a Justice for Matters of the Common Pleas and Pleas of the Crown, to be heard and determined within the said County Palatine, commonly called the Chief Justice of *Chester*.

4 *Inst.* 212. All Pleas of Lands or Tenements, and all other Contracts, Causes and Matters rising and growing within this County Palatine are pleadable, and ought to be pleaded, heard, and judicially determined within the said County Palatine, and not elsewhere; and if any be pleaded, heard or judged out of the said County Palatine, the same is (a) void, and *coram non Judice*, except it be in Case of Treason, Error, Foreign Plea, or Foreign Voucher.

(a) That this must be understood where the Plaintiff by his Declaration shews that the Matter arose within a County Palatine; for as to transitory Action, the Plaintiff may alledge that the Cause of Action accrued at any Place. *Vide* 1 *Sid.* 103, and *supra* of Courts in General.

1 *Rol. Abr.* A Man cannot sue in the Chancery of *Chester* for a Thing which in Interest concerns the Chancellor there, because he cannot be his own Judge; and therefore he may in this Case sue in the Chancery of *England*; for  
 374.  
 1 *Rol. Rep.* 246. (b) otherwise there would be a Failure of Right.

3 *Bulst.* 117. (b) If a Man hath Cause to complain in Equity of a Matter arising within the County Palatine of *Chester*; if the Defendant lives out of the County Palatine he may be sued in the Chancery here; otherwise there would be a Failure of Justice; for Proceeding in Equity binding the Person only, if the Person lives out of the Jurisdiction of the Chamberlain of *Chester*, there can be no Relief there. 4 *Inst.* 213. & *vide* 1 *Chan. Ca.* 40.

*Fitz. Coro.* 233. Outlawry in a County Palatine cannot be pleaded in any of the  
 12 *E.* 4. 16. Courts at *Westminster*, for the Party outlawed is only ousted of his  
*D. Plit.* 396. Law within that Jurisdiction, and it shall not extend to disable a Man in  
 1 *Vent.* 157. another County, where they have no Power; for the County Palatine  
 2 *Sid.* 146. being a Royal Jurisdiction within Bounds; the losing the Privileges of the Law within that Jurisdiction can be no Disadvantage to him in another County; and if he does not live within the Palatine Jurisdiction, he is not obliged to attend there; but it seems that Outlawry in the County Palatine of *Lancaster* may be pleaded in the Courts of *Westminster*, because that County was erected by Act of Parliament in *E.* 3d's Time, but *Durham* and *Chester* are by Prescription.

2. Of the County Palatine of Durham.

This is also a County Palatine by Prescription, and said to have been erected soon after the Conquest, and is Parcel of the Bishoprick of Durham.

The Jurisdiction of the Bishop of Durham (a) extends to all Places between Tine and Tese.

In this County Palatine there is a Court of Chancery, which is a mixed Court both of Law and Equity, as the Chancery at Westminster.

If an erroneous Judgment be given, either in the Chancery upon a Judgment there, according to the Common Law, or before the Justices of the Bishop, a Writ of Error shall be brought before the Bishop himself; and if he give an erroneous Judgment thereupon, a Writ of Error shall be sued returnable in the King's Bench.

If a Man be Surety for another to keep the Peace, and after he breaketh the Peace, and the Surety hath Lands in the County Palatine of Durham, the King shall command the Bishop of Durham, or his Chancellor, to do Execution; and so it is in the other Counties Palatine, and in the same Manner it is of a Statute Staple, &c. Recognizances, &c.

3. Of the County Palatine of Lancaster, and the Dutchy Court.

The County Palatine and Dutchy of Lancaster were erected by Act of Parliament in the Reign of E. 3.

If Lands, (b) Parcel of the Dutchy lie within the County Palatine, a Suit in Equity may be for this in the Dutchy Court.

(b) How the County Palatine became Parcel of the Dutchy, vide 1 E. 4. cap. 1. 1 H. 7.

But if a Man enters into an Obligation concerning Lands lying in the County Palatine, and he is sued upon this at Common Law, he cannot sue in Equity in the Dutchy Court to be relieved against this Bond, for the Jurisdiction being Local, it cannot be extended to this collateral Matter.

ed, because the Dutchy hath no Jurisdiction in Respect of the Person, as because the Sutors dwell within the County Palatine, nor upon the Lands of the Subject any where but upon the King's own Land, and his own Revenue, and perhaps upon Bonds and Assurances given for his Revenue of the Dutchy.

But it hath been since holden that a Bill may be exhibited in the Dutchy Court to be relieved against the Forfeiture of a Mortgage of Lands lying within the County of Lancaster.

The Proceedings of the Dutchy Court at Westminster are as in a Court of (c) Chancery for Lands, &c. within the (d) Survey of the Court by English Bill, &c. and Decree, and the Process the same as in Chancery, but it is not a mixed Court, as the Chancery of England is, (e) partly of the Common Law and partly of Equity.

would be inconvenient now to examine the Power thereof after so long Continuance, &c. (d) Whatever belongs to the Jurisdiction of the Dutchy may be determined in the Exchequer. (e) They cannot try the Validity of Letters Patents, or other Matter properly triable at Law.

1 *Roll. Rep.* It was granted by Patent that this Court might make Ordinances for  
 42. Sir *Tho. Beaumont* the Hospital of *W.* how they *se gererent, conversabantur & eligerentur*, and  
 and the Hof- this Patent was confirmed by the Statute of the 14 *Eliz.* yet it was re-  
 pital of *Wig-* solved that the Court hereby hath no Power to determine the Right of  
*ston.* the Possessions; and the Hospital having exhibited a Bill in this Court to  
 avoid a Lease by them made, of Lands lying out of the Dutchy, a Pro-  
 hibition was granted.

“ By the Statute of 16 *Car. 1. cap. 10.* reciting that the Proceedings,  
 “ Censures, and Decrees of the Court of *Star-Chamber* were found an  
 “ intolerable Burden to the Subject, &c. it is enacted that the Court of  
 “ *Star-Chamber* and all its Power, Jurisdiction and Authority shall be dis-  
 “ solved, and the like Jurisdiction then used and exercised in the Court  
 “ of the Dutchy of *Lancaster*, &c. is repealed, revoked, and made  
 “ void.

## Of the Royal Franchise of Ely.

4 *Inst.* 220. *ELY* is (a) not a County Palatine, but a Royal Franchise, granted  
 (a) 2 *Inst.* by *H. 1.* to the Bishop of *Ely* and his Successors, (b) of hearing and  
 223. determining as well Civil as Criminal Pleas.  
*Carth.* 109: (b) This Jurisdiction the Bishop now exercises by his Justices, by Prescription ground-  
 So resolved. ed on the said Grant. 4 *Inst.* 220.

And therefore the Party, who is sued in the Courts of *Westminster*, can-  
 not plead that the Lands lie, or that the Cause of Action arose within  
*Carth.* 109. *Ely*, but (c) Conuzance must be demanded, which is all the Jurisdiction  
*Cotton and* a Franchise has.  
*Johnson.*  
 1 *Salk.* 183. a Franchise has.  
 S. C. ad-  
 judged. (c) Of the Manner of demanding Conuzance, *vide* 1 *Sid.* 283. 1 *Keb.* 946, 948. 1 *Lev.* 89.  
 1 *Keb.* 435. 1 *Sid.* 303.

4 *Inst.* 221. If one be Bailiff of Lands in *A.* and *B.* and *B.* is within the Fran-  
 (d) But if an chise of *Ely*, and *A.* not, the Bailiff cannot be charged in (d) a joint  
 Action, that Action, for this would oust the Franchise of its Jurisdiction.  
 in its Nature  
 is joint, rife partly within, and partly without the Franchise, the Franchise cannot claim Conuzance.  
 4 *Inst.* 220.

# Courts of the Forest.

**A** Forest, as described by *Manwood*, is a certain Territory of Woody Grounds and fruitful Pastures, privileged for wild Beasts and Fowls of Forest, Chase and Warren, to rest and abide there in the safe Protection of the (a) King for his Delight and Pleasure, which Territory of Ground so privileged is meered and bounded with (b) unremoveable Marks, Meers and Boundaries, either known by Matter of Record, or by Prescription, and also replenished (c) with wild Beasts of Venary or Chase, and with great Coverts of (d) Vert for the Succour of the said Beasts there to abide; for the Preservation and Continuance of which said Place, together with the Vert and Venison, there are particular (e) Officers, (f) Laws and Privileges belonging to the same, requisite for that Purpose, and proper only to a Forest, and to no (g) other Place.

tion, which supposes a Grant from the Crown for that Purpose. *Plow.* 318. *Bract. Lib. 2. cap. 1. 4 Inst. 300. Bro. Quo Warranto, 7.* — But a Subject may have a Forest by Grant from the Crown. *Dyer* 169. *Manwood* 155. — Before the Statute of *Charta de Foresta*, the King used to convert the open and woody Grounds of his Subjects into Forests; but tho' at this Day he may make a Forest, yet he cannot afforest any of his Subjects Lands. *4 Inst. 300.* (b) But need not be actually inclosed with Hedge, Ditch, &c. *Manwood* 145. (c) Of the several Beasts of the Forest, *vide 4 Inst. 316.* (d) This Word comprehends every Thing bearing green Leaves in the Forest. *Manwood* 146. (e) The Chief of whom is the Chief Justice in Eyre, who must be a Peer, and who was formerly created by Writ, as other Justices in Eyre; but by the Statute 27 H. 8. *cap. 24.* he is made by Letters Patent, and may execute his Office by Deputy. *4 Inst. 291, 314.* — The other Officers are the Rangers, Stewards, Verderors, Foresters, Regarders, Agistors, and Woodwardes; these must duly attend their respective Offices, and therefore are privileged from attending on Juries in the County, &c. *F. N. B. 164. 2 Inst. 291. 1 Jon. 266.* (f) Which differ in many Cases from the Common Law of England, for which *vide 4 Inst. 315.* (g) For altho' Warrens and Parks are Civil Inclosures, and a Chase is a Franchise differing only from a Park, in that it is not inclosed; and tho' these enjoy Privileges by Grant from the Crown distinct from other Lands, yet are they not to be considered as Forest, having neither particular Laws, nor particular Officers; and therefore Offences committed in these must be punished by the Common Law. *4 Inst. 308. Manwood 49. Co. Lit. 233.*

There are three Courts (b) incident to a Forest.

(b) *Poph* 150.  
1 *Rol. Rep.*  
191.

1. The Justice Seat.
2. The Swainmote Court.
3. The Court of Attachments.

## 1. Of the Justice Seat.

This Court is so (i) incident to a Forest, that there cannot be a Forest without it, but it (k) cannot be holden oftner than every third Year.

It must be summoned at least 40 Days before Sitting, and one Writ of Summons shall be directed to the Sheriff, &c. the other *Custodi Forestæ vel ejus Locum tenenti*, to summon all Officers, &c. and all Persons that claim Liberties within the Forest, to shew how they claim them.

This Court may inquire, hear, and determine all Trespasses within the Forest, (l) according to the Law of the Forest, and all Claims of Franchises, &c. within the Forest.

ed for Non-payment of a Fine set there, *Web's Case.* 1 *Rol. Rep.* 411. 2 *Bulst.* 213. *arbitatur.*

(i) 2 *Bulst.*  
298.  
(k) 4 *Inst.*  
290.  
4 *Inst.* 291.  
4 *Inst.* 291.  
(l) Whether  
a Man may  
be imprison-

(a) But for this *vide* 1 *Rot. Abr.* 534. *Cro. Car.* 409. 1 *Jones* 268. (b) Where the Indictment was removed in *B. R.* and the Defendant there put to answer. 4 *Inst.* 295.

By the 7 *R. 3. cap. 3.* it is enacted, "That (a) no Jury shall be compelled by any Officer of the Forest, or other Person, to travel from Place to Place, out of the Place where the Charge is given, but shall give their Verdict in the Place where their Charge is given. The Proceedings in this Court are *de hora in horam*, and therefore the Defendant must plead to an Indictment there (b) presently.

By 9 *H. 3. cap. 2.* "Dwellers out of Forests shall not come before Justices of the Forest by common Summons, unless impleaded there, or Sureties for others attached for the Forest.

By 34 *E. 1. Stat. 5. cap.* "The Justice of the Forest, or his Lieutenant, in Presence, or by Assent of the Treasurer, may take Fines and Amercements of Indictées for Trespasses done there, and not tarry for the *Eyre* of the Justices.

4 *Inst.* 315. A Felony committed within the Forest must be inquired of, &c. before the Judges of the Common Law, and it belongs not to the Conuizance of the Chief Justice of the Forest.

4 *Inst.* 317. A Receipt of an Offender in Hunting, &c. or of the King's Venison out of the Forest, cannot be punished by the Law of the Forest, because the Jurisdiction is Local.

4 *Inst.* 290. (c) By 9 *H. 3.* the Swainmote.

*cap. 16.* Presentments of the Foresters, when enrolled and enclosed under the Seals of the Verderors, shall be presented to the C. Justices, &c. and be determined before them.—How the Truth of such Presentment shall be inquired of, and after by Assent of the Foresters, Verderors, Regarders, &c. and confirmed and sealed with their Seals, *vide* 34 *E. 1. cap. 1.* And Indictments taken in other Manner shall be void.—And by 34 *E. 1. Stat. 5. cap. 2.* If any Officer is dead, or sick, so that he cannot be at the Swainmote, the Justice of the Forest shall put another in his Place; so that the Indictment may be by all in Form.—If sealed with the Seal of one Officer only, by Assent of all the Verderors, &c. it is well enough. 1 *Jones* 268.

1 *Jones* 279. If upon the first Sitting of the Justice Seat, the four Men and Reeve of any Town make Default, the whole Vill shall be amerced; but if after Appearance they make Default upon an Adjournment, the Defaulters only shall be amerced.

4 *Inst.* 290. If at the Swainmote, the Presentment of the Foresters concerning Vert and Venison is found true, the Offender is convicted in Law, and

(d) 1 *Jones* 347. (d) cannot traverse; but a Presentment at a Justice Seat (c) not found at the Swainmote may be traversed, because Presented but by one

(e) Nothing can be done but upon their Presentments. 2 *Bulst.* 297.

4 *Inst.* 313. If the King Pardons a Trespass in a Forest, and an Offender at a Justice Seat pleads it, by the Law of the Forest, before any Allowance thereof, the Justices must charge the Ministers of the Forest to inquire whether the Delinquent hath done any Trespass in Vert or Venison since the Date of the Pardon, and when the Pardon is allowed, the Entry is *quod invenit manucaptos quodammodo non forisfac*, &c.

4 *Inst.* 313. If an Offender be convicted for a Trespass in the Forest in Hunting, &c. and adjudged to be fined or imprisoned, though he pays the Fine, yet he must find Sureties for his good Abearing.

4 *Inst.* 294. (f) How the C. Justice may inquire of the Truth of such Claims *per Ministros Forestæ*, or *tam per Ministros quam per alios*, at his Discretion. 4 *Inst.* 294, 295.

4 *Inst.* 294. (f) How the C. Justice may inquire of the Truth of such Claims *per Ministros Forestæ*, or *tam per Ministros quam per alios*, at his Discretion. 4 *Inst.* 294, 295.

But if refused to be allowed where it ought, the Party shall have a 4 *Inst.* 297. Writ *de Libertatibus allocandis* to the Justices of the Forest.

But if upon such Claim a Difficulty arises, or a Demurrer is joined, 4 *Inst.* 295. the Chief Justice may adjourn it in *B. R. &c.*

A *Certiorari* was prayed on Behalf of the Duke of *Norfolk*, to remove 1 *Sid.* 296. a Presentment taken in the Forest of *Pickering*, to be directed to the Duke of *Nor-* Chief Justice in *Eyre*; the Judgment was, because there was a Question of *folk v. Duke* Right, to whom certain Woods there did belong, whether to the Duke of *Newcastle*. 2 *Keb.* 43, of *Norfolk*, or to the Duke of *Newcastle*; and the Duke of *Newcastle*, be- 82. *S. C.* ing Chief Justice in *Eyre*, would not let the Woods be cut to the Preju- dice of the Duke of *Norfolk's* Right, but cause them to be presented; whereas in Truth these Woods had been deafforested; and it was held by the Court, That in this Case no *Certiorari* should go, for the Right to the Woods is not in Question; for a Man (*a*) cannot cut his own Woods (*a*) *Vide Man-* to destroy the Vert, but shall fine for it; and so the Chief Justice in *Eyre* wood 370, &c. may be a Judge for the King, though not for himself; and if it be de- afforested, *Trespas* lies, for the Proceedings will be *coram non JUDGE*; but if they should be removed, there will be a Failure of Justice; for the *K. B.* cannot proceed to convict, not having their Laws nor their Officers; but after a Conviction it may be otherwise.

The Chief Justice in *Eyre* cannot, upon an Information that such and such Persons have killed Does, and felled Trees in the Forest, issue his Warrant for apprehending such Persons; for it is (*b*) expressly provided, That no Man shall be taken or imprisoned by any Officer of a Forest without due Indictment, or being taken with the (*c*) Manner. *Carth.* 77. Lord *Love-* lace's Case, and several Persons ap- prehended on his Warrant

discharged on a *Habeas Corpus*. (*b*) As by 1 *E.* 3. *cap.* 8. 7 *R.* 2. *cap.* & *vide Reg. fol.* S. F. N. B. 67. 4 *Inst.* 289. (*c*) What shall be a Taking in the Manner, *Carth.* 79. & *vide post.*

Nor can any such Warrant be directed to a Messenger or other Person, *Carth.* 78. that is not an Officer of the Forest; for herein the Authority of the Chief Justice in *Eyre*, and that of a Justice of Peace, is the same, who cannot direct his Warrant to his Servant, or any other Person, but must direct it to the Constable or Parish Officers; and the Warrant *supra* being directed to a Messenger, for this Reason, principally, the Persons were discharged.

## 2. Of the Swainmote Court.

The *Swainmote* is holden by the Steward before the Verderors as Judges, (*d*) thrice in the Year, and the (*e*) Foresters are to present their Attachments at the next Swainmote, where the Freeholders within the Forest are to appear to serve on Juries. 4 *Inst.* 289. (*d*) And at what Time, and who

bound to ap- pear there, *vide* 9 *H.* 3. *cap.* 8. (*e*) 9 *H.* 3. *cap.* 16.

This Court may inquire *de superoneratione Forestarum & aliorum Mini-* 4 *Inst.* 289. *strorum Forestæ & de eorum oppressionibus Populo illat.* & *vide* 34

*E. 1. Stat.* 5. *cap.* 4.

This Court may not only inquire, but convict, but (*f*) not give Judg- 4 *Inst.* 289. ment. (*f*) And therefore a

Swainmote without a Justice Seat is of no Force at all. 2 *Bulst.* 293. *per Coke.*

## 3. Of the Court of Attachments.

4 *Inst.* 289.

The Court of Attachments, or Woodmote Court, is to be held before the Verderors every forty Days; and at this Court the Foresters bring in their Attachments *de viridi & venatione*, and the Presentments thereof, and the Verderors receive and inrol them; but no Man ought to be attached by his Body for Vert or Venison, unless taken with the (a) Manner within the Forest, else the Attachment must be by his Goods.

(a) Taking in the Manner, is when

a Man is taken in the very Fact, or ready to do it, as with his Bow bent, or ready to slip his Dogs, or with his Hands Bloody; also Taking upon a fresh Pursuit, is a Taking in the Manner. *Carth.* 79. Agreed *per totam Curiam*.—But finding Timber of the Forest in a Man's Possession, as in his Yard, is not a Taking in the Manner. *Carth.* 79. *per* three Justices against the Chief Justice, who doubted.

## Of the Sheriff's Torn.

2 *Inst.* 70, 71.  
*Bract.* 124.

**T**HE Inhabitants of every County were formerly divided into Decennaries, *i. e.* ten Families living together in the same Precinct, the Masters whereof were every one of them mutually bound for each other, and punishable for the Default of any Member of any such Family, in not appearing to answer for himself on any Accusation made against him.

Preface to  
9 *Co.*  
2 *Inst.* 70,  
121.(b) Hence the Stile of this Court is *Curia Visus Franci Plegii Domini Regis*

Over every County an Earl presided, and he, or the Shire- Reeve; arrayed the several Persons within the County; and for this Purpose the Perambulation was through the County twice every Year, and (b) if any Person was found that had no Compurgators, he was put into Prison until he could procure some Decennary to admit him; on the Law-Days the Sheriff used to give in Charge the several Articles of the Crown Law, and if any Person was guilty of the Breach of any of them, he was delivered up by his Compurgators.

*Tenta apud C. coram Vicecom' tent' in Turno suo tali die, &c.* But the Law takes no Notice of any such Court, under the Stile of *Torn Vicecom' tent'*, &c. for the Word *Torn* does not properly signify the Sheriff's Court, but his Perambulation. 2 *Inst.* 71. *Dalt. Sheriff* 385, 391. *Fitz. Leet* 11. 2 *Hawk. P. C.* 55.

*Finch* 241.  
*F. N. B.* 82.

But though the Custom of the Decennary be now worn away, yet the Sheriff's Torn still subsists, which is the King's Court of Record, holden before the Sheriff, for redressing of common Grievances within the County, to which all Persons, above the Age of twelve Years, not specially Privileged, are bound to attend; not only to make proper Inquiries, but to take the Oaths of Allegiance, &c.

But for the better understanding hereof I shall consider,

- (A) The Manner of holding this Court.  
(B) What Persons owe Suit to it.

- (C) In what Cases it has a Jurisdiction.  
 (D) Of the form of its Proceedings.

(A) The Manner of holding this Court.

BY the Common Law the Sheriff might hold his Torn at what Place, *6 H. 7. c. 8.* and as often as he thought fit; but this proving inconvenient, in *Co. Lit. 115.* giving the Sheriff too great a Power of oppressing the Subject, *cont.*

By the Statute of *Magna Charta, cap. 35.* it is enacted, " That no Sheriff, or his Bailiff, shall make his Torn through a Hundred but twice in a Year, and at the Place accustomed, *viz.* one after *Easter*, and again after the Feast of *St. Michael*; and that the View of Frankpledge shall be at the Term of *St. Michael*."

Also by the *31 E. 3. cap. 15.* it is enacted, " That every Sheriff shall make his Torn yearly one Time within the Month after *Easter*, and another Time within the Month after *St. Michael*; and if they hold them in other Manner, that then they shall lose their Torn for the Time."

It is agreed, that since these Statutes, if the Sheriff holds his Torn at a different Time, or at an unusual Place, he may be indicted for it. *Dyer 157. Keilw. 193.*

Also it hath been holden, that in every Caption of an Indictment taken in a Sheriff's Torn, or Court-Leet, the Day whereon it was taken ought to be set forth, that it may appear not to have been on a *Sunday*. *2 Hawk. P. C. 56. 1 Vent. 107. 2 Sand. 290.*

The Sheriff is to hold his Torn in each particular Hundred; yet as he has a Jurisdiction in the whole County, he may receive Presentments in one Hundred, of Offences committed in another; but the Jury cannot be charged on Oath to present any Offences but those which arose within their particular Hundreds. Also by the Statute of *Marlbridge, cap. 10.* it is provided, That those who have Tenements in different Hundreds, shall not be compelled to come to any Torn, but only in the Bailiwick wherein they shall be conversant. *2 Keb. 731. 2 Hawk. P. C. 68.*

(B) What Persons owe Suit to it.

ALL Persons, as well Masters as (a) Servants, above the Age of twelve Years, are by the Common Law bound to appear at this Court in their (b) proper Persons. *2 Hawk. P. C. 56.*

(a) That every Master may be amerced for suffering a Servant to continue with him a Year and a Day without being put into the Decennary. *41 E. 3. 26. b. 45 E. 3. 26. b.* (b) And therefore no Persons so bound to appear, are within the Benefit of the Statute of *Merton, cap. 10.* which allows Suit Service to be performed by Attorney. *2 Inst. 99.*

But Tenants in Antient Demesne are Privileged by the Common Law from coming to this Court, unless they and their Ancestors have Time out of Mind used to come to it; also Parsons of Churches have the like Privilege by the Common Law, and all Peers of the Realm, and Women have the same Privilege by the Statute of *Marlbrige, cap. 10.* unless their Presence be required for some particular Cause. *F. N. B. 161. 2 Inst. 121. 2 Hawk. P. C. 57.*

2 Hawk. P. C. 57. Also by the Common Law, as well as the Statute of *Marlbrige*, cap. 10. no one is bound to such Suit to a Torn, within the Jurisdiction whereof he doth not reside.

2 Hawk. P. C. 57. And if a Man has a House which stands within the Precincts of  
(a) two Leets, he shall do his Suit to the Court in whose Jurisdiction his  
(a) If one Bed-chamber lies.  
have a House  
and Family in two Leets, he ought to do his Suit to that wherein for the most part he Personally resides. 2 Hawk. P. C. 57.

2 Hawk. P. C. 57. But no Man can be of two Leets; and therefore one, who lives within a private Leet, shall owe no Suit to the Torn or other Leet, unless the private Leet be seized into the King's Hands, or unless the Lord neglect to hold his Court.

### (C) In what Cases it has a Jurisdiction.

2 Hawk. P. C. 66. THE Jurisdiction of the Sheriff's Torn is confined to Offences at Common Law, and cannot take Cognizance of any Crime made so by an Act of Parliament, unless (b) enabled to do so by the Act it self; (b) Vide 2 Dan. 291. (c) nor can it inquire of any Offence, unless it arose since the holding of Several Statutes mentioned which give the Sheriff's Torn and Court-Leet Jurisdiction. (c) *Keilw.* 66.

*Crompt. Jurif.* 212. All Capital Offences being of a publick Nature, as (d) Treasons, (e) Felonies, are properly inquireable of at the Sheriff's Torn.

2 Hawk. P. C. 67. (d) Except against the King's Person. 9 H. 6. 44.— But 2 Hawk. P. C. 66. cont', and yet it seems strange, that the highest Offence should be exempted; however, it is clear, that the Sheriff has no Power to inquire of any Offence made Treason by Statute, as of a Treason, but only as it was an Offence at Common Law. (e) Except Rape, because, as the Law now stands, it is a Felony only by Statute. 2 Hawk. P. C. 66.— And except the Death of a Man, because no common Nuisance: But *Q.* & vide 2 Hawk. P. C. 66, 67.

2 Hawk. P. C. 67. It may inquire of Assaults and Batteries, if accompanied with Bloodshed, but otherwise not; because without Bloodshed they are not accounted common Grievances.

2 Hawk. P. C. 67. Also it may inquire of all Affrays, as being *in Te. rorem Populi*.  
Also it may inquire of the common breaking of Hedges, Dikes or  
Vide 2 Hawk. P. C. 67. Walls, and of all Pound-Breaches, as being common Grievances; also it may inquire generally of inferior Offences, touching the King's Interest, and the several Authorities there cited. as of all Purprestures or Incroachments upon the King, and Alienations in Mortmain, and (f) Seizures of Treasure-Trove, or of Waifs or Estrays, or Wreck belonging to the King.  
(f) But *Q.* Whether it can prescribe to inquire of the Seizure of such Things belonging to the Lord, being a Subject. 2 Hawk. P. C. 67.

2 Hawk. P. C. 67. and the Authorities there cited. It may inquire of all common Nuisances, as all Annoyances to common Bridges, or Highways, Bawdy-houses, &c. and also of all other such like Offences, as selling corrupt Victuals, breaking the Assise of Beer and Ale, neglecting to hold a Fair or Market, keeping false Weights or Measures, &c. Also it is said, that it may inquire of all common Disturbers of the Peace, as Barrators, Eves-droppers, and of all common Oppressors, as Usurers, &c. and of all dangerous Persons, as Vagabonds, Night-walkers, &c. and of all Suitors to the Court who shall make Default, and of those who shall levy Hue and Cry without Cause,

or shall neglect to levy one where they ought, &c. and of the Neglect of keeping a Pair of Stocks in any Vill within the Precinct, for which every such Vill shall forfeit 5 l.

But a Man cannot be amerced in a Leet for surcharging a Common, because this only concerns the private Interest of the Inhabitants.

But it hath been holden, that (a) a By-Law made at a Leet, in Pur-  
suance of a Custom to make such By-Laws, that no one, under a cer-  
tain Penalty, shall receive a poor Man to be his Tenant, who afterwards  
shall become chargeable to the Town, is good.

(a) Of common Right, any Leet, with the Assent of the Tenants, may make By-Laws under cer-  
tain Penalties, in relation to Matters properly cognizable by the Court, as the Reparation of High-  
ways, &c. But By-Laws of a private Nature, are most proper for a Court-Baron. 2 Hawk.  
P. C. 68.

Although the above-mentioned Offences are properly inquirable of in  
the Sheriff's Torn, yet is his Power, as to the punishing of such Of-  
fences, much restrained by several Statutes, as by *Magna Charta*, cap. 17.  
*which enacts, That no Sheriff, Constable, or (b) other Bailiff of the King,*  
*shall hold Pleas of the Crown.*

(b) As this Statute has been con-  
strued to extend to Stewards of Courts, neither the Torn nor Court-Leet can deliver any Persons in-  
dicted before them for Felony, but must refer them to the Justices of Gaol-Delivery. 2 Inf. 32.  
2 Hawk. P. C. 57.

But this Statute of *Magna Charta* doth neither restrain the Torn nor  
Leet from taking Indictments, or awarding Procefs thereon as before ;  
but this Power of awarding such Procefs is taken from the Sheriff's  
Torn, but not from Courts-Leet, by 1 E. 4. cap. 4.

By which it is enacted, " That all Indictments and Presentments  
" before any of the King's Sheriffs, in his Counties, except in London,  
" their Under-Sheriffs, Clerks, Bailiffs, or Ministers, at their Torns,  
" or Law-Days, they, nor any of them shall have (c) Power to at-  
" tach, arrest, or put in Prison, or to levy or take any Fine or A-  
" mercement of any Person so indicted or presented, by Reason of any  
" such Indictment or Presentment; but that the said Sheriffs and Un-  
" der-Sheriffs, Clerks and Bailiffs, and their Ministers, shall deliver all  
" such Indictments and Presentments to the Justices of the Peace at  
" their next County Sessions, on Pain of 40 l. and that the said Justices  
" of the Peace shall have Power to award Procefs on all such Indict-  
" ments and Presentments as the Law doth require, and in like Form as  
" if the said Indictments and Presentments were taken before the said  
" Justices of Peace; and also to arraign and deliver all such Persons so  
" indicted and presented before the said Sheriffs, &c. and such Persons  
" which shall be indicted or presented of Trespafs, shall make such a  
" Fine as shall seem lawful by their Discretions; and the Estreats of  
" the said Fines and Amercements shall be inrolled, and by Indenture  
" be delivered to the said Sheriffs, Under-Sheriffs, their Clerks, Bailiffs  
" or Ministers, or some of them, to the Use and Profit of him that was  
" Sheriff at the Time of such Indictments or Presentments taken; and  
" if any of the said Sheriffs, their Under-Sheriffs, Clerks, Bailiffs, or  
" their Ministers, do arrest, attach, or put in Prison, or cause any Fine  
" or Ransom to be taken, or levy any Amercement of any Person or  
" Persons so indicted or presented, by Reason or Colour of any such In-  
" dictment or Presentment taken before them, at their Terms or Law-  
" Days above rehearsed, before that they have Procefs from the said  
" Justices of Peace, or Estreats delivered out of the said Indictments  
" or Presentments so brought, delivered and presented to them, that  
" then the Sheriffs, which so do, shall forfeit an hundred Pounds. )

*2 Hawk. P. C. 57, 71.* It seems agreed, that, at this Day, neither the Torn or Leet have any Power to try any Person indicted before them, of any Offence whatsoever, and that there is no Remedy for such Presentments as are traversable, but by removing them into the King's Bench.

*2 Hawk. P. C. 71.*  
*3 Mod. 138.* But a Presentment by twelve or more in a Torn or Leet, of any Offence within the Jurisdiction of the Court, being neither Capital, nor concerning Freehold, subjects the Party to a Fine or Amercement, without any farther Proceeding, and binds him for ever, after the Day on which it is found, and admits of no Traverse; but if it concern Life or Freehold, as if it charge a Man with not repairing a Highway as he ought to do by the Tenure of his Lands, it may be removed into the King's Bench, and there traversed; but not if it barely charge his Person, as for not cutting the Branches of his Trees hanging over the Highway, &c. also it seems, that an Indictment of an Offence out of the Jurisdiction of a Leet, as of an Affray done out of its Precinct, is in like Manner traversable.

*2 Hawk. P. C. 58.*  
*(a)* Or may award an Amercement at his Discretion.  
*3 Co. 39.*  
*Dalt. Sheriff 400.* Also, notwithstanding the above-mentioned Statutes, the Sheriff may, at this Day, impose a *(a)* Fine on all such as shall be guilty of a Contempt in the Face of the Court, and on a Suitor refusing to be sworn, and on a Bailiff refusing to make a Panel, and on a Tithingman refusing to make a Presentment, and on a Juryman refusing to present the Articles given in Charge, and on a Person duly chosen Constable, refusing to be sworn, but he *(b)* ought to Fine each Offender severally, and not jointly, except where a Vill is to be fined.  
*this vide Tit. Fines and Amercements. (b) 3 Co. 38.*

*2 Hawk. P. C. 61. and several Authorities there cited.* Also on the Presentment of a Nuisance in a Torn or Leet, the Sheriff or Steward may either amerce the Party, and also order him to remove it by such a Day, under a certain Pain, or may order him to remove it, under such a Pain, without amercing him at all; and the Party having Notice of such Order, shall forfeit the Pain on a Presentment at another Court, that he hath not removed the Nuisance without any farther Proceeding; and every Pain so forfeited may be recovered in like Manner as a Fine or Amercement, by Distress, or Action of Debt; neither shall it be assented to a less Sum than was at first set.

### (D) Of the Form of its Proceedings.

*Keilw. 66, 141, 148.*  
*Dalt. Sheriff 388.*  
*Crompt. 212.*  
*9 H. 6. 44. b.* IN making Presentments, it is said to have been the Course, formerly, to impanel, not only a Grand Jury, but also a Jury of twelve Men, which was commonly called the Petit Jury, and to have Offences first presented by the Headboroughs, and the Presentment affirmed by the Petit Jury, before they were brought to the Grand Jury.

*2 Hawk. P. C. 69.* But however the Practice might have been, it seems now agreed, that no Exception can be taken to any such Indictment, in respect of the Non-observance of any such Custom or Usage; for that no Averment lies against the Acts of a Court of Record, and every Judge of such Court shall be presumed to act according to the Rules of it.

*(c)* In the Construction hereof it By *Westm. 2. cap. 13.* "The Sheriff shall take no Inquest *(c)* but by twelve Men at the least, who shall put their Seals thereto.

hath been holden, that if there be more than twelve Jurors, and all agree, all must put their Seals, but that if twelve only agree, it is sufficient for those twelve to set their Seals. *Dalt. Sheriff 389.*

By 1 R. 3. cap. 4. " No Officer shall return or impanel any Person on any Inquiry in a (a) Torn, but such as be of good Name, and have Freehold of 20 s. per Ann. or Copyhold of 26 s. per Ann. on Pain of 40 s. and every Indictment taken otherwise shall be void. (a) That a Court-Leet seems not to be within the

Equity of this Statute, for it is said, that any Person happening to be present at a Leet, or riding by where it is holden, may, for want of Jurors be compelled to be sworn. 7 H. 6. 13. 12 H. 7. 18. 6. Bro. Leet 15.

By 1 E. 3. Stat. 2. cap. 17. " Sheriffs, and all others who take Indictments in their Torns, or elsewhere, shall take them by Roll indented, whereof the one Part shall remain with the Indictors, and the other with him that takes the Inquest; so that the Indictments shall not be imbeziled as they had been in Time past.

But it must be observed, that what is above said concerning Indictments taken before the Sheriff at his Torn, is to be intended of such as are taken before him *ex Officio*, for he is restrained to take them by Virtue of any Writ or Commission, by 28 E. 3. cap. 9. which reciting the Mischiefs which had happened from Commissions and general Writs granted to Sheriffs at their own Suit, for their singular Profit, enacteth, That no such Commissions nor Writs shall be granted. 28 E. 3. c. 9.

## Of the Court-Leet.

A Court-Leet is a Court of Record, (b) having the same Jurisdiction within some particular Precinct, which the Sheriff's Torn hath in the County. Finch 246. 2 Hawk. P. C. 72.

(b) And said to have been derived out of the Torn, being a Grant to certain Lords for the Ease of their Tenants and Resiants within their Manors, that they may have the Array of them, and administer Justice amongst them in their Manors, &c. from whence came the Duty in many Leets *de certo Litea*, towards the Charge of obtaining the Grant of the Leet; for the Non-payment whereof, or Default to present it, such Grantees may prescribe to amerce the Defaulters, and to distrain for the Amercement; but they cannot so prescribe for any Matter of a private Nature. 2 Inst. 71. 1 Jones 283. 6 Co. 77. b. Dyer 30. pl. 209.

The Statute 18 E. 2. which shews of what Things the Sheriff's Torn and Court-Leet shall have Conuzance, (c) does not confine their Jurisdiction to those Particulars enumerated in the Statute. 4 Inst. 261. Cromp. Fur. 213. (c) That

the Leet may inquire of the same Offences with the Sheriff's Torn, of which *vide Tit. Sheriff's Torn*, Letter (C) of the Persons that owe Suit to it, Letter (B)— May inquire of corrupt Victuals, as a common Nuisance, tho' omitted in this Statute. 4 Inst. 261.— That a Railer is presentable there. Hob. 147.— So of a Night-walker. Poph. 208.— Of the several Statutes which impower this Court to inquire, &c. *vide 2 Dan. 291.*— That by the 31 Eliz. cap. 5. They may inquire of Users of unlawful Games, or of any Art or Mystery, not being brought up in it, but exercising a Trade contrary to 5 Eliz. is not within the Act, nor Presentable in the Leet. 1 Sid. 289. 2 Keb. 50. Raym. 154. S. C.

No Man can be within two Leets at the same Time, and in the same Respect; therefore, he who presides within the Precincts of a Leet, the Lord whereof doth duly hold his Court, cannot be compelled to come to a Superior Leet, for any Purpose which may as well be answered by his 2 Hawk. P. C. 73. and several Authorities there cited.

Attendance at his own Leet; but if a private Leet be specially granted for two or three Articles only, it seems that the Inhabitants must attend the Torn for all other Matters; also a Grand Leet may prescribe to oblige a certain Number of Inhabitants in every Town within its Precinct, to appear at every such Grand Leet, to enquire of such Offences as were omitted by the Inferior: Also if a Leet be seised into the King's Hands, all who owed Suit to it ought to come to the Torn, &c. also the Sheriff's Torn, as an Overseer of the Leet, is to inquire whether the Tithings be full, and may inquire of the Concealments of Offences inquirable in Leets.

<sup>2</sup> *Hawk. P. C.* 73. A Court-Leet shall be forfeited, not only by Acts of gross Injustice, but also by bare Omissions and Neglects, especially if often repeated, and without Excuse.

<sup>1</sup> *Salk.* 195. The Caption of an Indictment in a Court-Leet, *ad Cur' Vis. Franc' Pleg' cum Cur' Baron'*, &c. is good, for the Words *cum Cur' Baron'* shall be rejected; for it shall be intended that the Indictment was taken by that Court, which alone hath the Colour of Authority to take it.

<sup>1</sup> *Salk.* 200. The not setting forth in the Caption, whether the Court was holden by Grant or Prescription, is helped by the Multitude of Precedents.

## Of the County Court.

*Spelm. Rem.*  
50.  
<sup>4</sup> *Inst.* 266.

**B**Y the Escheat of Earldoms and Baronies, the Tenants of such Earls and Barons were to hold from the King, and not being qualified to sit in the King's own Court, they composed a Court in each County, under the Array of the Sheriff, or the King's Bailiff; those were the *Pares* of the County Court: And hence it is, that ever since it has been (a) held, that the Sheriff is no Judge, but only the Suitors.

(a) The Suitors are Judges.

<sup>2</sup> *Inst.* 225.—Though the Proceedings be upon a *Fusticies*. <sup>2</sup> *Inst.* 312. <sup>6</sup> *Co.* 11. *b.* <sup>1</sup> *Mod.* 171.

(b) This Court is no Court of (c) Record, therefore an Action of Account against a Receiver, for 13 s. and 4 d. or other Sum under 40 s. (b) The Stile lies not in the County Court; for being no Court of Record it cannot of the Court assign Auditors.

is *Curia prima Comitatus*. *E. C. milit' Vic' Com' Præditt' Tent' apud B. &c.* <sup>4</sup> *Inst.* 266. (c) Therefore a Writ of false Judgment lies of a Judgment there, and not a Writ of Error. <sup>4</sup> *Inst.* 266.—But in a Rediffisin the Sheriff is made Judge by the Statute of *Merton*, cap. 3. And a Writ of Error lieth of his Judgment. <sup>4</sup> *Inst.* 266.

<sup>2</sup> *Inst.* 312. It is a Maxim of the Common Law, *quod Placita de catallis debitis, &c.* (d) *quæ summam (e) 40 s. attingunt vel excedunt secundum Legem & consuetudinem Angliæ sine brevi Regis placitari non debent.*

Contracts, each of which were under 40 s. <sup>1</sup> *Vent.* 65. (e) An entire Debt cannot be divided and sued for by several Plaintiffs under 40 s. <sup>2</sup> *Inst.* 312. But for this *vide* <sup>2</sup> *Rol. Abr.* 317. pl. 1.—If the Plaintiff counts to his Damages 40 s. though the Jury find the Damages under 40 s. so that in Truth the Cause *de Jure* belonged to the Court, yet he shall not have Judgment. <sup>2</sup> *Inst.* 312.

But by *Justicies* this Court may hold Plea of Goods, (a) Debts, &c. of any Value, and the Proceſs therein is an Attachment of his Goods, &c. but no *Capias*.

2 *Inst.* 312.  
(a) Of Debts  
ex contractu,  
but not of

Debts *ex delicto*, as upon the Statute of Tithes. 1 *Lev.* 253. *dubitatur*.

So by Force of a *Justicies* it may hold Plea of Trespaſs *Vi & Armis*.

2 *Inst.* 312.

In Replevin, by Writ or Plaint upon the Statute of *Marlbridge*, this Court may hold Plea of Goods and Chattels above the Value of 40 s.

2 *Inst.* 159,  
312.

By the Statute of *Gloucester*, made 6 E. 1. cap. 6. " Sheriffs shall plead Pleas of Trespaſs in their Counties, as accustomed, &c. (b) but for Maims and Wounds a Man shall have his Writ, as before hath been used.

(b) So that  
this Court  
hath no Ju-  
riſdiction in

ſuch Caſe; *ſecus* of a Battery without wounding or maiming. 2 *Inst.* 312.—But it cannot hold Plea of any Trespaſs *Vi & Armis*. *Co. Lit.* 118. 2 *Lev.* 93. 1 *Mod.* 215.

## Of the Hundred Court.

(c) THIS Court was, for the Ease of the Subject, by the King divided and derived from the County Court, and hath the (d) same Jurisdiction.

2 *Inst.* 71.  
4 *Inst.* 267.  
(c) Of the  
first Division

of Counties into Hundreds, and of the Grants of Hundreds, *vide* 6 *Co.* 11. 9 *Co.* 25. 4 *Co.* 33. *Dyer* 175. 1 *Rot. Rep.* 118. *Raym.* 360. 1 *Vent.* 399. 3 *Mod.* 199. (d) And therefore is no Court of Record. 4 *Inst.* 267.—Cannot hold Plea of Debt or Trespaſs, where the Debt or Damages amount to 40 s. *Co. Lit.* 118.—Nor of Trespaſs *Vi & Armis*. *Co. Lit.* 118.

Although the Stile of this Court is *Curia E. C. militis Hundredi sui de* 4 *Inst.* 267. *B. in Com' Buck tent'*, &c. *Coram A. B. Seneschallo ibidem*, yet the Suitors are Judges.

In an Hundred Court the Plea was laid to be *coram Seneschallo & Sectatoribus*; Serjeant *Newdigate* took an Exception to it, that it should be laid to be held *coram Seneschallo per Sectatores*; but *Wyndham*, *Atkins*, and *Scroggs* thought it well enough; but the Chief Justice *cont'*, and cited the Case of *Wyat* and *Wigges*, 4 *Co.* 47. where the Coroner of the Hostel, and the Coroner of the County took an Indictment, where it did not appear that the Party was killed within the Verge; and resolved to be ill; for that there the Record was intire, and it could not lie *coram non Judice*, as to the Coroner of the Hostel, and so void; and good as to the Coroner of the County; and perhaps the Jury, in their finding, were principally directed by the Coroner of the Hostel; so it might be here, for they in the Hundred Court may be swayed principally by what the Steward said. Another Objection was, That the first Proceſs was an (d) Attachment; but as the Defendant appeared, the Court said that Fault was cured; so Judgment was affirmed.

(d) That the  
Court of  
King's Bench

daily grants Attachments against Stewards of Hundred Courts, for granting Attachments against all the Parties Goods. 1 *Salk* 201.

The true Procefs of this Court at Common Law is a *Distringas*, but (a) An Exec. by Custom the Procefs may be (a) a *Levari Facias*; and it is faid, that cution may moft Hundred Courts have this Custom.

be in the

Hundred Court by *Levari Facias*; and therefore where the Books fpeak of a *Distringas*, they muft be intended of a *Levari*, for a Diftrefs infinite would be endless in an Execution. 2 *Lev.* 81. 2 *Keb.* 117, 126. *Vide Carth.* 54.—And for the Manner of fetting forth a Judgment in this Court, *vide alfo Carth.* 53, 54. 2 *Lutw.* 1369. 3 *Lev.* 403.

1 *Salk.* 201. If a Jury in an Hundred, or other Inferior Court, will not agree on their Verdict, the Way is, as in other Courts, to keep them without Meat, Drink, Fire or Candle, till they agree; and the Steward may from Time to Time adjourn the Court till they do agree.

## Of the Court-Baron.

**T**HIS Court is (b) incident to every Manor, and had (c) antiently Conuzance of all Pleas of Land within the Manor, fo that no Perfon within the Manor could apply to any other Jurifdiction without a *Remifit Curiam* from the Lord.

4 *Inf.* 264.

4 *Co.* 33.

*Co. Lit.* 58.

(b) That it is incident to a

Manor, and was at firft instituted for the Eafe of the Tenants, for ending Controversies where the Debt or Damage was under 40 s. at home, &c. 4 *Inf.* 268. *Owen* 35. 1 *Brownl.* 175. 1 *Bulft.* 55. (c) But at this Day is no Court of Record, nor can it hold Plea of Debt or Trefpafs, where the Debt or Damage amounts to 40 s. *Co. Lit.* 118. 2 *Inf.* 311.—Nor of Trefpafs *Vi & Armis*, becaufe it cannot impofe a Fine. *Co. Lit.* 118. 2 *Inf.* 311, 312.

6 *H.* 4. pl. 3. The Suitors are (d) Judges, and the (e) Steward but as a Re-gifter.

*Co. Lit.* 58.

4 *Co.* 33. b.

4 *Inf.* 268. S. P. (d) Though the Plea there is held upon a Writ of Right. 6 *Co.* 11. b. 12. a. 4 *Inf.* 268. (e) And a Man cannot preſcribe to hold a Court-Baron before his Steward, but before Suitors. *Cro. Fac.* 582. adjudged. 1 *Mod.* 173. *Cro. Eliz.* 792. *Noy* 20. *Godb.* 49.—But perhaps may preſcribe to hold a Court before his Steward, but not a Court-Baron. *Cro. Fac.* 582. 1 *Leon.* 316. 1 *Brownl.* 21. *Noy* 20. 2 *Jones* 23. *Godb.* 68.—A Court-Baron being incident to a Manor of common Right cannot be preſcribed for. *Cro. Eliz.* 792. adjudged. *Noy* 20. adjudged.

The Stile of this Court is (f) *Curia Baronis E. C. militis Manerii fui* (f) My Lord *Prædicti* (having the Manor's Name written in the Margin) *tent' tali die* Coke ſays, he *coram A. B. Senſchallo ibidem*, &c.

hath ſeen

Court-Rolls in the Reign of *Edw.* 1. (having the Name of the Manors in the Margin) filed thus, *Aula ibidem tent' tali die*, &c. becaufe it was holden in the Hall of the Manor. 4 *Inf.* 268.

*Co. Lit.* 58. a. This Court cannot be holden out of the Manor; but if a Man be Lord of two or three Manors, and there be a Custom to hold a Court at one, for them all, ſuch Courts are by Custom good.

This Court is of two Natures, the first is by Common Law, and called the Freeman's Court, or Court-Baron; and of this the Suitors are Judges, and the Steward is Register; and this may be kept from (a) three Weeks to three Weeks: The Second is (b) a Customary Court, and concerns Copyholders, of which the Lord or his Steward is Judge; as the first cannot be without Freeholders, so this cannot be without Copyholders; a Court-Baron may be of this double Nature, and then the Roll contains Matter concerning both.

(a) Note; The Court of King's Bench has granted Informations

against Lords and Stewards for oppressing the Tenants, by warning Court-Barons every three Weeks, and distraining them to appear, or pay a certain Sum of Money upon no Occasions at all, but to extort Amercements from them. (b) For this *vide* 4 Co. 27. Cro. Car. 366. 1 Jones 342.

By *Magna Charta*, (c) cap. 24. "A *Præcipe in Capite* is not to be granted, whereby any Freeman may lose his Court.

(c) For the Exposition thereof, *vide* 2 Inst. 39.

By 52 H. 3. cap. 22. (d) "No Man shall cause his Freeholders to swear (e) against their Will, for that ought not to be done without the King's (f) Commandment.

(d) The King bound hereby in his Court-Baron,

Hundred or County Court. 2 Inst. 143. (e) Intended between Party and Party, for to inquire for the Lord of all the Articles belonging to the Court-Baron or Hundred, they may be sworn. 2 Inst. 142. For which Articles *vide* Statute 4 Edw. 1. entitled, *Extenta Manerii*. (f) In a Writ of Right Patent, wherein Plea is held of Frechold, the Court may give an Oath, for the Writ is *Mandatum Regis*. 2 Inst. 143.

All Pleas in a Court-Baron, of common Right, and by Course of Law, are determinable by Wager of Law, but by Prescription they may be determined by Jury.

If a Man recovers in a Court-Baron, they have not Power to make Execution to the Plaintiff, of the Goods of the Defendant; but they may distrain him, and retain the Distress till Satisfaction.

4 H. 6. 17.  
22 Aff. 72.  
1 Rol. Abr. 543. Bro.

Court Baron 6. S. C. But a *Quære* made, for it is usual for the Suitors, assigned by the Steward, to tax the Sum, and then to award a *Levari Fecias*. *Quære*, If by Custom or Common Law.—By 1 Brownl. 81. Upon a *Levari* out of a Court Baron, Goods cannot be sold without a Custom to sell, &c. & *vide* Noy 17.

If in a Court-Baron the Defendant appears not upon the Distress, yet the Goods distrained are not forfeited, nor can be sold by the Bailiff, for the Distress is but in Nature of a Pledge; and though by the Course of the Common Law, where a Man is attached by his Goods, and appears not, they are forfeited; yet in a Court-Baron no (g) Attachment lies, but a Distress infinite only.

Yelv. 194.  
Gomerfal and Medgate, adjudged.  
Cro. Jac. 255.  
1 Bulst. 52.  
S. C. adjudged.

(g) The Process in a Court-Baron is Summons, Attachment, and Distress infinite. 2 Rol. Rep. 493. & *vide* 1 Bulst. 53.

## Courts of the Cinque Ports.

**T**HE Cinque Ports are (a) ancient trading Towns lying towards the Sea Coast; these held *per Baroniam*, and were represented in Parliament by the Lord Warden, or Keeper of the Cinque Ports; but they did not hold by the Tenure of Knights Service, only by sending Ships to Sea, &c. and as they were instituted for the Defence and Safety of the Kingdom, they had several (b) Liberties and Privileges granted them in Respect of their necessary Attendance in those Ports.

*Bract. Lib. 3. fol. 118.*  
*4 Inst. 222.*  
 (a) For ancient Records touching the Cinque Ports, *vide*  
*2 Inst. 558.* —At first the privileged Ports were but three, *viz.* *Dover, Sandwich, and Romney*, but *Hastings* and *Hithe* were added by *William the Conqueror. 4 Inst. 222.* —To which *Winchelsea* and *Rye* were adjoined; these now send each of them their Representatives to Parliament, and tho' seven in Number, are still called Cinque Ports. *4 Inst. 222. 2 Inst. 556.* (b) To which they have a lawful Title, confirmed by *Magna Charta, cap. 9.* in these Words, *Barones de Quinque Portibus & omnes alii Portus habeant omnes Libertates & Liberas Consuetudines suas. 2 Inst. 20.* —But this Confirmation does not extend to Pleas of the Crown, with which they intermeddle as Justices of the Peace. *Cro. Car. 253.*

There are several Courts within the Cinque Ports; one before the Constable of the Castle of *Dover*; others within the Ports themselves before the Mayors and Jurats; (c) another which is called *Curia Quinque Portuum* *apud Shepway.*

*4 Inst. 223.*  
 (c) *1 Sid. 166.*  
 It is said by *Twisden* that no Body knows where this Court is.

There is a Court of Chancery in the Cinque Ports, but no original Writs issue thence, but it serves only to decide (d) Matters of Equity.

*1 Sid. 166.*  
*per Curiam.*  
 (d) *1 Sid. 356.*  
 It is said the great Use of their Chancery is to relieve against Errors in Proceedings at Law, which they used to indorse upon the Bill.

The Lord Warden hath two Jurisdictions, 1. The (e) Authority of an Admiral to hold Plea by Bill concerning the Guard of the Castle, &c. according to the Course of the Common Law.

*2 Inst. 556.*  
 (e) Exempt from the Admiralty of England; which Jurisdiction is saved to him in several Acts of Parliament, as *2 H. 5. Stat. 1. cap. 22. 27 H. 8. cap. 4. 28 H. 8. cap. 15. 5 Eliz. cap. 5. 11 & 12 W. 3. cap. 7. & vide 2 Fon. 66, 67. Chan. Ca. 305.*

(f) Who is always Warden of the Five Ports.

“ By *28 Edw. 1.* the (f) Constable of the Castle of *Dover* shall not hold Plea of a Foreign County within the Castle Gate, except it touch the Keeping of the Castle, nor distrain the Inhabitants of the Cinque Ports elsewhere or otherwise than they ought after the Form of their Charter for their old Franchises confirmed by *Magna Charta.*

*2 Inst. 556.*

The Mayors and Jurats of the several Cinque Ports have Power to hold Plea, &c. and (g) upon their Judgment no Writ of Error lies in *B. R.* but they are examinable by Bill in Nature of a Writ of Error, *coram Domino Custode seu Guardiano Quinque Portuum apud Curiam suam de Shepway.*

*2 Inst. 557.*  
*Dyer 376.*  
*4 Inst. 224.*  
 S. P.  
 (g) *Secus* upon the Judgment of the Court of *Shepway. 1 Sid. 356. Per Twisden*; and so are the Books which speak of a Writ of Error to the Cinque Ports to be intended.

The Jurisdiction of the Cinque Ports is General as well as to (a) personal as (b) real and mix'd Actions. 4 Inst. 224.  
(a) Other-  
wise in Debt

or Trespafs transitory. *Cro. Eliz.* 910. —Where a Stranger comes within the Cinque Ports and does a transitory Trespafs, and after goes out of their Jurisdiction, he to whom the Trespafs was done may have an Action at Common Law, else he would be without Remedy, for they can call none in who are out of their Jurisdiction, and the Privileges were granted for the Ease and Benefit, and not the Prejudice of the Inhabitants. *Yelv.* 12. 2 *Inst.* 557. (b) And they hold Plea of Freehold by Plaintiff. *Sid.* 166. But a Judgment in B. R. for Lands there shall bind for ever, tho' such Judgment for Lands in *Wales*, or a County Palatine, is meerly void. 2 *Inst.* 557. 4 *Inst.* 223. *Bro. Cinque Ports* 24. —That they cannot plead to the Jurisdiction of the Court of *Westminster*, but must demand Conuzance. 4 *Inst.* 224. —Also if an Ejectment on a feigned Lease be brought of Lands within the Cinque Ports, the Courts of *Westminster* will not allow the Tenant of the Lands, on his Prayer, to be made Defendant, to plead to the Jurisdiction of these Courts, but will tye him strictly to the Rules of confessing Lease, Entry, and Ouster, and pleading Not guilty; this is not like the Case of Ancient Demesne, where a Recovery in the Courts above makes the Lands Frankfee for ever.

If a Man is murdered in any of the Cinque Ports, his Wife may have an Appeal against the Murderer, (c) directed to the Sheriff of the County, and he shall execute the Writ (d) within the Cinque Ports, for the Constable hath no Jurisdiction to hold Plea thereof. 2 Inst. 557.  
Said to have  
been re-  
solved be-  
tween *Waes*

and *Braines*. *Cro. Eliz.* 694. S. C. adjudged. (c) Because the King in a Manner is concerned; for if the Plaintiff is nonsuit the Defendant shall be arraigned at his Suit. *Yelv.* 13. *Cro. Eliz.* 911. (d) Yet per *Yelv.* 13. per *Poph.* if the Defendant at all Times after continued within the Cinque Ports, so that he might be proceeded against there, no Appeal would lie elsewhere.

So if the Defendant is in *Custodia Marescalli*, the Appeal may be against him by Bill. 2 Inst. 557.  
*Cro. Eliz.*  
695. 778.

If a Man hath Judgment in any of the King's Courts, and the Defendant hath no Lands or Goods but in the Cinque Ports, the Plaintiff may have (e) a Writ to the Lord Warden to make Execution. 4 Inst. 223.  
(e) The Re-  
cord must be  
certified into Chancery, and from thence by *Mittimus* to the Lord Warden to make Execution. 1 And.  
28. 3 *Leon.* 3. *W. Bendl.* 46.

If a Man is imprisoned at *Dover* by the Lord Warden, an (f) *Habeas Corpus* (b) may issue to the Lord Warden, &c. for the Privilege, that the King's Writ runs not, must be intended between (i) Party and Party, for there can be no such Privilege against the King. *Cro. Jac.*  
543.  
*Palm.* 96A  
S. C. ad-  
judged.

(f) Where a Prohibition, *Mandamus*, &c. *Cro. Car.* 543. *Palm.* 55. 1 *Sid.* 355. 4 *Inst.* 223. 2 *Lev.* 86. 3 *Keb.* 598. *Hard.* 475. —Where a *Certiorari*, vide 1 *Rol. Abr.* 395. 2 *Hawk. P. C.* 286, 287. (g) *Ad faciendum* & *reipendum*; but if *ad Respondendum* a private Person, *Q.* 1 *Mod.* 20. (b) But 1 *Sid.* 166. it was said by some, that it had scarce ever been known that a Prohibition or *Habeas Corpus* went to the Cinque Ports. (i) A *Quo minus* lies thither. *Hard.* 475.

The (k) Lord Warden is the immediate Officer of the Court, and (l) Writs shall be directed to him (m) as in all real Actions, &c. for Land within the Five Ports. 2 Inst. 557.  
4 Inst. 223.  
S. P.

(k) The Constable or Keeper of *Dover* Castle is also Warden of the Cinque Ports, and the Writs directed to him are, *Rex*, &c. *Constabulario Castri suo de Dover* & *Custodi Quinque Portuum*, &c. 2 *Inst.* 556. 4 *Inst.* 223. (l) But Writs of Appeal must be directed to the Sheriff. *Cro. Eliz.* 694. Because the King is in a Manner concerned. Vide *Yelv.* 13. *Cro. Eliz.* 911. 2 *Inst.* 557. (m) But if there be an Indictment before Justices of Peace within the Cinque Ports, a *Certiorari* may be immediately directed to them, for they proceed by Virtue of their Commission, and not their ancient Charters, &c. *Cro. Car.* 253, 254. but for this vide 1 *Rol. Abr.* 395.

“ By 2 *W. & M. cap.* 7. whereas the late Lord Wardens claimed a  
“ Right of Nomination of one Person to each of the Cinque Ports, the  
“ two ancient Towns, and their Members, whom they ought to elect to  
“ serve in Parliament; it is declared and enacted that all such Nomina-  
“ tions were and are against Law and Void.

If a Murder is committed at *Sandwich*, and an Appeal brought by Original in B. R. directed to the Sheriff of the County of *Kent*, who brings *Yelv.* 12, 13.  
*Cro. Eliz.*  
910. S. C.

(a) For the Cinque Ports brings in the Defendant, who pleads that *Sandwich* is Part of the Cinque Ports, *ubi breve Domini Regis non currit*, &c. and demands Judgment of the Writ, this is a bad Plea, for the Defendant having done the Murder within the Cinque Ports, and after flying out, if this Pleading should be allowed, (a) there would be a Failure of Justice. that ought to be proclaimed in open County. *Cro. Eliz.* 910.

*Yels.* 15.

But if the Defendant by his Plea shews that at the Time of the Murder supposed, and at all Times after, he had been an Inhabitant and Comorant within the Cinque Ports, and so had given Jurisdiction to the Judges there, and shewed they might have proceeded, &c. it had been a good Plea.

## Of the Courts of the Stannaries.

4 *Inst.* 229. (b) For ancient Charters, Records, and Acts of Parliament concerning the Stannaries, and for an Exposition of the Charter of *E. 1.* and the Statute *50 E. 3.* which gave great Privileges to the Tanners, *vide* 4 *Inst.* 232. 12 *Co.* 10, 11. *Plow.* 327. 1 *Roll. Abr.* 547, 548. & *vide* 16 *Car. 1. cap.* 15. by which their Privileges are declared and circumscribed.

THESE Courts were (b) instituted for the Conveniency of Tanners, that they might be encouraged in the making of Tin, one of the Staple Commodities of the Kingdom; and therefore in *Cornwall* and *Devonshire*, where the Oar or Mine of which it is made chiefly abounds, the Workers herein were allowed the Privilege of suing and being sued in those Places.

4 *Inst.* 229. (c) For the Court, *vide* 4 *Inst.* 229. —And that the Lord Warden hath Jurisdiction of all the Tin in *Cornwall* and *Devon.* 4 *Inst.* 229.

The Jurisdiction of the (c) Court is guided by special Laws, by Customs, and by Prescription Time out of Mind.

4 *Inst.* 230. (d) For any Matters touching the Stannaries, otherwise upon a Judgment there given upon collateral Matters. 3 *Bull.* 183. *Per Coke*, C. Justice, said to have been so resolved upon a Conference by all the Judges, as is to be seen recorded in Chancery in the Petit-Bag Office, *Q. Ow.* 8. 1 *Sid.* 233.

No Writ of Error lies upon (d) any Judgment in these Courts; but the Party grieved must be relieved by Appeal in several Degrees, first to the Steward of the Stannary Court, where the Matter lies, then to the Under-Warden of the Stannaries, and from him to the Lord Warden of the same Stannaries; and for Want of Justice there, to the Prince's Privy Council.

4 *Inst.* 231. Resolved by all the Judges. *Vide* 2 *Roll. Rep.* 44. and the Statute 16 *Car. 1. cap.* 15.

Blowers and all other Labourers and Workers without Fraud or Covin, in and about the Stannaries in *Cornwall* and *Devon*, have the Privilege of the Stannaries during the Time they work there.

All Matters concerning the Stannaries, or depending thereupon, are to be heard and determined (a) according to the Custom of the same Time out of Mind used. 4 Inst. 231. resolved by all the

Judges. (a) But *vide* Cro. Car. 333.

Transitory Actions between Tinner and Tinner, or Worker and Worker, tho' not concerning the Stannaries, nor arising therein, if the Defendant be found within the Stannaries, may be brought in these Courts or at Common Law. 4 Inst. 231. Resolved by all the Judges.

But if one Party only be a Tinner or Worker, such Transitory Actions which concern not the Stannaries, nor arise therein, cannot be brought there, and in such Case the Defendant by the Custom and Usage of that Court may plead to the Jurisdiction, and (b) ought not to be arrested *eundo* to swear it, or *redendo*. 4 Inst. 231. Resolved by all the Judges. (b) 2 Rol. Rep. 379. S. P.

But it was said by the Chief Justice, that after the Oath taken they will for 3 d. enter the Plaintiff a Tinner.

There ought to be no Demurrer in those Courts for Want of Form, but for Matter of Substance only. 4 Inst. 231. Resolved by all the Judges.

They have no Jurisdiction of (c) any local Action arising out of the Stannaries, and (d) Matters of Life, Member and Plea of Land are expressly excepted out of their Charters. 4 Inst. 231. Resolved by all the Judges.

(c) That the Plaintiff must shew that he was a Tinner, and that the Court was held within the Jurisdiction of the Stannaries. *Ferest.* 103. (d) They have no Court of Equity, and therefore a Suit concerning an Agreement relating to Mines, &c. proper here. *2 Vern.* 483, 484.

## Of the Court of Commissioners of Sewers.

**B**Y the (e) Common Law the King used to grant Commissions for inquiring into the Want of Reparations of Sea Walls, Ditches, Gutters, Sewers, &c. (e) Reg. 127. F. N. B. 113. 4 Inst. 276.

But as these Matters are now to be regulated according to (f) several Acts of Parliament, it will be necessary to set down the Purport of such as are mostly in Use at this Day. (f) As magna Charta, cap. 15, 16. 23. for

which *vide* 2 Inst. 29, 30. 25 E. 3. cap. 4. 45 E. 3. cap. 1. H. 4. cap. 12. 6 H. 6. cap. 9. H. 6. cap. 5. 18 H. 6. cap. 10. 23 H. 6. cap. 9. 12 E. 4. cap. 6. 4 H. 7. cap. 1. 6 H. 8. cap. 10.

The chief Statute relating hereto, is 23 H. 8. cap. 5. which ordains that the Lord Chancellor, Treasurer, the two Ch. Justices for the Time being, or any three of them, whereof the Lord Chancellor to be one, shall, as often as need be, direct Commissions, and appoint Commissioners; the Form of 23 H. 8. cap. 5. Which vide at large made perpetual by 3 & 4 E. 6. cap. 8. and vide 1 M. Sess. 3. cap. 11. This Statute to extend to Glamorgan, &c.

which Commission is set forth in the Statute, which fully declares the Duty and Authority of the said Commissioners, *viz.* That they do inquire by the Oaths of the honest and lawful Men, &c. through whose Default the Hurts and Damages have happened, &c. and who hath, or holdeth any Lands or Tenements, &c. or hath, or may have any Hurt, Loss, or Disadvantage, &c. and all these Persons, and every of them to tax, &c. and to make and ordain Statutes, Ordinances, &c. after the Laws and Customs of *Rumney Marsh* in the County of *Kent*, or otherwise after their own Wifdoms and Discretions.

25 H. 8.  
cap. 10.

“ The 25 *H. 8. cap. 10.* enacts that no Person shall be compelled to take upon him the Execution of any such Commission, unless he be a Dweller in the County wherein he is appointed Commissioner; also that every Person refusing to take the Oath of Commissioner, as appointed by 23 *H. 8.* shall, as often as such Refusal shall be certified into Chancery, forfeit five Marks.

3 & 4 E. 6.  
cap. 6.

“ The 3 & 4 *E. 6. cap. 6.* directs in what Manner the King's Lands shall be liable, and taxed by the Commissioners, and his Tenants discharged and indemnified in their Payments of such Taxes, and that every such Commission shall be in Force for five Years from the Teste, unless superseded.

13 Eliz.  
cap. 9.

“ By the 13 *Eliz. cap. 9.* all Commissions of Sewers shall continue in Force for 10 Years after the Date thereof, unless they be repealed by a new Commission or *Supersedeas*; also by this Statute all Laws, Ordinances, and Constitutions duly made, according to the Statute 23 *H. 8. cap. 5.* and written in Parchment, indented under the Seals of the Commissioners, or six of them (whereof one Part shall remain with the Clerk of the Commission, and the other in such Place as the Commissioners, or six of them shall appoint,) shall without any Certificate to be made into the Chancery, and without the King's Assent continue in Force, notwithstanding any Determination of such Commission by *Supersedeas*, until the same Laws, Ordinances, and Constitutions shall be altered, repealed, or made void by Commissioners afterward assigned; also by this Act there shall be no Certificate or Return of the Commission, or of any of their Laws, Ordinances, or Doings by Virtue thereof.

3 Jac. 1.  
cap. 14. &  
vide 7 Ann.  
cap. 9.  
By which  
Power is

“ By 3 *Jac. 1. cap. 14.* all Walls, Ditches, Banks, Gutters, Sewers, Gates, Causeways, Bridges, Streams, and Water-courses within two Miles of *London*, having their Fall into *Thames*, shall be subject to the Commission of Sewers, and to all Statutes made for Sewers, and to all Penalties in the said Statutes contained.

given to the Lord Mayor of *London* to appoint Commissioners.

7 Ann.  
cap. 10.

By 7 *Ann. cap. 10.* reciting the Power of the Commissioners by former Statutes, as to selling the Lands of those who refused to pay the Taxes and Proportions with which they were charged, and that these Laws did not extend to Copyhold Lands, it is enacted that the Commissioners shall have the like Power as to Copyhold Lands, and that the Lords of such Copyholds shall admit the Vendees, &c. Also by this Act it is enacted, that it may be lawful for the Commissioners by Warrant to authorize any Person to levy the Sums of Money assessed upon the Lands, &c. by Distress and Sale of the Goods of the Party refusing, returning the Overplus.

4 Inst. 276.

Notwithstanding the ample Powers by the above-mentioned Statutes given to the Commissioners of Sewers, yet are their Proceedings still examinable in the Courts above, and accordingly we find several Resolutions in which their Proceedings and Sentences have been controul'd by the Courts at *Westminster*.

5 Co. 99. b.  
Rook's Case.

As where the Commissioners on the finding of a Jury that *J. S.* had seven Acres of Land next adjoining to a Bank on the River *Thames*, and that

that the Occupiers of those seven Acres used to repair, but that there were besides 800 Acres within the same Level liable to be surrounded, having taxed each of the seven Acres at 8 s. it was held; 1<sup>st</sup>, That the finding that the Occupiers of these seven Acres used to repair, was not material, because that such Occupiers might have been Tenants at Will whose Acts could not bind him who had the Inheritance. 2<sup>dy</sup>, That tho' these seven Acres lay next the Bank, yet ought the Commissioners to tax all those Lands which were in Danger of being damnified by the overflowing of the Waters, and consequently received Benefit by the Repairs; for tho' they are to act (a) according to their Discretion, yet such Discretion must be governed and directed by the Rules of Law and Reason.

The Commissioners of Sewers cannot make any (b) new Inventions to charge the People; (c) but if there were an old Wall, they may build another (if that be decayed) on the Inside, or some small Way distant if it be necessary, and may compel them that repaired the former to repair it if they have no Damage by the Remove.

If one be bound by Prescription to repair a Bank, which by sudden Violence, and without the Default of him who is so bound to repair, is thrown down, the Commissioners are not to charge him only with the Repair, but ought to tax all others according to the Advantages accruing to them from such Repairs.

The Commissioners of Sewers cannot tax a whole Township, but must proportion each Man's Share according to the Quantity of his Land, &c. and therefore where the Commissioners assessed a Fine on the Village of D. and by their Warrant ordered it to be levied on J. S. whose Cattle being distrained, he brought his Action, and had Judgment; afterwards the said J. S. refusing to release the Judgment, he was committed by the Commissioners; but upon Complaint thereof the Court of King's Bench committed and fined the Commissioners, and held that by such Proceedings after a Judgment at Law they were guilty of a *Præmunire*.

It has been holden that, tho' the Commissioners of Sewers are not a Court of Record, thus and may commit for a Contempt; yet that must be understood of a Contempt in the Face of their Court, and not to imprison a Person for disobeying their Orders.

There was a Complaint of the Inhabitants of *Whitechappel* at the Council-Board, that the Commissioners of Sewers had taxed the said Inhabitants for Repair of a Shore in *Wapping*, whereas they were not within the Level; thereupon the Council ordered a *Certiorari* out of B. R. and that the Matter in Question should be tried there; which was accordingly done, and the *Certiorari* delivered; notwithstanding which they issued out their Warrants for putting the Orders in Execution, and the Officers refusing to execute the same were fined 10 l. a Man; thereupon a second *Certiorari* was delivered to return all Proceedings and all Orders, &c. concerning the same; this being also disobeyed, and new Orders made for fining some of their Officers for their Contempt; whereupon they appeared, and tho' they alledged the Advice of Council in what they did, yet they were committed for the Contempt; the next Day the Return was brought into Court, and upon the several *Certiorari's* the Returns were several, which the Court disallowed, and ordered them to return all their Proceedings upon the Return of the first Writ, and to return upon the last, that *ante adventum brevis* they had returned the whole Matter, which was accordingly done and filed; and after they continued a Week in Prison without Bail, they were fined 40 Marks a-piece, and discharged, and the Matter ordered to be tried at the B. R. it was here moved in Behalf of some of the Commissioners, that these Orders, whereby the Contempt of the Commissioners appeared, tho' they were returned, might not be filed, upon a Clause in 13 *Eliz. cap. 9.* which excuses them from returning their Orders, and exempts them from Penalties; but it was resolved that that, and other Provisions in the same Statute, did only extend

(a) *Havd.*  
146.(b) *Vide 10 Co.*

137, 138.

13 Co. 35.

*Alcor* 825.1 *S. d.* 145.(c) 2 *Kebl.*

129.

10 Co. 139.

*Keigly's**Case.*

5 Co. 100. a.

S. P.

2 *Bulst.* 197.*Cro. Jac.* 356.

S. P.

3 *Inft.* 125.

S. P.

1 *Sid.* 145.1 *Lev.* 288.

The Case of

the Commis-

sioners of

Sewers for

*Whitechap:el.**Raym.* 186.1 *Vent.* 66.1 *Mot.* 44.2 *Kebl.* 635.

S. C.

1 *Salk.* 145.

S. C. cited.

(a) That the Commissioners of Cambridge Fenns, by 15 Car. 2. cap. 17. have an absolute Jurisdiction, and are not to return their Proceedings on a *Certiorari*; but if they observe not the Statute, their Proceedings will be void, & *coram non Judice*, and the Parties may examine the same by an Action at Law. 1 Sid. 296.

1 Sid. 78.  
Lord Dunbar's Case.

If it be found before Commissioners of Sewers, that such a one ought to repair a Bank, and he removes the Proceedings into *B. R.* the Court will neither quash the Inquisition, nor grant a new Trial, unless he, who is found to be the Person that ought to repair, will first repair the Bank; after which if it be otherwise found, they will order him to be reimbursed.

2 Hawk.  
P. C. 288.  
1 Salk. 145.

There is a Rule in the Court of King's Bench, that no Order of Commissioners of Sewers ought to be filed without Notice given to the Parties concerned; also it is every Day's Practice of that Court, before it will suffer the Return of a *Certiorari* for the Removal of the Orders of such Commissioners to be filed, to hear Affidavits concerning the Facts whereon they are grounded; and if the Matter shall still appear doubtful, to direct the Trial of feigned Issues, and either to file the Return, or supersede the *Certiorari*, and grant a *Procedendo*, as shall appear to be most reasonable for the Trial of such Issues, and to give (b) Costs against the Prosecutor of the *Certiorari*, if it appear to have been groundless.

(b) 2 Keb. 500.

## Court of Pipowders.

(c) Incident to every Market as well as Fair.  
4 Inst. 272.

**T**HIS Court is incident to every Fair and (c) Market, and is called *Curia Pedis Pulverisati* (d); because for Contracts or Injuries done concerning the Fair or Market, Justice shall be done as speedily as the Dust can fall from the Foot.

Kelw. 99. 1 Brownl. 175. 1 Bulst. 55. Cro. Eliz. 773. — That there may be a Court of Pipowders by Custom without Fair or Market, and a Market without an Owner. 4 Inst. 272. (d) *Mirror*, cap. 1. Sect. 3. *Bract. Lib.* 3. fol. 334. 4 Inst. 272.

4 Inst. 272.  
6 Co. 12.  
2 Bulst. 23.

It is a Court of Record, of which the Steward is Judge, there being no Suitors.

4 Inst. 272.  
(e) Cannot hold Plea of Obligations, for this Court is

Its Jurisdiction consists herein, that the (e) Contract or (f) Cause of Action be in the same Time of the same Fair or Market, and not before, or in former, it must be for some Matter concerning the same Fair or Market, done, complained on, heard and determined the (g) same Day within the Precinct of the same Fair or Market.

ordained for Things arising within the Fair. 1 Rol. Abr. 545. Moor 830. Cro. Jac. 313. 2 Bulst. 21. (f) If one Slanders another who trades in the Market, in any Thing which concerns his Trade, as by disparaging his Goods, which he exposes to Sale there, an Action lies; *secus* if the Words do not concern any Thing touching the Market. 10 Co. 73. *Hall and Jones* adjudged. Cro. Eliz. 773. Moor 623. S. C. adjudged. 4 Inst. 272. 1 Rol. Abr. 544. S. C. cited. (g) The Proceedings being *de Hora in Horam*. 2 Inst. 272. — This Court continues during the Time of the Fair, and no longer. 2 Bulst. 23. — It may be adjourned from Market to Market. Kelw. 99. — The Continuance may be entered by an *Idem Dies*, &c. Moor 459.

By the 17 E. 4. cap. 2. reciting, that divers Persons coming to Fairs Made perpetual by Actions, and also by Actions of Debt, Trespasses, Feats and Contracts <sup>1 R. 3. c. 6.</sup> made and committed out of the Time of the said Fair, or the Jurisdiction of the same, contrary to Equity and good Conscience, &c. it is enacted, " That no Minister of any such Court of Pipowders shall hold any Plea (a) without (b) Oath made by the Plaintiff or his Attorney, that the Contract, or other Feats contained in the Declaration, <sup>(a) Though such Oath ought to be made if the Defendant</sup> was made within the Fair, and within the Time of the Fair, and within the Jurisdiction and Bounds of the said Fair. will insist upon it, yet it shall not be made Part of the Record. 4 Inst. 272. (b) Yet this concludes not the Defendant, but notwithstanding, he may plead to the Jurisdiction of the Court. 4 Inst. 272. 2 Bullf. 22.

## Of the Courts in London.

**T**HERE are several Courts within the City of London, which exercise a Jurisdiction according to their own stated Rules and Forms; but yet are subject to the Controul and Correction of the King's Courts at *Westminster*, whenever they exceed their Jurisdiction; the Chief of these are, <sup>4 Inst. 247.</sup>

### 1. The Court of Hustings.

This is the (c) highest and most antient Court of Record within the City of London, and is always held at *Guild-Hall*, before the Lord and Sheriffs of London for the Time being; but when any Matter is to be argued and determined in this Court, the Recorder sits as Judge with the Lord Mayor and Sheriffs, and gives Rules and Judgment therein. <sup>4 Inst. 247. (c) My Lord Coke says, it is derived from the Saxon Words</sup>  
*Hus*, which signifies a House, *Dhing, thing*, that is, the House of Causes or Things. <sup>4 Inst. 247.—</sup> But by *Fortesc. Pref. to Monarchy* 59. it is a pure Saxon Word, signifying any Counsel or Court in general, and therefore applied to the Supreme Court of the City of London.

This Court hath Jurisdiction of (d) all Pleas Real, Personal and Mixt; and for this Purpose it is distinguished into two Courts, as the Judges sit one Week on Real Actions, and the other on those which are Personal or Mixt. <sup>4 Inst. 247. (d) In this Court Deeds may be inrolled, Recoveries may be passed, Wills may be proved, and Replevins, Writs of Error, Writs of Right Patent, Writs of Waste, Writs of Partition, and Writs of Dower, may be determined for any Matters within the City of London and the Liberties thereof. Lex Lond. 105. But note, That all Real Actions are now grown out of Use.</sup>

Judgment of Outlawry in the Hustings is not given by the Mayor, who is Coroner, or his Deputy, but by the Recorder, by the Custom of the City. <sup>4 Inst. 247.</sup>

In this Court, the Lord Mayor for the ensuing Year, the Sheriffs, Chamberlain, and Bridge-masters, are chosen. <sup>Lex Lond. 115.</sup>

18 E. 3. 14. Upon a Judgment given in this Court of Hustings, a Writ of Error  
 1 Rol. Abr. lies at St. Martin's (a) before certain Justices.  
 745. S. C.  
 1 Lev. 309. 2 Sand. 252. S. P. And upon a Judgment of the said Justices a Writ of Error lies in Par-  
 liament. 2 Leon. 107. (a) For their Commission, &c. vide Reg. 130. F. N. B. 23.

## 2. The Sheriffs Courts.

4 Inst. 248. There are two Sheriffs of *London* and *Middlesex*, each of whom keep  
 a Court of Record for all Personal Actions within the City of *London*;  
 these Courts are kept at *Guild-hall*, and in each Court a Steward is the  
 Judge; they have belonging to these Courts, two Prisons, called *Counters*,  
 the one in *Woodstreet*, the other in the *Poultry*.

(b) But for The (b) Process in these Courts is by Summons, Arrest, (c) Foreign  
 this vide Lex Attachment, &c.  
 Lond. 241.  
 &c. (c) Vide for this Title *Customs of London*.

4 Inst. 247, From these Courts a Cause may be removed by *Habeas Corpus* to *West-*  
 248. *minster-Hall*; but if an erroneous Judgment be given, the Cause may be  
 removed by Writ of Error to the *Hustings*, before the Lord Mayor and  
 Sheriffs.

Skim. 105. If a Complaint be levied in a Counter in *London*, and a *Habeas Corpus* is  
 brought, it is returned by that Sheriff in whose Counter the Party is in  
 Custody, and he only is to answer if he escapes.

## 3. The Court of Equity before the Lord Mayor, common- ly called the Court of Conscience.

4 Inst. 248. The Jurisdiction of this Court arises from (d) a Custom in *London*,  
 (d) That viz. that if a Complaint of Debt is entered in the Sheriff's Court, upon Sug-  
 this is a rea- ggestion of the Defendant, the Lord Mayor may send for the Parties, and  
 sonable Cu- for the Record, and examine the Parties upon their Plea; and if he finds  
 stom, altho' that the Plaintiff is satisfied, he may award that the Plaintiff shall be  
 it hath been barred, but he cannot examine after Judgment.  
 of late a-  
 bused. Skim.  
 67.

Judgment was given in an Action in the Sheriff's Court in *London*,  
 and after it was removed to the Mayor's Court by *Levata Querela*, with-  
 in which Court there are four Attornies, who, by an exclusive Custom,  
 are the only Attornies of the Court; one of them was assigned to the  
 Plaintiff by the Recorder, who refused to act, as did all the others; be-  
 cause the then Lord was concerned in Interest; on Complaint to *B. R.* it  
 was held, That no Person could withdraw himself from the Jurisdiction  
 of the King's Bench, which had a Power of obliging all Officers to do  
 their Duty; that the denying Justice in such a Manner, was of dange-  
 rous Consequence, and might be punished by Information, &c. that in  
 the Case of the Abbot of *Crowland*, 20 E. 4. the Liberties were seized,  
 because he had not Officers; and that the Attornies Refusal in this Case  
 was sufficient to forejudge him.

There is also the Court of Requests, which is called the Court of  
 Conscience, and is held before certain Commissioners at *Guild-hall*, and  
 (e) First be- was (e) established for recovering Debts under forty Shillings.  
 gan by an  
 Act of Council 9 H. 8. but has since been confirmed by Act of Parliament, 3 Jac. 1. cap. 15.  
 which vide.

3 Keb. 533. This Court cannot grant Prohibitions to stay Proceedings in the  
 Courts at *Westminster*; and therefore where *J. S.* brought Debt upon an  
 Obligation of 10*l.* for Payment of 5*l.* in *B. R.* against a Freeman of  
*London*, who cited the Plaintiff in the Court of Conscience, surmising  
 that less than 40*s.* was due; the Plaintiff appeared there, and shewed  
 the

the Obligation; notwithstanding which, the Commissioners there, upon the Allegation of the Defendant, that less than 40 s. was due, ordered the Plaintiff to accept it, and to stay Proceedings in *B. R.* which he refusing, the Commissioners ordered the Register to keep the Obligation, so that the Plaintiff could not proceed in *B. R.* whereupon the Court granted an Attachment against the Commissioners and Register.

## Curtesy of England.

**T**ENANT by the Curtesy is he, who after his Wife's Death (having had Issue by her Inheritable) is introduced into her Inheritance, and has an Estate for Life therein; and he is so called from the Favour or Curtesy of that Law which made this Provision for him, to which he had no Natural Right, nor to which any other Nations, except those of *Great Britain* and *Ireland*, admitted him.

*Dr. and Stud. lib. 1. c. 7. Co. Lit. 30. a. Cowel, Tit. Curtesy; it began in England and Ireland in the Time of*

*H. 1. Seld. Jan. 65. and in Scotland in the Time of Malcolm. Macan. 56. Both by a positive Institution.*

The Words of this Law, as they are found *Pat. 11 H. 3. M. 30. exemplified are, Si aliquis desponsaverit aliquam Hereditatem habentem, & ex ea prolem habuerit cujus Clamor auditus fuerit infra Quatuor Parietes, & Vir supervixerit Uxorem, habebit totâ vitâ sua Custodiam hereditatis, licet hæredem habuerit ex primo viro qui plene ætatis est: Præceptum est quod eadem Lex Observetur in Hibernia.* Under this Head we shall consider,

(A) What Persons may be Tenants by the Curtesy, what not.

(B) Of what Sort of Inheritances this Estate is allowable, of what not.

(C) What Estate the Wife must have to let in the Husband to be Tenant by the Curtesy: And herein,

1. The Descendible Quality of such Estate.
2. The Seisin of the Wife thereof.
3. When this Estate and Seisin is to begin, and how long it must continue.

(D) Of the Husband's Title being initiate by having of Issue, and to what Purposes: And herein,

1. What Sort of Issue this must be.
2. When it must be born.
3. What it must do to intitle the Husband to be Tenant by the Curtesy.

(E) The

## (E) The Nature and Quality of such Tenancy by Curtesy.

1. With respect to the Estate it self.
2. With respect to the Privity between him and the Heir.

## (F) By what Means this Title may be prevented and destroyed.

## (A) What Persons may be Tenants by the Curtesy, What not.

1. **T**HE Words of this Law are general, and seem to extend to all sorts of Persons without Distinction; therefore (a) Ideots and Lunaticks, and (b) Villains, may be Tenants by the Curtesy. (a) But the King shall have this Estate during the Ideocy or Lunacy, and provide for them and their Families, as he should do out of their own Estates. 4 Co. 123. *Eeverly's Case*. (b) The Lord, if he will, may enter and hold those Lands against the Villain and his Issue for ever. Co. Lit. 113, 123. a.

2. Persons convict only of (c) Felony or Treason, Persons (d) outlawed in any Civil Action, may be Tenants by the Curtesy. (c) For they and Chattels forfeit only their Goods absolutely, for of their Lands the King gains but a Pernancy of the Profits. 5 Co. 110. Co. Lit. 92, b. 391. a. *Stanf.* 192. (d) Bro. Tit. *Outlawry* 26, 36, 59. Co. Lit. 128. For such Process of Outlawry might be easily superseded, and thereby the King's Pernancy of the Profits discharged.

3. But Persons attainted of (e) Felony or Treason, shall not be Tenants by the Curtesy; for they being thereby *extra Legem Positi*, and their Persons forfeited to the King, they are from thenceforth become incapable of our Laws in general, and, by consequence, of this in particular, which intended to give the Inheritance only to those who were capable of holding of it *tota vita sua*; also Persons attainted in (f) a *Præmunire* are excluded the Benefit of this Law, and also (g) *Aliens*, be they Friends or Enemies; and in these Cases their Title shall never arise, even for the Benefit of the King, but the Wife's Estate shall be discharged of it for ever.

(e) Brok. Tit. *Curtesy* 15. *Stauf.* 196. *Godb.* 323. (f) Co. Lit. 391. a. 3 *Inst.* 43. (g) But if the Alien be made Denizen, or the Person attainted Pardoned, and have Issue after, they may be Tenants by the Curtesy, in respect to that Issue had after, but not in respect of any Issue had before. 7 Co. 25.

## (B) Of What Sort of Inheritances this Estate is allowable, of What not.

1. **O**F a Use at Common Law, or what is now called a Trust, it is expressly resolved, that a Man shall not be Tenant by the Curtesy, and the *Doctor and Student* assigns this as one Reason, why so much Land was put in Use to prevent this Title; and the 27 H. 8. in the *Preamble* recites this as one of the Mischiefs that Statute intended to remedy; the Reason seems, that of a Use there was neither Tenure nor

Wardship, nor any Escheat nor Benefit to the Lord, and therefore not within the Reason of this Law; besides that the Feoffees were Tenants to the Lord, and the Land in their Hands the proper Subject of such Tithes, and therefore could not be double out of the same Lands; another Reason may be, that a Use consisting meerly in Privy between the Feoffor and Feoffees, and being in the Nature of a Thing in Action, for which no Remedy lay but by *Subpoena* in Chancery, that therefore none could have any Remedy for it, but those who were Parties or Privies to the Feoffment, or within the Words or plain Meaning thereof, \* and consequently the Husband could not be Tenant by the Curtesy, nor his Wife be endowed thereof, they being Strangers and Collaterals to the Feoffment; and they denying of them the Rents and Profits, could be no Breach of Trust in the Feoffees, they not being originally trusted for any such Purpose, nor compellable to Account to them.

\* As to the Construction this Matter has received in the Courts of Equity,

and the Relief given to Tenants in Dower and by Curtesy, vide 2 Vern. 585, 681. 1 Chan. Rep. 254. 2 Vern. 404. Abridg. of Equity 218.

2. A Man shall not be Tenant by the Curtesy of a Copyhold, unless there be a special Custom to warrant it, for the Freehold and Inheritance being in the Lord, and the Copyhold being only a Customary Right of taking the Profits Time out of Mind at the Will of the Lord, this Custom, like all others, must be a Law to it self, and all Estates derived thereout are so far good as they are warranted by that Law, and no farther; if therefore there be no Custom for a Man to be Tenant by the Curtesy, of his Wife's Estate, there is no Law by which he can claim it; and if there be no Law, he can have no more Right than to another Man's Property; and this Statute cannot operate upon Copyhold, since this Statute, like other Statutes, was made within Time of Memory, and so falls short of any Share in the Original Constitution, or Governing of Copyholds; and for this Reason, where such Custom of holding by the Curtesy has prevailed, it has yet been taken literally strict, and not to be extended in the least beyond those Bounds the Custom has allowed of.

4 Co. 22.  
Hob. 216.  
Cro. Eliz. 361,

3. As where *J. S.* set forth, that within such a Manor there was a Custom, That if one took to Wife any Customary Tenant of the said Manor in Fee, and had Issue by her, if he outlived such Wife he should be Tenant by the Curtesy; and the Case was, that *J. S.* married a Woman, who at the Time of the Marriage had not any Copyhold, but afterwards, during the Coverture, a Copyhold descended to her; and it was adjudged, that he should not be Tenant by the Curtesy by this Custom, for that his Wife was not a Customary Tenant at the Time of the Marriage, which by the strict and literal Meaning of the Custom she ought to be.

Sir John Savage's Case,  
1 Leon. 109,  
208.

4. Of an Annuity to a Woman and her Heirs, after a Writ of Annuity brought, a Man shall not be Tenant by the Curtesy no more than a Woman shall be endowed thereof, for thereby it becomes a Personal Inheritance.

Co. Lit. 144. b.  
Poph. 87.  
Moor 83.

5. A Man may be Tenant by the Curtesy, of Lands held in *Antient Demesne*, and a Woman may claim Dower of such Lands; also of Lands in *Borough English*.

5 Co. 105.  
Cro. Eliz. 826.  
Alden's Case.

6. Of Lands in *Gavelkind*, a Man may be Tenant by the Curtesy without having Issue by his Wife, by the Custom; and herewith our Statute has nothing to do, since Custom, a Law of much longer standing, had already provided for him, and prescribed the Terms of his enjoying of it.

Co. Lit. 30. a.  
Dav. 50.

7. There are some kinds of Inheritances whereof a Man may be Tenant by the Curtesy, though a Woman, in such Case, shall not be endowed; as if Lands holden of the King by Knight's Service descend to a Woman, and after Office found she intrudes and taketh Husband, and

Prerog. Regis,  
cap. 13,  
4 Co. 55.

hath Issue, in this Case the Husband shall be Tenant by the Curtesy; yet if the Heir Male, after Office found in the like Case intrudeth, and taketh a Wife, she shall not be endowed, by the express Provision of *Prærogat' Regis, cap. 13.* But this Statute doth not alter or abridge the Statute that gives a Man a Title by the Curtesy.

*Co. Lit. 30. b.* 8. So if a Man marry the Neif of the King, by his Licence (which amounts to an Infranchisement, at least during the Coverture) and after Lands descend to the Wife, and the Husband hath Issue by her, and then she dies, the Husband shall be Tenant by the Curtesy; but if a Woman marry the Villain of the King, by his Licence, she shall not be endowed; for notwithstanding the Licence he still remained a Villain to the King, who may enter at his Pleasure, and defeat the Wife's Title of Dower by his own Title Paramount.

*Co. Lit. 30. b.* 9. A Man shall be Tenant by Curtesy, of a Castle, of a \* House that is *caput Baronie*, or *Comitatus*, because able to defend the Realm, and of a Common without Number; but of these a Woman shall not be endowed.

*this vide Head Dower, and that by a late Resolution,* a Woman shall be endowed of such a House.

*Plow. 379.* 10. Of Offices of Profit a Husband shall be Tenant by the Curtesy.  
My Lord

*Coke* cites some antient Records, wherein Tenancy by the Curtesy was allowed of Dignities and Offices of Honour, as to carry a Sword before the King at his Coronation, to be his Carver upon that Day; and to the Earl of *Salisbury* by the Curtesy; but these being Offices, as appears, annexed to particular Dignities, or being Dignities themselves, and capable of being intailed, may without any Inconvenience be allowed the Privilege of this Law. *Co. Lit. 29.*

### (C) What Estate the Wife must have to let in the Husband to be Tenant by the Curtesy.

*Lit. Sect. 35.* 1. *Littleton* acquaints us, That it must be an Estate either in Fee-simple  
*Dyer 148.* or Fee-tail General, or where the Wife has it as Heir of the Special Tail; and my Lord *Coke* says, for the Husband to be Tenant by  
*8 Co. 36.* the Curtesy, is one of the Incidents to an Estate-tail, which to restrain  
*6 Co. 41.* by Condition, were repugnant, &c. and therefore if a Woman, Tenant  
*Co. Lit. 227.* in Tail General, marries and hath Issue, which Issue dieth, and then  
*8 Co. 34.* the Wife dies, so that the Estate is thereby determined, yet the Husband shall be Tenant by the Curtesy; the same Law if the Limitation  
*1 Leon. 167.* had been to the Woman and the Heirs of her Body, upon Condition,  
*Pain's Case.* that if she die without Issue, then to remain to another; for this is not  
*Co. Lit. 30. a.* a Condition but a Limitation, and no more than what the Law saith.

*Co. Lit. 30. a.* 2. So if one seised of a Rent in Fee, makes a Gift in Tail general, or if a Rent *de novo* be granted in Tail general to a Woman, who marries and hath Issue, the Issue dieth, and then the Wife dieth without other Issue, yet the Husband shall be Tenant by the Curtesy, of the Rent, though the Estate-tail therein be determined and spent; for this being an Incident to such an Estate at the Time of its Creation, whenever the Husband has Issue, his Title is initiate, and shall not be lost after by Failure of Issue, which being the Act of God, ought not to turn to his Prejudice; and this is within the Words of our Law *Hereditatem habentem*, without fixing its Continuance: But to understand the Nature of the Wife's Estate we must consider farther.

## 1. The Descendible Quality of such Estate.

1. The Rule herein to be observed is, that the Issue of such Husband may by Possibility inherit. This Rule seems to have been

formed after the Statute *de donis*, and by Virtue thereof, for our Statute requires no such Property in the Inheritance, neither did the Common Law; but for this *vide* 2 *Inst.* 336. 8 *Co.* 35, 36. *Co. Lit.* 29. *b.* *Perk.* 465.

2. Therefore if Lands are given to a Woman and the Heirs Males of her Body, and she has Issue a Daughter, and dies, the Husband shall not be Tenant by the Curtesy; the same Law if it had been given to her and the Heirs Females of her Body, and she had Issue a Son. 8 Co. 35. Co. Lit. 29. b.

3. But if a Woman seised in Fee marries, and hath Issue, and then the Husband dies, and she takes another Husband, and hath Issue by him and dies; though the first Issue be living, yet the second Husband shall have it by the Curtesy, because his Issue, by Possibility may inherit; as if the first Issue die without Issue, whereby it comes to the Uncle, &c. Brok. Tit. Curtesy 8. Perk. 466. 8 Co. 34. Lit. Sect. 52.

## 2. The Seisin of the Wife thereof.

1. That the Wife must be seised of the Estate, is required by the very Words of the Law, which says, *aliquam hereditatem habentem*, so that there must be a Possession of such Inheritance by the very Words of the Law; and therefore if a Man die seised of Lands in Fee-simple or Fee-tail general, and those Lands descend to his Daughter, and she marries, and hath Issue and dies, before any Entry made by her or her Husband, or any other for them, the Husband shall not be Tenant by the Curtesy; but here we must understand Seisin in a twofold Sense, *viz.* Seisin in Fact and Seisin in Law; and where a Seisin in Fact may be had, as in the above Case, there a Seisin in Law will not do; nay, though the Husband doth all he can to get Possession in his Wife's Life-time, and as soon as he heareth of her Father's Death, goeth towards the Land to take Possession, and before he can come there the Wife dies, yet he shall not be Tenant by the Curtesy, and therefore one \* Book says, he should have spoken to some Neighbour, being near the Lands, to have entred for his Wife, as in her Right, immediately after the Father's Death; and the Reason of this is from the Words of the Law, which require that the Wife should have actual Possession of the Inheritance; and of Things lying in Livery the Wife hath not actual Possession till the Entry of the Husband. Dr. and Stud. lib. 2. cap. 15. Perk. 464. Co. Lit. 29, a. 90. 8 Co. 34, 36. F. N. B. 143. Kelw. 2. a. Brok. Tit. Curtesy 7. \* Perk. 470.

2. But now of such Inheritances, whereof there cannot possibly be a Seisin in Fact, a Seisin in Law is sufficient; and therefore if a Man seised of an Advowson, or Rent in Fee, hath Issue a Daughter, who is married and hath Issue, and he dieth seised, and the Wife die likewise before the Rent becomes due, or the Church becomes void, this Seisin in Law in the Wife shall be sufficient to entitle her Husband to be Tenant by the Curtesy, because, say the Books, he could not possibly attain any other Seisin, as indeed he could not, and then it would be unreasonable he should suffer for what no Industry of his could prevent; but the true Reason is, That the Wife hath these Inheritances which lie in Grant, and not in Livery, when the Right first descends upon her; for she hath a Thing in Grant when she hath a Right to it, and no Body else interposes to prevent it. Co. Lit. 29. Perk. 463, 469. 7 Ed. 3. 66. Kelw. 104. 1 Co. 97. 6 Co. 63. F. N. B. 149. Bro. Tit. Curtesy 5, 9. 2 Sid. 112.

## 3. When

### 3. When the Estate and Seisin must begin, and how long it must continue.

1. The Estate and Seisin of the Wife ought to begin some Time during the Coverture; so the Words of the Law import, *Si aliquis desponsaverit aliquam hereditatem habentem*, &c. and therefore if a Woman be disseised and marries, and dies, leaving Issue before any Re-entry made, the Husband shall not be Tenant by the Curtesy; for here she had no Inheritance, but only a Right to an Inheritance, which is out of the Words of this Law; but if the Husband or Wife had entred during the Coverture, there, after the Wife's Death, he should have it by the Curtesy, because he had *hereditatem* during the Coverture.
2. If a Woman Seignores intermarry with the Tenant, and have Issue and die, the Husband shall not be Tenant by the Curtesy of the Seignory, because by the Intermarriage the Seignory was in suspension, and so she could not be said to have it, or if she had, it is like the Seisin of an Instant whereof a Woman shall not be endowed.
3. A Woman Tenant in Tail, *apres* Possibility, &c. takes Husband, and hath Issue, and the Fee-simple descends upon the Wife, be it before or after Marriage, the Husband shall be Tenant by the Curtesy, because by the Descent of the Fee the other Estate was merged and gone, and she became Tenant in Fee-simple executed.
4. In Trespass, the Defendant says, that one *A.* was seised of those Lands in her Demesne as of Fee, and that he took her to Wife, and they had Issue between them, and after *A.* died, and he held himself in as Tenant by the Curtesy, and (*inter alia*) it was moved, that he did not shew that after the Marriage he was seised in his Demesne as of Fee in Right of his Wife, and though it was answered, that his shewing that *A.* was so seised, and that he took her to Wife was sufficient, since it could not be intended but that the Defendant was seised in Fee, as in Right of his Wife; yet, says the Book, the Defendant *Videns Opinionem Curie* amended his Plea according to the Exception taken by the Plaintiff.
5. If a Woman seised in Fee makes a Lease for Life, or endows her Mother, and after has Issue and dies, living the Lessee or the Mother, the Husband shall not be Tenant by the Curtesy of the Reversion.
6. In a *Quare Impedit* by the King against divers, the Defendant makes Title that the Advowson descended to three Coparceners, who made Partition to present by Turns, the Eldest to have the first, the Middle the second; and that he married the Youngest and had Issue by her, and she died, and the Church became void, and so it belonged to him to present; and doth not alledge that ever his Wife presented, and yet he was allowed Tenant by the Curtesy by the Seisin of the others; the Reason of which Case seems to be, that the Advowson being in its Nature entire and indivisible, and descending upon all the Daughters as Coheirs, though they do agree to Share the Fruits of it in such Proportions amongst themselves, yet the Inheritance remains entire in them all, and they all have a Seisin in Law before Presentment by either, which, according to the Rules before laid down, is sufficient to intitle the Husband to be Tenant by the Curtesy.

Co. Lit. 29. a.  
30. a.  
Perk. 458.

3 Leon. 347.  
Perk. 460.  
Co. Lit. 29. b.

Bro. Tit.  
Curtesy 4.

Kelw. 2.  
which plainly shews that that Seisin in the Wife, some Time during the Coverture, is essential to make the Husband Tenant by the Curtesy.

But in the Case of the Lease, if a Rent were reserved to her and her Heirs, *Q.* if the Husband shall not have the Rent during its Continuance, and after the Death of the Lessee the Land it self, as Tenant by the Curtesy; and *vide Perk. 467. Co. Lit. 29. a. Bro. Tit. Curtesy 10. Co. Lit. 15. a. 32. a. Kelw. 104. pl. 12.*

Bro. Tit. Curtesy 121.

7. A Rent-charge is granted to a Woman and her Heirs, payable at two Feasts of the Year, the first Payment to begin at such of the two Feasts as shall first happen after the Death of *J. S.* the Feme takes Husband, and hath Issue and dies, then *J. S.* dies; and one Question was, if the Husband should be Tenant by the Curtesy of this Rent.

2 *Syl.* 110,  
117. *Dethick*  
*v. Bradburn*,  
In this Case

no Judgment is given, but the Opinion of *Glyn*, Ch. Just. that he should; for though this begins *in Futuro*, yet it is grantable over presently, which proves it to be *in esse*, and then she may be well said *habere hereditatem*, and the Seisin is not material, especially in the Case of a Rent.

The Time when this Estate and Seisin in the Wife is to begin, whether before or after Marriage, is not material; and therefore if a Woman marries and hath Issue, which dies, and after Lands descend to the Wife, and the Husband enters, and then the Wife dies without other Issue, yet the Husband shall be Tenant by the Curtesy, for the Time of the Descent is not material, so it be during the Coverture; the same Law is if Lands had been conveyed to the Wife *mutatis mutandis*.

As to the Continuance of this Estate and Seisin in the Wife, in some Cases it is necessary it should continue in her till Issue had, and in some not; and in some Cases Continuance both before and after will not serve; for the First, if a Woman seised in Fee of Lands hath Issue, and after commits Felony, and is attainted thereof, yet the Husband shall be Tenant by the Curtesy, in respect of the Issue had before, and which by Possibility might have inherited; *aliter* if the Wife had been attainted before Issue; but in the other Case, the Husband's Title, by having of Issue was so far initiate, that the Lord might avow upon him for Homage without the Wife, and then her Crimes after shall not defeat him of it; besides, this is within the Letter of our Law, &c.

*Co. Lit.* 40. a.  
351. a.  
*Bro. Tit. Cur-*  
*tesy* (3). But  
*Q.* if in this

Case after Issue had the Feme had been attainted of Treason, if the Husband's initiate Title shall prevail against the King. *Q.* Also in the Case of the Felony, if the Husband may enter presently upon the Attainder during the Wife's Life, who is thereby *Civiliter Mortua*, as he might if the Wife had abjured the Realm, which is one kind of Attainder; for which *vide Co. Lit.* 133. And that the Abjuration is an Attainder, *vide Co. Lit.* 15. a. 390. b.

In some Cases it is not necessary that the Seisin should continue till Issue, and therefore if a Man, seised of Lands in Fee in Right of his Wife, is disseised before Issue, and afterwards he hath Issue, and the Wife die before any Re-entry made, yet the Husband may re-enter and hold the Land as Tenant by the Curtesy, for the Disseisin left a Right in him to be Tenant by the Curtesy, if he had Issue, as it did in the Wife and her Heirs to the Inheritance.

*Perk.* 472.  
*Co. Lit.* 30. a.

So in such Case, if a Recovery had been had against the Baron and Feme by erroneous Process, or by false swearing, and after Execution sued thereof they have Issue, and the Wife dieth, yet the Husband shall have Error or Attaint, and upon Reversal shall enter and hold as Tenant by the Curtesy, for being Party to the Record he may well have these Writs, and when the Recovery is reversed, it is so *ab initio* as to him.

*Perk.* 475.

In some Cases Continuance of Seisin before and after Issue will not do, therefore if a Woman makes a Gift in Tail, reserving Rent in Fee, and marries and hath Issue, and then the Donee dies without Issue, and then the Wife dies, the Husband shall not be Tenant by the Curtesy of the Rent, for that is determined and gone, but he shall have the Land.

*Co. Lit.* 30. a.

If a Woman marries and hath Issue, and Lands descend to the Wife, and the Husband enters, and after the Wife is found an Ideot, by Office the Land shall be seised for the King; for when the Title of the King and a common Person begin at one Instant, the Title of the King shall be preferred; *a fortiori* in this Case, if the Woman had Lands before Issue and after Issue had been found an Ideot.

*Plow.* 263.  
*Co. Lit.* 30. b.  
55. But *Q.*  
of this Case,  
because the  
King's Title  
can continue  
no longer

than during the Ideot's Life.

*Bro. Tit. Cur-*  
*tesy (10, 13.)* If a Daughter Inheritrix marries and hath Issue, and after a Son is born, who enters upon the Husband and Wife, and then the Wife dies, the Husband's Title is defeated; but if after the Son had died without Issue, and the Husband had re-entred, it seems he should be Tenant by the Curtesy, whether he had Issue by his Wife after or not, and though such first Issue was dead before his Re-entry; so if the Daughter in such Case after Issue had endowed her Mother, and after the Mother dieth, and the Husband re-enters, and his Wife dieth without other Issue, yet it seems reasonable the Husband should have it by the Curtesy; otherwise in these Cases, if the Son or the Mother had not died till after the Death of the Wife, for their Title in both Cases was Paramount the Wife's, and disaffirms her Title *ab initio* from the Death of the Father; but when the Son or the Mother die, living the Wife, then the Estate comes to her again, and whether it come before or after Issue, so there be an Entry made, is not material, as before appears.

*Co. Lit. 29. b.* If a Woman Tenant in Tail general makes a Feoffment in Fee, and takes back an Estate in Fee, and marries, and hath Issue and dies, yet the Issue may recover in a *Formedon* against his Father, and then he shall not be Tenant by the Curtesy; for the Estate-tail he cannot have, that being discontinued during the whole Coverture, the Fee he cannot have, that being defeated and gone, and the Issue restored to his Right *per formam Doni*; and as the Estate of the Wife, during the Coverture, was Tortious, so must the Husband's be too after her Death, and liable to be defeated by the Issue.

### (D) Of the Husband's Title being initiate by having of Issue, and to what Purposes.

1. What Sort of Issue this must be.
2. When it must be born.
3. What it must do to intitle the Husband to be Tenant by the Curtesy.

*S Co. 35.*  
*Pain's Case.*  
*Co. Lit. 29. b.*  
*S. P.* AS to the First, if a Woman be delivered of a Monster, which hath not the Shape of Mankind, this is no Issue in Law; but however deformed it may be, or if it be born deaf and dumb, or an Ideot, yet this is such Issue as will intitle the Husband to be Tenant by the Curtesy.

*S Co. 35.*  
*Co. Lit. 29. b.* 2dly, It must be born during the Life of the Wife; therefore if the Wife die in Child-bed, and the Issue is ript out of her Womb, the Husband shall not be Tenant by the Curtesy, because he had no Issue during the Marriage, and therefore he cannot be said *ex ea prolem habere*, and in pleading he must alledge that he had Issue during the Marriage.

*S Co. 34.*  
*Co. Lit. 29. b.*  
*Dyer 25.*  
*pl. 159.*  
*Dendl. 21.*  
*Perk. 471.*  
*Kelw. 2. a.*  
But in *Scotland* they require that the Child should cry.  
Neglect, he shall not be Tenant by the Curtesy; but the Statute requires no such Thing, and therefore it seems no essential Part of his Title.

As to what Purposes this Title is initiate in the Husband by having of Issue, it appears before, that after Issue had he shall do Homage alone, and receive Homage alone during the Life of his Wife, and Avowry shall be made only upon him; for the Statute says *si ex ea prolem habuerit, &c. habebit totâ vitâ suâ Custodiâ hereditatis*; but Homage done by the Husband before Issue shall not bind the Wife.

Co. Lit. 30 a.  
67. a.  
2 Inst. 145.

Therefore if an Estate be made to two Women, and the Heirs of their two Bodies, and one of them marries, and hath Issue and dieth, the Husband shall be Tenant by the Curtesy of her Moiety; for this Statute severs the Jointure between them by giving the Husband the Custody of it in the Life of the Wife; but if such Limitation had been to two Men in this Manner, their Wives should not be endowed, for the Jointenancy takes Place of the Dower.

17 Et. 3. 51.  
Co. Lit. 30 a.  
183. a. Accord.  
2 Rel. Abr. 90. cont.

If the Husband, after Issue, makes a Feoffment in Fee, and the Wife dies, the Feoffee shall hold it during the Life of the Husband, and the Heir of the Wife shall not, during his Life, avoid it by *sur cui in vitâ*, for it could not be a Forfeiture, because the Estate of Tenant by the Curtesy was but initiate, and not consummate; and now since 32 H. 8. cap. 28. the Issue shall not enter in such Case till after the Husband's Death, which shows, that in this Feoffment his Interest and Title to be Tenant by the Curtesy is involved, and passes by it to the Feoffee, though not to such Purpose to make him Tenant by the Curtesy, which none but the Husband himself can be; for the same Reason, it seems, that after Issue he may Lease the Lands for his own \* Life.

Co. Lit. 30 a.  
326. a.  
Dyer 363. pl. 26.  
8 Co. 72.

\* But Q. if such Feoff-

ment or Lease before Issue shall be made good for his Life by Issue had after.

Baron and Feme have Issue, and after join in suffering a Recovery, the Feme was within Age and appeared by Attorney, yet after her Death it seems the Heir could not assign this for Error till after the Husband's Death.

Hob. 324  
Dany v. Lec.

## (E) The Nature and Quality of such Tenancy by Curtesy.

1. With respect to the Estate it self.
2. With respect to the Proximity between him and the Heir.

AS to the first, this Estate, in several Respects, is looked upon as a Continuance of the Estate of the Wife, and therefore if three Coparceners are of an Advowson, and they agree to present by Turns, the Eldest first, and so on, and the Eldest die, her Husband, Tenant by the Curtesy, shall present as she should have done; and so of any of the other Sisters.

3 Co. 22.  
Co. Lit. 166 b.  
186. a.  
2 Inst. 365.  
Cro. Eliz. 19.  
F. N. B. 34.  
Bro. Tit. Curtesy (2).

So a Writ *de Partitione facienda* lies against Tenant by the Curtesy, because he is in Continuance of the Estate of Coparcenary, though not being a Coparcener in Fact he cannot have such Writ.

Co. Lit. 174. b.  
175. a.  
Kelw. 118.

If Baron seised of an Advowson in Right of his Wife presents, and after hath Issue, and the Wife dies, and then the Church becomes void, the Husband shall not have Assise *de Darrein Presentment*, because he is in of another Estate than that upon which he presented before; for before he had no Estate but in Right of his Wife, and now he is seised for his own Life, as Tenant by the Curtesy.

2 Rel. Abr. 38.  
Kelw. 118.

Q. But it seems clear, if the first Presentment had been af-

ter Issue, he should have had this Writ.  
The

- F. N. B.* 143. The Wife's Heir shall not be in Ward during the Life of Tenant by the Curtesy, because by his Continuance of his Wife's Estate, the Descent to the Heir is interrupted.
- Dyer* 51. in *Margin.* If a Woman, Tenant in Tail, acknowledge a Statute and marries, and hath Issue and dies, the Land may be extended in the Hands of her Husband, Tenant by the Curtesy.
- 9 *H.* 7. 24. So the Entry of the Disseisee is congeable of the Tenant by Curtesy, but not on the Heir after his Death.
- 2 *Inst.* 309. If Tenant by the Curtesy alien in Fee, in Tail, or for Life of the Lessee, he in the Reversion shall have a Writ of Entry *in Casu consimili* presently, by the Statute of *Westm.* 2. *cap.* 24.
- Hob.* 21. If Tenant by the Curtesy grant his Estate with Warranty, and comes in as Vouchee, he shall have Aid of him in the Reversion for the Weakness of his Estate; so if he himself be impleaded.
- 2 *Fones* S.  
1 *Rel. Abr.* 167. As to the Privity between him and the Heir, this is so inseparable, that at Common Law, altho' both had, as it were by Consent, granted away their Estates, yet no Action of Waste lay against any other than the Tenant by the Curtesy, nor against him by any other than the Heir at Law; but now by the Statute of *Gloucester*, *cap.* 5. Remedy is provided for the Grantee of the Reversion against Tenant by the Curtesy, so long as he continues his Estate, or against his Assignee, if he assign it over; but still so long as the Heir keeps the Reversion, Tenant by the Curtesy is liable to his Action of Waste notwithstanding any Assignment, that Statute having provided no Remedy for this Case; and the same Law of Tenant in Dower.
- 3 *Co.* 23.  
9 *Co.* 142.  
11 *Co.* 83.  
4 *Co.* 62.  
*Co. Lit.* 54.  
2 *Inst.* 301.  
*F. N. B.* 56.  
*Cro. Car.* 430.  
*Dr. & Stud.*  
*lib.* 2. *cap.* 1.

### (F) By What Means this Title may be prevented and destroyed.

*Bro. Tit. Curtesy* (6).  
1 *Co.* 111.  
*Hob.* 338.  
*Moor* 31, 32.  
But *Q.* as to the first Case, because the Feoffment being before Issue, the Husband hath not Title either initiate or consummate, but his Title began wholly afterwards by having of Issue, and then the Wife was in actual Seisin by the Remitter.

IF the Husband before Issue make a Feoffment in Fee, and retake an Estate to him and his Wife, by which the Wife is remitted, and after he hath Issue, and the Wife dies, yet he shall not be Tenant by the Curtesy, for the Law gives him *Custodiam hereditatis*; and if he parts with it in Fee, so that it is once out of him, there is no Law that gives it to him again, since he hath extinguished it by his unjust Alienation; *a fortiori* if after Issue he had made this Feoffment.

*Co. Lit.* 30. *b.* So if after Issue he make a Feoffment in Fee upon Condition, and re-enter for the Condition broken, and then the Wife dies, yet he shall not be Tenant by the Curtesy, for that Title was inclusively past and given away by the Livery, and the Condition was not annexed to his Title but to the Feoffment; and yet if such Feoffment were before Issue, one

\* *Perk.* 474. \* Book makes a *Q.* of it; but it seems clear in this Case he shall not, because, upon his Re-entry for the Condition broken, he is not in of an Estate in Right of his Wife, but of the tortious Estate gained upon the Discontinuance of his Wife's Right.

*Bro. Tit. Curtesy* (1.) A Woman, Tenant in Tail general, marries, she and her Husband levy a Fine, and take back an Estate to them and the Heirs of their two Bodies, and have Issue, the Husband dies, she marries another, and hath Issue and dies, and the Husband claims to be Tenant by the Curtesy, upon Pretence, that by the Estate taken back upon the Fine his Wife was remitted to her general Tail, and so every Issue inheritable, and he Tenant by

by the Curtesy; but *optima Opinio*, that as his Wife was estopped, so shall the second Husband who claims by her.

Baron and Feme seised of Lands in Right of the Feme (whereof the Husband was intitled to be Tenant by Curtesy) levy a Fine which was after reversed as to both for the Nonage of the Feme, the Husband shall have it again as Tenant by the Curtesy, because the Fine was utterly avoided. Cro. Jac. 482. Cro. Eliz. 128. Charnock and Worsley ad-judged.

## Customs.

- (A) Of the Commencement and Length of Time necessary to establish a Custom.
- (B) What Persons are affected with, or bound by a Custom.
- (C) Of such Customs as are against the Rules of the Common Law, yet not being unreasonable in themselves are good, and from the Conveniency of them bind in particular Places.
- (D) Where from the Benefits accruing from them they shall bind.
- (E) Where from the Certainty or Uncertainty of them they shall be deemed good or void.
- (F) How to be construed, and to what Things a Custom shall be said to extend.
- (G) Custom how destroyed.
- (H) Of the Manner of alledging and pleading a Custom.

### (A) Of the Commencement and Length of Time necessary to establish a Custom.

THE frequent Repetition of an Act, which at first was (a) assented to by the People of a certain Place (b) for their mutual Conveniency and Advantage, is called a Custom, and every such Custom being certain and reasonable in itself, and commencing Time immemorial, and always continued without Interruption, has obtained the Force of a Law, Co. Lit. 110. b. Dav. 32. (a) That all Laws bind by the Assent of the People, and such Assent may

be expressed as well by Facts as by Writing or Word. 44 E. 3. 19. Dav. 32. (b) The Difference between Custom and Prescription is, that Custom is local as prevailing in a certain Province, County, Hundred, &c. but Prescription is for the most part personal, being made in the Name of a certain Person, and his Ancestors, or those whose Estate he has, or of a Body Politick, and their Predecessors.

for. Co. and in such Places shall prevail, tho' (a) contrary to the general Laws of  
Lit. 113. b. the Kingdom.

6 Co. 69.

8 Co. 62. & vide 2 Bulst. 206. 1 Rol. Rep. 46. (a) *Consuetudo ex certa Causa rationabili usitata privat communem Legem. Lit. Sect. 37.*

Co. Lit. 110. b. Time and Usage are essential Parts of a Custom, and therefore no  
(b) The Con- Custom is (b) allowable but such as has been used by Title of Prescrip-  
tinuance of tion, viz. Time out of Mind.  
an Usage

from the Reign of R. 1. which being the Time of a Limitation of a Writ of Right, is said to be a good Title of Prescription. Co. Lit. 113. But *Q.* for the Manner of pleading is, that *de Tempore cujus contrarium Memoria Hominum non existit, &c.* —That laying a Custom for 40 Years is naught, tho' it was objected that might have been for more Years, and so Time out of Mind. *Skin.* 108, 109. —That Customs may be Time out of Mind, tho' not Coeval. 1 *Salk.* 203.

46 E. 3. 16. Hence it is that tho' a Lord of a private Manor may have Waifs and  
Bro. *Estray.* Strays by Prescription, yet he cannot have the *bona Felonum & Fugitivorum*  
5 Co. 109. without Grant from the King, because no Man can prescribe for  
Co. Lit. 114. them, for every Prescription must be immemorial, and the Goods of Felons and Fugitives cannot be forfeited without Record, which presupposes the Memory of that Continuance.

## (B) What Persons are affected With or bound by a Custom.

Co. Lit. 114. THE King by his Prerogative can only make a Corporation, Confer-  
1 Rol. Abr. vator of the Peace, &c. therefore in these, or in other Things which  
566. (c) highly touch the King's Prerogative, no Title can be gained by Custom  
that exalts or Prescription, as Conuzance of Pleas, to have a Sanctuary, to make a  
itself above Corporation, Coroner, Conservators of the Peace, &c.  
the King's Prerogative is void. *Dav.* 33.

Co. Lit. 114. b. But Treasure Trove, Waifs, Estrays, Wreck, to hold Pleas, Court-  
Leets, Hundreds, Infangthef, Outfangthef, a Park, Warren, Royal  
Fishes, Fairs, Markets, Frankfoldage, Keeping of a Gail, Toll, &c. may  
be claimed by Prescription without any Matter of Record; and a County  
Palatine may be claimed by Prescription, and by Reason thereof *Bona*  
*Felonum, &c.* also a Corporation may be by Prescription.

Plow. 205. a. Also Customs that bind private Persons do not extend to the King;  
Co. Lit. 15. b. therefore if Lands in Gavelkind descend to the King and his Brother,  
*Raym.* 77. the King shall take one Moiety, and his Brother the other; but if the  
1 Sid. 158. King dies, his Moiety shall descend to his eldest Son, and not according to  
the Rules of Descent in Gavelkind, for the King was seised of his Moiety  
*Jure Coronæ*, therefore it shall attend the Crown, and consequently go to  
the eldest Son.

35 H. 6. 26. So the Custom of *London*, as to retaining Goods mortgaged till Satis-  
*Dav.* 33. b. faction be made of the Money lent on them, extends not to the King's  
1 Rol. Abr. 566. Jewels.

2 And. 152. So if a Man hath Toll or Wreck, or Strays by Prescription, this ex-  
*Dav.* 33. b. tends not to the King's Goods.

(d) Dr. and A Custom may extend to and give an (d) Infant a Power of doing  
Stud. 21. that, which by the Rules of the Common Law he could not do, as an  
5 H. 7. 41. Infant at the Age of 15 may make a (e) Feoffment of Lands of the Na-  
Fitz. Custom 9. ture

9 Co. 76. a. (e) By the Custom of a Town an Infant may bind himself Apprentice. 9 H. 6. 7, 8. Bro. Custom 63.

ture of (a) Gavelkind; but this like all other Customs is to be construed strictly, and in such Manner as that no Prejudice may accrue to the Infant thereby; and therefore such Feoffment must be for (b) valuable Consideration, must be made in (c) Person, and not by Attorney, cannot be with (d) Warranty, must be of Lands which (e) descended to him in Gavelkind, and not of Lands by Purchase, and must be of Lands in (f) Possession, not in Remainder or Reversion.

(a) Lamb. 624.  
(b) 1 And. 193.  
Lamb. 629.  
(c) Lamb. 628.  
(d) 1 Rol. Abr. 568.

(e) Bendl. 33. pl. 52. Lamb. 627. (f) Bendl. 33. pl. 52. Lamb. 627.

It is a good Custom in a Copyhold Manor, that a Feme Covert with or without the Consent of her Husband may devise her (g) Copyhold Land to her Husband, or whom she pleases.

Moor 123.  
pl. 268.  
Godb. 14,  
143.

3 L. eon. 81, 83. 2 Brownl. 218. (g) But of such a Custom as to Freehold Lands, Q. & vide 4 Co. 61. b. 1 And. 152. 1 Rol. Abr. 563. pl. 6.

**(C) Of such Customs as are against the Rules of the Common Law, yet not being unreasonable in themselves are good, and from the Conveniency of them bind in particular Places.**

Every Custom ought to appear to have had a reasonable Commencement, and that at first it was voluntarily agreed to for the better Promoting of Trade and Commerce, the Suppression of Fraud, the greater Security of Men in their Estates and Possessions, &c. and in such Cases tho' the Custom be contrary to the Common Law, or against the Interest of a particular Person, yet it shall be good.

Dav. 32. b.  
Vide of the Customs of Gavelkind, Borough-English, Copyholds, Regulation

of Corporations, Commons, Choosing Constables, Churchwardens, the several Head:

As a Custom that a Man, in ploughing his own Ground, may turn the Plough on the Ground of his Neighbour, for this is for the general Good, being in Favour of Husbandry and Tillage, altho' a particular Person receive Prejudice thereby.

21 E. 4. 28.  
Bro. Customs 51.  
1 Rol. Abr. 560. Dav. 32. b. S. C

So a Custom to dry Nets upon the Land of another, for this is in Favour of Fishing and Navigation.

So a Custom to build Bulwarks on the Lands of another for the Safety of the Kingdom is good.

Dav. 32. b.  
Dyer 60. b.

So is a Custom to pull down the Houses of another to prevent the Spreading of Fire.

Dav. 32. b.

It is a good Custom in a Manor, that the Homage have used yearly to choose two Surveyors, to take Care that corrupt Victuals are not sold within the Manor, and to destroy such as they find exposed to Sale there, for the Preservation of Mens Health is designed thereby, and it is at the Peril of the Surveyors if they destroy any Meat that is not so.

1 Mod. 202.  
Vaughton and Atwood.  
2 Mod. 56.  
S. C.

A Custom in *Ipswich* to choose yearly two Burgesses, who used yearly to make a Feast, and to fine those who refused to make a Feast, and to imprison them till paid, was allowed a good Custom, upon an *Habeas Corpus*, and the Prisoner remanded.

Cro. Fac. 555.  
Wallis's Case.

- 1 *Rol. Abr.* 560. It is a good Custom that every Man of the Town, that hath an House next adjoining, and abutting to the High Street, may sell all Merchandizes in his Shop within the said House in the Time of the Market, which is held in the High Street.  
But *vide* 8 *Co.* 127.
- 8 *Co.* 126. A Custom in *Exeter*, that every Woman taken in Adultery should be (a) whipped, is good.  
(a) That a Skimmington or Riding, where a Woman cuckolds her Husband, is a Custom against Law, *vide* 3 *Keb.* 578. *Raym.* 401. And note that such Riding has been held by *Holt*, C. J. a Libel, *vide* *Tit. Libel.*
- 30 *Aff. pl.* 47. A Custom, that a Feoffment by Tenant in Tail with Warranty shall not be a Discontinuance, is good, altho' this is against the (a) Rule and Maxim of the Common Law.  
(a) So that a Woman shall not have Dower where she received, during the Coverture, Part of the Money for the Sale of the Land. *Bro. Customs* 53. —So that a Widow who marries shall not have Dower. 1 *Rol. Abr.* 562. —But a Custom, that the Wife of a Tenant in Fee shall not have Dower, is void. *Dav.* 46. b. —So that the Wives of *Irish* Lords shall, during Coverture, have the sole Property of certain Goods, to dispose of them without the Assent of the Husband. *Dav.* 50. b. 1 *Rol. Abr.* 563.
- Dav.* 32. b. But every Custom which appears to have been unreasonable in (b) itself, as being against the Good of the Commonwealth, or Injurious to a Multitude, tho' Beneficial to a particular Person, or to owe its Commencement to the arbitrary Will and Oppression of a powerful Lord, and not to the voluntary Agreement of the Parties, is void; nor can any Custom against the Law of Reason is void, which was void in its Creation.  
*vide Moor* 588. *Bridg.* 11, 12. 1 *Leon* 217, 314. 3 *Leon* 41.
- Hob.* 329. A Custom within a Parish, that all Lambs fallen and bred upon one Tenement in the same Parish, though belonging to several Owners, shall be reckoned together as if but one Man's, and the Tenth so counted together paid for Tithes, is void and unreasonable; for by this Means it might happen that a Man might have but one Lamb, and that should be taken for Tithe, and he that had more should pay nothing.  
*Barker and Coker* adjudged.
- Skin.* 45. A Custom to elect a Supernumerary before any Vacancy, to be admitted upon the Death of the next Prebendary, is ridiculous and void.  
2 *Jon.* 199. S. C.
- 1 *Rol. Abr.* 560. A Custom, that no Commoner shall put his Cattle into the Land before the Lord, is void; for a Custom that leaves it to the arbitrary Will of the Lord, whether the Tenant should ever enjoy any Benefit by the Common, or not, can never be presumed to have had a reasonable Commencement.  
*Dav.* 32.
- Lit. Sect.* 46. So a Custom, that the Lord of the Manor shall detain a Distress taken upon the Demesnes 'till a Fine at his Will is paid for the Damage, is void.  
*Dav.* 33. a.
- Lit. Sect.* 209. A Custom that every Tenant of a Manor, that marries his Daughter without the Licence of the Lord, shall pay a Fine, is against Reason and void, for every (c) Freeman may marry his Daughter to whom he pleases.  
(c) But that every Tenant (though his Person be free) that hold in Bondage, the Freehold being in the Lord, shall pay such Fine, is good.  
*Co. Lit.* 140. a.
- Co. Lit.* 59. b. If the Lord of a Copyhold by Custom claims to have a Fine of the Copyholder, upon every Alteration of the Lord, be it by Alienation or otherwise, this is a void Custom as to the Alteration or Change of the Lord, by the Act of the Lord himself, for by such Means the Copyholders might be oppressed by the Multitude of Fines by the Act of the Lord.  
But for this *vide Tit. Copyhold.*

A Custom, that the Lord shall have Common in all the Lands of his Tenants for Life or Years lying Fresh, is void, for it is against Law that the Lessor shall have Common against his own Lease, because it is Part of the Thing demised; *aliter* of an Heriot, which is collateral. Palm. 211. White and Sayer, adjudged.

A Custom that the Lord may take for his Heriot (a) the Beast of a (b) Stranger, levant and couchant upon the Land of the Tenant, is not good. 1 Rol. Abr. 561. 2 And. 153.

the Custom was laid, that if the Tenant hath none, or the best Beast is esloined, the Lord has used to take the best Beast levant and couchant upon the Land. *Moor* 16. *N. Bendl.* 112. adjudged.— But that the Cattle of a Stranger may be distrained for an Heriot, but not seised, *vide N. Bendl.* 302. *pl.* 294. *Dals.* 61. *Ow.* 146. *March* 165. (b) A Custom that the Lord shall have the best Beast of every Person dying within his Manor, which is found there, is naught; for between the Lord and a Stranger it could have no lawful Commencement, though between the Lord and his Tenants it may be good. *Cro. Eliz.* 725. adjudged. 1 Rol. Abr. 266.

A Custom in a Town, for a Lord to enter into the (c) Lands of his Tenant till an Agreement made for the Arrears, when the Tenant ceases for two Years, is not good; for it is an ill Usage to oust a Man of his Inheritance without Action or Answer. 43 E. 3. 32. 2 Inst. 56. (c) But if this Custom had extend-

ed it self into many Towns it had been good. 43 E. 3. 32. 1 Rol. Abr. 559.

A Custom that the Lord of the Manor shall have 3 *l.* for every Pound Breach, of every Stranger, is not good; (d) but it is good against the Tenants of the Manor. 1 Rol. Abr. 561. Dav. 33. (d) So of a

Custom, that if a Tenant makes a Rescous, or drives his Cattle off the Land when the Lord comes to distrain, that he shall be amerced by the Homage, &c. *Godb.* 135.

As to particular Customs relating to the Proceedings in Inferior Courts, such as have prevailed Time out of Mind, and are in Furtherance of Justice, seem to be good; but such as are in Delay of Justice, and tend to Oppression and Injustice, and are against the general Rules of Law and Reason, have always been held void. 1 Rol. Abr. 564. Cro. Eliz. 185.

Hence it is that a Custom in an Inferior Court, that when any Man comes to the grand Distress in any Plea, and it is returned that he is distrained by his Goods, & *quod nihil habet ulterius per quod distringi potest*, that his Goods shall be delivered to the Plaintiff, finding Security, that if the Suit passes for the Defendant, that he shall have again his Goods; and that if it passes for the Plaintiff, that he shall have them, has been held good. 1 Rol. Abr. 564. in Maidston in Kent.

So a Custom in the County Palatine of Chester, that if Judgment be given in a base Court there, and thereupon a Writ of Error is brought before the Chief Justice there, and he reverses the first Judgment to give Costs to him at whose Suit it is reversed, is good. 1 Rol. Abr. 564.

So it is a good Custom in an Inferior Court, that in an Action of Debt, if the Defendant does not deny the Debt, but *Petit quod inquiratur de vero debito secundum consuetudinem*, that a Jury may be returned that shall try it, and if they find it to be a true Debt, that the Plaintiff shall have Judgment thereupon. 1 Rol. Abr. 564. Cro. Eliz. 894. 1 Rol. Rep. 193. 1 Mod. 96.

S. P. adjudged, and said by Hale, Ch. Just. that this Cause prevented a Suit in Chancery.

But a Custom in an Inferior Court, upon a Judgment in the same Precept, in Nature of a *Capias ad Satisfaciendum*, to give a Warrant to the Bailiff to take the Principal in Execution, if he may be found, and in his Default to take the Bail, is not good; for it is (e) against Law 1 Rol. Abr. 563. (e) For this to Reason a Custom in an

Inferior Court, which is not within the Statute of 32 H. 8. to grant a *Tales de circumstantibus*, is void. 1 Rol. Abr. 563, 564.— So to award a Capias in Debt before any Summons. 1 Rol. Abr. 563.

to take the Bail before a *Capias* returned against the Principal, and (a) a  
780. *Scire Facias* against the Bail.

(a) That the Custom of *London* to take the Bail without a *Scire Facias*, is void. *Cro. Car.* 561. *Palm.* 567. *Cro. Eliz.* 185. 2 *Leon.* 29.

A Custom in an Inferior Court to try Issues by six Jurors, is not good, though many Courts have used it, and many Judgments depend there-  
1 *Rol. Abr.* 564. upon.

*Tredinwick* and *Peryman* adjudged, in a Writ of Error upon a Judgment in *Bodmyn* in *Cornwall*. *Cro. Car.* 259. S. C. adjudged; and said by *Jones*, That although in some Parts of *Wales* there be such Trials by six only, it is by reason of the Statute of 34 *H. 8.* which appoints, that Trials may be by six only, where the Custom hath been so. 1 *Sid.* 233. S. P. *per Cur.*

A Custom in a Leet, that if the Petit Jury make any (b) false Pre-  
9 *H. 6.* 44. b. sentment, and it is found false by the Grand Inquest, that the Petit  
(b) Bur a Custom that Jury shall be amerced, is void; for this is against common Right, and  
if they con- Extortion.

ceal any Thing that ought to be presented, that they shall be amerced, is good. 9 *H. 6.* 44. 1 *Rol. Abr.* 560.

If there be a Custom in an Inferior Court, that if a Man brings an  
1 *Rol. Abr.* 564. Action against another there, and the Defendant appears and pleads to  
*Burges* and *Spark* ad- Issue, and at the Day of Trial, the Defendant being solemnly called,  
judged; and does not appear, nor find Pledges *qui eum manucapere voluerint*, to have  
such Judg- his Body from Court to Court, at every Court there after to be held, till  
ment given the Plea be determined, as he ought by the Custom; but in Contempt of  
in *Plymouth* the Court *recessit & defaultam fecit*; and Judgment is thereupon given;  
reversed ac- yet this is not a good Custom, but utterly unreasonable; but they  
cordingly. ought according to Law to take the Inquest by Default; for if he had  
appeared and staid in Prison without finding Pledges, yet they ought not  
to have given Judgment against him if he would have pleaded to  
Issue.

It is no good Custom in *Sandwich*, that if the Goods of a Freeman of  
*Moor* 603. *Sandwich* come into the Hands of a Freeman of *London*, that the Mayor  
pl. 834. of *Sandwich* shall write to the Mayor and Aldermen of *London*, to call  
*Paramour* and the Party before them, and take Order for the Restitution; and if they  
*Veral.* 2 *And.* 151. refuse, or return no Answer to the Mayor and Jurats, the Mayor of  
S. C. & *vide* *Sandwich* shall write *alias & pluries*, and after give Judgment of *Wither-*  
*Moor* 588. *nam* against the Mayor and Commonalty of *London*; which shall be sig-  
*Palm.* 56. nified to the Mayor of *London*; and if he make not Restitution in fifteen  
2 *Inst.* 204. Days, then those of *Sandwich* may retain the Body of any *Londoner*  
1 *Sid.* 355. that comes there, till Restitution.

A Custom in an Inferior Court, to give a Day to one that hath  
*Cro. Jac.* 357. adjudged. (c) made Default, is void and against Law.

(c) So a Cu-  
stom to give Judgment in a Personal Action upon four Defaults before Appearance, is void.  
*Style* 124.

(D) Where from the Benefits accruing from them they shall bind.

Where-ever the Party bound by a Custom has some Benefit by it, 6 Mod. 124. or the Party, who claims the Advantage of it, is at some Charge thereby, the Custom is good.

Hence it is, that a Custom that the Parson of the Parish should find a Bull and a Boar for the Use of the Parish, and in Consideration thereof should have the Tenth of the Increase, has been held good. Cro. Eliz. 569. Moor 555. 1 Rol. Abr. 559. S. C.

So a Custom, that whereas *J. S.* is seised in Fee of the Manor of *T.* and all the Tenements in the said Town are held of the said Manor, that he and all those, &c. have had Time out of Mind, &c. a Bakehouse, Parcel of the said Manor, maintained at their Charge, and that this Bakehouse was sufficient to bake Bread for all the Inhabitants, and for all Passengers through the said Town; and the Bread there baked had used, &c. to be sold at reasonable Prices, and that no other Person within the said Town had used to bake any Bread to sell to any Person; this is a good Custom, (a) though it restrains other Men to exercise their Trades within a certain Place, for this might have a reasonable Beginning to bind his own Tenants, as it only does. Cro. Eliz. 203. Sir George Farmer and Brook, adjudged. 1 Leon. 143. S. C. debated. Owen 67. S. C. adjudged. cont. 8 Co. 125. 3 Bulst. 61. 2 Bulst. 195. 1 Rol. Abr.

559. S. C. cited. (a) A Custom in *Winchester*, that none shall exercise a Trade there who is not Free of the City, or brought up Apprentice there; *Q.* if good. 1 Salk. 203. & vide 8 Co. *Wagoner's Case*.

A Custom, that every Inhabitant of an antient Messuage held of the Bishop in the City of *S.* have ground at the Bishop's Mill all their Grain spent in their Houses, and that the Bishops, in Consideration thereof, have Time out of Mind kept Servants to grind and carry, &c. is good, because mutual Considerations and mutual Actions will lie. 1 Rol. Abr. 561. But for this vide *F. N. B.* 271. Reg. 153. Hob. 189.

Moor 887. Style 421. 1 Rol. Abr. 559. 2 Bulst. 195, 196. Hard. 67. 1 Lev. 15. 1 Vent. 168. 2 Sand. 117. 2 Lev. 27. Carth. 193.

A Custom, that the Corporation of *Litchfield* have had a Market there Time out of Mind, &c. and that the Corporation ought to repair the Way to it, and to appoint a Bellman, that ought to sweep the Market-Place, and in Recompence thereof, the said Bellman, Time out of Mind, &c. from those that brought their Grain to the said Market, and untied their Sacks there to sell it, had used to take a Pint of Grain if it was but one Bushel or under, but if it was above a Bushel, then a Quart, to the Use of the said Corporation; this is a good Custom, for the Men that are charged by it have a reasonable Benefit thereby. 1 Rol. Abr. 561. Hill and Hawks. Moor 835. S. C. adjudged, and that the Custom was good, though the Corn was not sold, but brought in

to be sold. 2 Bulst. 201, 206. 1 Rol. Rep. 1, 2, 44, 46. S. C. adjudged.

It is no good Custom, that the City of *Norwich* hath Time out of Mind maintained a Key for unlading Goods brought up the River to the City, and that every Vessel passing through the River by the Key had paid a certain Sum; for the Vessels, that unlade not at the Key or other Place in the City, have no Benefit from the Maintenance of the Key. 1 Vent. 71. 1 Mod. 47. Hassart and Wills, S. C. that there would have been some

Reason for it, if it had appeared that they cleansed the River. 1 Sid. 454.

If a Lord of a Manor, which extends it self upon the Banks of Part of a River only, hath Time out of Mind maintained a Key for the Lading and Unlading of Goods, and kept a Bushel within the Manor for 2 Lev. 96, 97. Prideaux and Warrn.

Raym. 232. 1 Mod. 104. S. C. adjudged. the

the Measuring, and other Merchandizes, he cannot Prescribe *ratione inde* for a Bushel of Salt, of every Ship sailing in the River; for the Repairing the Key, and keeping a Bushel within the Manor, cannot warrant the taking of Toll out of the Manor, for Goods not brought to the Key within the Manor, though brought to another Place within the same River.

3 Lev. 37. It is a good Custom, that the Mayor and Commonalty of *London* have had of every Master of a Ship 8 *d. per Tun*, in the Name of Weighage, for every Tun of Cheefe brought from any Place in *England* to the Port of *London*; for the Liberty of bringing it into the Port, which is a Place of Safety, is a sufficient Consideration; and the Mayor and Commonalty have the View and Correction of the River *Thames*.

3 Lev. 424. Crisp and Bellwood. For keep- ing a Ferry- Boat. Carth. The Lord of a Manor may Prescribe to keep and repair a Wharf with- in the Manor, & *ratione inde* to have Toll of all Goods landed within the Manor, though not upon the Wharf; for the Landing upon the Soil is an Easement; and all the Lands in the Manor were the Lord's origi- nally, and this is in Nature of a (a) Toll Traverse.

192. (a) For this vide 2 *Roll. Abr.* 522.

3 Lev. 307. Simpson and Bithwood, ad- judged. It is a good Custom within a Manor adjoining to the Sea, that in Case of any Shipwreck of any Ship cast upon the Manor *inter fluxum & refluxum maris*, the Lord shall take Care of the Sick and Wounded, and Burial of the Dead, and keep the Goods there cast for the Use of the Proprietors; and in Consideration thereof, to have the best Anchor and Cable of the Ship; for though Charity obliges the Lord so to do, yet it is not unreasonable that he should have a Recompence of his Charity and Charge: But 2.

Hill. 54 Car. Bear and Ballingsbam, 3 Lev. 85. S. C. For where in Trover the Jury found a special Verdict, that within the Manor of *Beeching* in *Suffex*, adjoining upon the Sea, there was this Custom, That if any Ship navigating and floating upon the Sea should happen to strike upon the Land, Parcel or within the Manor, and should there happen to perish, or if a Ship so striking should happen to get off, that in both Cases the Lord of the said Manor used to have the best Anchor and Cable belonging to the said Ship; and the Custom was held un- reasonable in both Cases; for there is no Consideration to ground such a Custom upon; for if there be a Trespass upon the Lord's Soil, it is in- voluntary, and by the Act of God, where it is by Strefs of Weather; and therefore not to be punished as a voluntary Trespass; as if the House of my Tenant for Years be burnt with Lightning, I shall never have an Action of Waste against him, for it is the Act of God, which does no Man an Injury; but besides, it is very unreasonable for so (b) small a Damage done to the Lord, as striking upon his Soil, that he should have so great a Satisfaction as the best Cable and Anchor.

(b) That a Custom al- ledged by a Lord, that whoever broke his Pound should pay him 3 *l.* is a void Custom as to Strangers; for this, among other Reasons, because there is no Proportion betwixt the Damage and the Recompence. 11 *H.* 7. 13, 14. 21 *H.* 7. 40.—But where a Custom alledged in *Bucks*, That if any Swan cometh upon the Land of any Man adjoining upon the *Thames*, or upon any Water running into the *Thames*, and there lays and hatches Cignets, that the Owner of the Land shall have one, was held a good Custom; and yet the Damage which the Owner of the Land sustains is but very small. 2 *R.* 3. 15, 16. 7 *Co.* in the Case of Swans.

Carth. 557. Vinkinston v. Edden, ad- judged. 5 *Mod.* 359. 1 *Salk.* 248. S. C. By special Verdict it was found, that by a Custom in *Newcastle*, Time out of Mind, &c. a Toll of five Pence for every Chaldron of Coals there Shipped off, was due to the Corporation, in Consideration of their Charge in maintaining the Port, which they were bound to do, and had done Time out of Mind; and that the Custom was to distrain (for Non-pay- ment of this Duty) any Goods of the Owner of such Ships, which were distrainable by Law; and it was held, That the Charge of maintaining a

Port

Port was a sufficient Consideration, and that the finding that the Corporation are bound to repair, &c. was sufficient, without finding that it was then in Repair.

(E) Where from the Certainty or Uncertainty of them they shall be deemed good or void.

EVERY Custom ought to be certain, or such as may be reduced to a Certainty, for an uncertain Thing cannot be supposed to have had a reasonable Commencement; also the Uncertainty of a Custom destroys the Supposition of its Continuance and Duration Time out of Mind.

Hence it is, that a Custom that when an Infant is of such an Age that he can count Twelve Pence, or measure an Ell of Cloth, that he may make a Feoffment, is void for the Uncertainty.

and said, that such Custom is not good, but that it ought to be at a certain Age, that it may appear to be an Age of Discretion.

So a Custom, that the Tenant of the Manor who first comes to such a Place, &c. shall have all the Windfalls there, is void for Uncertainty.

So of the Custom of *Tannistry* in *Ireland*, which was, That the Lands of that Nature of which a Man died seised, should descend *Seniori & dignissimo viro Sanguinis & Cognominis* of him that died so seised; and it was held void, both for the Uncertainty of the Person and the Estate.

(F) How to be construed, and to what Things a Custom shall be said to extend.

EVERY particular Custom, that is derogatory from the Common Law, is to be construed strictly, because as far as the particular Custom hath not derogated from the Law, the general Custom of the whole Kingdom ought to prevail; and we are not to presume that the particular Custom goes further than by notorious Facts may appear.

If the Inhabitants upon a Common have used Time out of Mind, &c. to dig Clay in the said Common of their Lord, for the Reparation of their Houses standing upon the said Common, and a Stranger digs Clay in the Common, the Inhabitants cannot take this Clay from him, for this is not (a) within their Custom.

Inhabitants have used to have Common to their Houses, this extends not to a new House.

If the Custom of a Manor be, That if any Copyholder in Fee surrenders out of Court, and he to whose Use it is surrendered, does not come in at the Court to take his Copyhold after three Proclamations made, that then the Lord may seise the Copyhold as forfeited; and a Copyholder in Fee surrenders to the Use of another for Life, the Remainder over in Fee, and the Tenant for Life does not come into Court to take his Copyhold after three Proclamations made, according to Custom, upon which the Lord seises the Copyhold as forfeited; and after *Cestui que Use* for Life dies; he in the Remainder shall not be bound by

the not coming in of the Lessee; for the Custom being in Destruction of an Estate shall be taken strictly, and shall be intended of Tenant in Fee in Possession, and not of him in Remainder, as in this Case.

2 Leon. 109.  
2 Leon. 208.  
S. C. cited  
to have been  
adjudged,  
because the  
Custom ex-  
tended only  
If there be a Custom within a Manor, that if a Man takes to Wife any Customary Tenant of the Manor, and has Issue, and overlives his Wife, he shall be Tenant by the Curtesy; and a Man marries one, to whom during the Coverture a Customary Tenement descends, and has Issue by her, and she dies, yet he shall not be Tenant by the Curtesy.

Cro. Eliz. 803.  
adjudged.  
If there be a Custom in *London*, that none ought to intermeddle with the Art of a Weaver there, but only those who are Free of the Guild, if a Stranger receives Silk in *London*, and carries it to *Hackney*, and weaves it there, and then brings it back again to *London*, and receives his Pay for it, this is not any Intermeddling in *London* against the Custom, though the Contract was made in *London*.

Style 409.  
debated, but  
no Resolu-  
tion; & vide  
1 Rol. Abr.  
609.  
If there be a Custom in the Town of *Newcastle*, That the Owners of Houses there, but not Tenants in Tail, may devise them by Parol, and a Man is seised of an House there in Tail, Remainder to himself in Fee-simple, he may devise the Remainder; for the Word Owner is general, and comprehends all Ownerships.

Raym. 58.  
Baker and  
Berisford.  
If there be a Custom within a Manor, that the Wife shall be endowed of the Moiety of all such Copyhold Lands as her Husband was seised of, and a Copyholder dies, and his Wife is endowed of a Moiety, and his Son and Heir having the other Moiety dies, the Wife of the Son shall be endowed of the Moiety of this Moiety; for this is directly within the Custom.

Cro. Eliz. 783.  
1 Rol. Abr.  
569.  
If there be a Custom within a Town to have 2 *d.* for every Hide of every Sheep, Cow, or Ox, that is killed or sold within the said Town, and for Non-payment thereof to seise the Hides, &c. the Party that is to have the 2 *d.* cannot by this Custom justify the Tanning the Hides and converting them into Leather.

### (G) Custom, how destroyed.

Co. Lit. 114. b. **A** Title gained by Prescription or Custom cannot be lost by Interruption of Possession ten or twenty Years, unless there be an Interruption of the Right, as by Unity of Possession of Rent or Common, and the Land charged therewith of an Estate equally high and perdurable in both.

Dals. 23.  
1 Sid. 138.  
Style 476.  
If Gavelkind Lands are held in Socage, and the Tenure is after changed into Knight's Service, yet the Custom is not altered, for that goes with the Land, and not with the Tenure.

Raym. 59,  
76, 77.  
1 Sid. 77,  
135.  
1 Lev. 79.  
2 Keb. 288.  
Hard. 325.  
Cotton and  
Wiseman.  
Lands in *Kent* were disgavelled by 31 H. 8. and a Private Act made 2 & 3 E. 6. to all Intents, Constructions and Purposes whatsoever, and that they should descend as Lands at Common Law, any Custom to the contrary notwithstanding; and the Question was, Whether these Lands lost by these Statutes all their other Qualities or Customs belonging to Gavelkind, as well as their Partibility; and it was resolved that they lose only their Partibility.

For the Reasons hereof, vide Tit. *Gavelkind*.

If Lands of the Nature of Gavelkind, or Borough English, escheat to the Crown, and be enjoyed in several Descents, and are afterwards granted out by the Crown in Knight's Service, yet they descend in Gavelkind or Borough English; for the Law of those Places cannot be controlled by the King's Charter, or altered without an Act of Parliament.

(H) Of the Manner of alledging and pleading a Custom.

A Custom of devising Lands Borough English or Gavelkind may be alledged in a City, Borough or Manor, but not in an Upland Town, that is neither City nor Borough; but a Custom to have a Way to the Church, and to make By-Laws for the Reparation of the Church, and well ordering of the Commons, and such like Things, may be alledged in an upland Town, that is neither City nor Borough.

*Co. Lit. 110 b*  
But as to the Manner of laying a Custom, and the Difference between alledg-

ing a Thing by way of Custom, or by way of Prescription, *vide 6 Co. 60. Hob. 113. Cro. Eliz. 441. Poph. 201. Style 477. 1 Lev. 176. 1 Vent. 386. 3 Lev. 160. Carth. 192. 4 Mod. 342. 2 Lutw. 1317.*

A Custom for a Way was laid *quod talis habetur consuetudo quod quilibet inhabitans haberet, &c.* and the Court held it naught, for it should be laid by way of Fact triable, *viz. tempore cujus contrarium, &c. usi fuerunt habere.*

*1 Sid. 237. 1 Keb. 836.*

The Law takes Notice of the (a) Customs of Gavelkind and Borough English, and therefore it is sufficient to alledge generally, that the Lands are of the Nature of Gavelkind, &c. But other private Customs must be set forth in Pleading, that the Judges may be apprized of them, and where they obtain, and so give their Decisions with a proper regard to them.

*Co. Lit. 175. b.*  
(a) But as to such Customs as are no Part thereof, but meerly collateral, they must be

shewed in Pleading, as that the Lands are devisable. *1 Lev. 80. Raym. 77. 1 Sid. 77, 138. Cro. Car. 562.*—So if a Man would intitle himself to be Tenant by the Curtesy, without having Issue, or a Woman to have Dower of a Moiety, it ought to be shewed specially, that Time out of Mind, &c.

One Prescription or Custom may be pleaded against another, where they are not inconsistent, but a Prescription pleaded against another is not good without a Traverse.

*Godb. 183. 2 Mod. 104.*  
But for this *vide 1 Rol.*

*Abr. 558, 565. Yelv. 215. 1 Bull. 115. 8 Co. 127. Cro. Car. 432. 1 Jones 375.*

If one Prescribes to have a Way over the Land of B. to his Freehold, B. cannot Prescribe to stop it.

*9 Co. 59.*

## Customs of London.

8 Co. 127.

(a) *Magna  
Charta, cap. 2.  
7 Rich. 2, &c.*

**T**HE antient City of *London* being the Metropolis and chief Town for Trade and Commerce within the Kingdom, it was necessary that it should have certain Customs and Privileges for its better Government; which though derogatory from the general Law of the Realm, yet being for the Benefit of the Citizens, and for the Advantage of those who Trade to, and therefrom, have not only been allowed good by the Judgments and Resolutions in the Superior Courts, but (a) have also been confirmed by several Acts of Parliament.

As these Customs are of various and different Kinds, I shall consider them under the following Division,

(A) Of the Customs of London in general.

(B) Of the Custom of London in respect to Orphans.

(C) Of the Custom of London in respect to a freeman's Estate: And herein,

1. What shall be esteemed such an Estate as will be subject to the Custom, and what Disposition a Freeman may make thereof.
2. Of the Children's Part, and herein of Survivorship, Advancement, and bringing into Hotchpot.
3. Of the Wife's Part, and what shall bar her thereof.
4. Of the Legatory, or dead Man's Share.

(D) Of the Custom of London, as it relates to feme Coberts.

(E) As it relates to Masters and Apprentices.

(F) As it relates to Landlords and Tenants.

(G) Of the Customs of London which are in furtherance of Justice, and for the more speedy Recovery of Debts.

(H) Of the Custom of Foreign Attachment: And herein,

1. Of the Nature of the Debt or Duty which may be attached.
2. In whose Hands, and at what Time the Attachment may be made.
3. Of the Form of the Proceedings in a Foreign Attachment.

(A) Of the Customs of London in general.

IF a Freeman forestalls Fish coming to a Market within the City, and upon Complaint to the Court of Aldermen, he appears there and confesses the Fact, and they order that he shall desist, and he will not promise to obey, &c. they may (a) commit him until he signifies to the Court that he will conform; and this is a good Custom.

1 Vent. 115.  
The City of London, and Coates, adjudged.  
(a) Custom to commit

for refusing to serve on the Livery, good. 2 Lev. 200. Raym. 447. 1 Mod. 10. 5 Mod. 156, 319.— So to Fine and Imprison for opprobrious Words spoke of an Alderman. 1 Vent. 327. 1 Lev. 200. But vide Cro. Eliz. 689. and 2 Salk. 425, 426. Farell. 2S.—But a Custom to Disfranchise for contemptuous Words spoken of an Alderman, is void. 2 Lev. 200. 2 Salk. 426.— To imprison for disturbing the Election of a Warden of a Company, and for not promising not to disturb again. Style 7S dubitatur.—To imprison until he takes the Oath of an Alderman of London, a good Custom. Marb 179.

By the Custom of London, a Freeman or Citizen might, even before the Statute of Wills, devise his Lands and Tenements, of which he was seised in Fee-simple, to whom he pleased, and may at this Time devise the same in Mortmain, notwithstanding the Statute of Mortmain, &c.

1 Rol. Abr. 556. Several Cases to this Purpose.  
Moor 136.  
S Co. 127.  
S. P.

By the Custom of London, no Attaint lies for a false Verdict given in London.

7 H. 6. 32. b.  
1 Rol. Abr. 557. S. C.

A Citizen of London, upon an Appeal brought by him, shall not be obliged to wage Battle.

S. P. C. 180.  
Letter C.  
Fitz. Coron. 411.

It is a good Custom in London, that the Mayor of London may take Recognizances of any Persons, being of full Age, or Women unmarried, (b) for he is a Judge of Record, although the Debt was contracted out of London.

1 Rol. Abr. 557. & vide Moor 871.  
Chamberlain

and Thorp; but vide Cro. Eliz. 186. 1 Leon. 130. S. P. dubitatur. (b) And the Courts Above will take Notice thereof. 1 Leon. 284.

It is a good Custom in London, that they, Time out of Mind, have had the (c) measuring of Coals *intra Portum London*, which (d) extends from Stanes Bridge to London Bridge, and from thence to Gravesend, and from thence to Tenland and Tendale.

1 Rol. Abr. 557. (c) A Custom that all Foreigners shall

Weigh at the City Beam, good. 1 Lev. 14, 15. 6 Mod. 123.—And a By-Law founded on the Custom of London, which enables them, &c. That no Freeman shall, under a certain Penalty, sell his Goods unless weighed at the City Beam, is good. 1 Salk. 341, 352. 5 Mod. 156. 6 Mod. 177. (d) For this vide 4 Inst. 250. 1 Sid. 148.

By the Custom of London Whores are to be Carted, and therefore if a Person calls a Woman (e) Whore (f) in London, an Action on the Case lies in respect of the Punishment they are subject to by the Custom; but the Party (g) cannot be proceeded against in the Spiritual Court for Defamation; for that would be punishing him twice for the same Offence.

1 Rol. Abr. 550.  
(e) Note, That it hath been often adjudged of late, that calling one

Bastard, or Son of a Whore, or calling the Husband Cuckold, was, by Implication, calling the Mother or Wife a Whore. (f) If laid in London, when spoke elsewhere, the Defendant may plead the Words were spoke at, &c. and Traverse the speaking in London; and if the Plea is refused, may have a Prohibition. 1 Lev. 116.—That the Action must be brought in the Courts in London. Cartk. 75. (g) Whether in such Case a Prohibition must be granted after Sentence. Cartk. 213.

There (a) is a Custom in *London*, that when a Chaplain keeps any Woman in his Chamber suspiciously, a Man may come to his Chamber with the Beadle of the Ward, and enter the Chamber and search.

(a) The Custom of *London*, That if a Villain abides in *London* for a Year and a Day, that he shall not be taken nor put out by Writ *de nativo habendo*, nor by any Process thereupon issuing, is good. 7 H. 6. 32. 8 H. 6. 3. 1 Rol. Abr. 557. S. C. Moor 2. pl. 4. S. P. adjudged.

By the Custom of *London*, if a Man commit a Horse to an Hostler, and he eat out the Price of his Head, the Hostler (b) may take him as his own, upon the reasonable Appraisement of four of his Neighbours; which is a Custom arising from the Abundance of Traffick with Strangers;

(b) But if a Man leaves several Horses with an Inn-keeper in *London*, and takes them all away except one, the Inn-keeper cannot retain the Horse so left till he is satisfied for the keeping of the other Horses, unless there was an Agreement to that Purpose. 1 Bulst. 207.—So if A. commit the Horse of B. to an Hostler in *London*, and he eat out his Head, yet cannot the Hostler sell him; for all Customs being derogatory to the Common Law, are to be taken strictly; and there is no Custom of *London* that hath gone so far as this Case, to authorize one Man to sell and convey the Property of another. 2 Rol. Abr. 85.

(c) *Cro. Car.* 128. It was (c) antiently insisted upon, that by Custom all Indictments and Proceedings for any Cause, except Felony, should be tried and determined in *London*, and not elsewhere; but (d) it seems to be now admitted, that a *Certiorari* lies to remove any Indictment from *London*; but (e) it is said, that by the (f) City Charters, the Tenor of the Indictment only shall be removed, and not the Indictment it self.

(d) *Raym.* 74. 3 *Mod.* 230. *Hard.* 409. 6 *Mod.* 246. & vide 5 & 6 *W. & M.* cap. 11. (e) 1 *Keb.* 252. 1 *Sid.* 155. (f) That by the City Charters the Mayor shall be a Principal in every Commission. 3 *Inst.* 72. 2 *Rich.* 3. 11. a.

Besides these and several other Customs, there is a general Custom which is usually set forth by the City, when any of their Proceedings is called in Question, viz. That (g) if any of their Customs heretofore used prove hard or defective, or if any Thing newly arising within the City where Remedy was not before provided, should need Amendment, in either of these Cases, the Mayor and Aldermen for the Time being, with the Assent of the Commonalty, may ordain fit Remedy thereunto, so as such Ordinance be profitable to the King, for the Profit of the Citizens, and agreeable to Reason.

(g) What Ordinances, By-Laws, &c. made by Virtue of this Custom, vide 8 Co. 126. *Waggoner's Case.* *Skin.* 371, &c.—That none but a Freeman shall exercise a Trade, and that a Freeman bred up to one Trade, may exercise another of the same Nature, vide *Cro. Car.* 516. 1 *Rol. Rep.* 10. 1 *Saund.* 311. 1 *Sid.* 427. 4 *Mod.* 145. Vide Tit. By Laws.

## (B) Of the Custom of London in respect to Orphans.

IF any Freeman or Freewoman die, leaving Orphans under Age unmarried, the Custody of their Bodies and (b) Goods, by the Custom of *London*, belongs to the City, and their Executors or Administrators must exhibit true Inventories of all their Goods and Chattels, and must (i) bind themselves to the (k) Chamberlain to the Use of the Orphans,

(b) Though given them as a Legacy by other Freemen.

Or in a Foreign County. 1 *Vent.* 180. (i) Although they have already acknowledged a Judgment at Common Law for the Securing, &c. 1 *Rol. Abr.* 550. *Hutt.* 30. S. P.—So although they have given Security in the Prerogative Court, yet may they be compelled to give new Security to the Chamber of *London*. 1 *Rol. Abr.* 550. (k) For which Purpose he is a Corporation, and such Securities

Orphans, to Account for the same upon Oath; which if they refuse to do, they may be committed; also (a) if the Ecclesiastical Court will compel them to Account there, against this Custom, a Prohibition lies. curities shall go to his Successor, who may sue the same. *Civ. Eliz.* 464. (*a*) 4 *Inst.* 249. S. P. But an Infant may waive the Benefit of the Court of Orphans, and file a Bill against one for the Discovery of the Personal Estate. *March* 107.

If a Freeman of *London* leaves *London*, and resides in the Country, yet his Children, though born out of *London*, shall be Orphans, and subject to this Custom. 1 *Roll. Rep.* 516.  
1 *Sid.* 250.  
1 *Vent.* 180. 1 *Mod.* 80. 2 *Vern.* 110. S. P.

If such Orphan is taken out of the Custody of such Person, to whom by them committed, they may imprison the Offender till he produces the Infant, or is delivered by Course of Law. 1 *Sid.* 250.  
*Raym.* 116.  
1 *Lev.* 162.  
*Et vide* 1 *Mod.* 80. 1 *Lev.* 320.

Also by this Custom, if (b) any one without the Consent of the Court of Aldermen, marry such Orphan (c) under the Age of twenty-one, though out of the City, they may fine and imprison him for Non-payment thereof; for if the Custom should not extend to Marriages out of the City, their Power would be but in vain. 1 *Lev.* 32.  
The *King* and *Hirwood.*  
1 *Vent.* 178.  
1 *Mod.* 79.  
S. C.  
(b) Tho' not a Freeman. 1 *Vent.* 178 1 *Mod.* 79. (c) Whether the Marriage was before or after twenty-one, the Husband is fineable, and may be committed if he had not the Licence of the Court of Orphans. *Preced. Chan.* 537, 538.

The Orphans Money in the Chamber of *London* is not a meer depositum, but in Nature of a Debt, or Chose in Action, which does not vest in the Husband by the Marriage of such Orphan, nor can he bequeath it by Will. 2 *Vent.* 340.  
*Preced. Chan.* 209. S. P. adjudged.

### (C) Of the Custom of London in respect to a Freeman's Estate: And herein,

1. What shall be esteemed such an Estate as will be subject to the Custom, and what Disposition a Freeman may make thereof.

HERE it is necessary in the first place to take Notice, that by the Custom of *London*, if a Freeman of *London* dies, leaving a Widow and Children, his Personal Estate, after his Debts paid, and the Customary Allowance for his Funeral, and the Widow's Chamber being first deducted thereout, is by the Custom of the said City to be divided into three equal Parts, and disposed of as follows, viz. One third Part to the Widow, another third Part to the Children unadvanced by him in his Life-time, and the other third Part such Freeman may dispose of by his Will as he pleases; but if a Freeman of *London* has no Wife, but has Children, the Half of his Personal Estate belongs to his Children, and the other Half the Freeman may dispose of; so if the Freeman has a Wife and no Children, half of his Personal Estate belongs to his Wife, and the other Half he may dispose of. *F. N. B.* 122.  
2 *Inst.* 33.  
*Lit. Rep.* 324.  
2 *Lev.* 130.  
1 *Chan. Ca.* 285.  
*Hell.* 158.  
*Godb.* 49.  
*Lat. b.* 137.  
2 *Leon.* 29.  
*Civ. Eliz.* 189.  
*Abr. Eq.* 150.  
2 *Salk.* 426.

This Custom extends only to the Personal Estate of the Freeman, for when it first began, the Citizens of *London* had no regard at all to a Real Estate, for they did not suppose any Freeman of *London* would purchase such

such Estate, but would employ his whole Fortune and Stock in Trade, for the Benefit of Commerce.

<sup>1</sup> *Chan. Ca.* 285. But if a Freeman of *London* has a Mortgage in Fee, this shall be counted Part of his Personal Estate, and will be subject to the Custom.

<sup>2</sup> *Chan. Ca.* 160. But a Lease for Years waiting on the Inheritance shall not be reckoned Part of a Freeman's Personal Estate, but shall, together with the In-

<sup>1</sup> *Vern.* 2, 104. heritance, descend to the Heir at Law.

<sup>1</sup> *Vern.* 345. Also if a Freeman of *London* agrees to lay out Money in the Purchase of Lands, and to settle the same on his eldest Son, &c. this shall not be reckoned Part of the Freeman's Personal Estate.

<sup>2</sup> *Chan. Ca.* 118. S. C.

<sup>2</sup> *Vern.* 665. S. P. adjudged; for by the Agreement the Money is to be looked upon as Lands in Equity, and therefore not subject to the Custom.

*Abr. E.* 151. between Grice and Gooding decreed.

On a Marriage of *B.*'s Daughter with *A.* a Freeman of *London*, *B.* the Father, settles a Term for Years in Trust, that *A.* the Husband, shall receive the Rents and Profits till such Time as *D.* and *E.* or the Survivor of them should otherwise appoint, and then such Person as they should appoint; and for want of such Appointment, for such Persons as the said *A.* by Will should appoint; and for want of such Appointment, then in Trust for the Executors and Administrators of *A.* The Trustees having made no Appointment, the Question was, Whether this Term should go according to that Appointment, or be looked on as Part of *A.*'s Personal Estate, who was a Freeman of *London*, and so go according to the Custom; and the Court was of Opinion, That it was not to be looked upon as Part of *A.*'s Personal Estate, because it was never in him, but was settled by his Wife's Father, and therefore not subject to the Custom.

<sup>1</sup> *Chan. Ca.* 310. per Lord Chancellor.

If a Freeman of *London* is made both Executor and residuary Legatee, and he dies before he has made his Election, whether he will take as Executor or Legatee, yet the Legacy must be considered as such, and will be subject to the Custom of *London*.

<sup>1</sup> *Lev.* 227.

<sup>2</sup> *Vern.* 277.

<sup>1</sup> *Chan. Ca.* 199.

(a) It is said

that this Cu-

stom of the

City of *London*, that a Man could not give away any Part of his Estate without the Consent of his Children, is the Remains of the old Common Law, and is so taken Notice of in *Bracton*; but it being found extremely inconvenient and hard, it was by the Tacit Consent of the whole Nation abrogated and grown into Disuse; for what Law has been ever made to repeal it? but in the City of *London*, where the Mayor and Aldermen had the Care of Orphans, they by that sole Authority and Power had preserved this Part of the Common Law in *London*, which is disproved every where else. *Preced. Cham.* 596. (b) But for this vide *2 Lev.* 130. *2 Vern.* 98, 202, 612, 685. *1 Lev.* 227. *Preced. Cham.* 17, 50. *Abr. Eq.* 152.

But now by the *11 Geo. 1. cap. 18.* it is enacted, " That it shall and  
 " may be lawful to and for all and every Person and Persons, who shall  
 " at any Time from and after the first Day of *June*, 1725. be made or  
 " become Free of *London*, and also to and for all and every Person and  
 " Persons, who are already Free of the said City, and on the said first  
 " Day of *June* 1725. shall be unmarried, and not have Issue by any former  
 " Marriage, to give, devise, will and dispose of his and their Personal  
 " Estate and Estates, to such Person and Persons, and to such Use  
 " and Uses, as he or they shall think fit.

" Provided nevertheless, That in Case any Person, who shall at any  
 " Time or Times from and after the said first Day of *June* 1725. be-  
 " come Free of the said City, and any Person or Persons who are al-  
 " ready Free of the said City, and on the said first Day of *June* 1725.  
 " shall be unmarried, and not have Issue by any former Marriage, hath  
 " agreed, or shall agree by any Writing under his Hand, upon or in Con-

" sideration

“ fideration of his Marriage, or otherwise, that his Personal Estate shall  
 “ be subject to, or to be distributed, or distributable, according to the  
 “ Custom of the City of *London*; or in Case any Person so Free, or be-  
 “ coming Free as aforesaid, shall die intestate, in every such Case, the  
 “ Personal Estate of such Person so making such Agreement, or so  
 “ dying intestate, shall be subject to, and be distributed and distribu-  
 “ table according to the Custom of the said City; any Thing herein con-  
 “ tained to the contrary in any wise notwithstanding.

2. Of the Children's Part, and herein of Survivorship,  
 Advancement, and bringing into Hotchpot.

It has been already observed, That the Children of a Freeman of *Lon-*  
*don*, are intitled to the third Part of his Personal Estate, in Case he dies  
 leaving a Wife, and to a Moiety in Case he dies leaving no Wife, but  
 (a) this Custom does not extend to Grandchildren; and therefore if a (a) 2 *Salk.*  
 Freeman of *London* has two Sons, and the eldest dies, leaving a Son, 426.  
 the Grand-child, though in Law a Representative of the Son, shall have <sup>1</sup> *Vern.* 397.  
 no Part by the Custom. S. P.

But a Posthumous Child shall come in with the rest of the Children *Abr. Eq.* 154,  
 for a Customary Share of a Freeman of *London's* Personal Estate.

If a City Orphan dies before twenty-one, his Orphanage Part survives  
 to the other Orphans, and he can make (b) no Disposition (c) by Will (b) 2 *Salk.*  
 to contradict it; but if he dies after twenty-one, at which Time he 426. *Preced.*  
 might by Will have disposed of it, there, though he die intestate, it *Chan.* 207.  
 shall go according to the Statute of Distributions, between his Mother So certified  
 and surviving Brothers and Sisters. by the Re-  
 corder.

*Preced Chan.*  
 537. S. P.—2 *Vern.* 559. S. P. Although he devises it away at the Age of seventeen. (c) But if a  
 Man marries an Orphan, who dies under twenty-one, her Orphanage Part shall not survive to the  
 other Children, but shall go to the Husband. <sup>1</sup> *Vern.* 88. But *vide Preced. Chan.* 537. *cont.*

But if a Freeman of *London* dies, leaving two Daughters and a Wife, *Abr. Eq.* 156.  
 and one of the Daughters dies before twenty-one, though after a Division *Loeffes* and  
 and Partition of the Personal Estate, yet the surviving Sister shall have *Leuwen.*  
 the Whole of the Orphanage Part.

But this Custom of Survivorship holds only with respect to the Or- *Preced. Chan.*  
 phanage Part belonging to such Child; and therefore if he by Survivor- 537.  
 ship hath the Part of any other Brother or Sister, such Part shall go ac-  
 cording to the Statute of Distributions, or may be disposed of by him  
 by Will before the Age of twenty-one.

If the Daughter of a Citizen of *London* marries in his Life-time, <sup>1</sup> *Vern.* 354.  
 against his Consent, unless the Father be reconciled to her before his Said by Lord  
 Death, she shall not have her Orphanage Share of his Personal Estate; Chancellor,  
 and it would be unreasonable to take the Custom to be otherwise.

By the Laws and Customs of the City of *London*, if any Freeman's *Abr. Eq.* 154,  
 Child, Male or Female, be married in the Life-time of his or her Father, <sup>1</sup> 55. Certi-  
 by his Consent, and not fully advanced to his or her full Part or Portion fied accord-  
 of his or her Father's Personal or Customary Estate, as he shall be worth ingly in the  
 at the Time of his Decease, then every such Freeman's Child so mar- *Case of Cha. e*  
 ried as aforesaid, shall be excluded and debarred from having any further *and Box.*  
 Part or Portion of his or their said Father's Personal or Customary E- <sup>1</sup> *Vern.* 61,  
 state, to be had at the Time of his Decease, except such Father, by his 89, 216.  
 Last Will and Testament, or some (d) other Writing by him written <sup>1</sup> *Salk.* 426.  
 and signed with his Name or Mark, shall declare and express the Value S. P.  
 of such Advancement; and then every such Child, after the Decease of *Preced. Chan.*  
 (d) Where 269.

and his Wife, who was a City Orphan, in Consideration of 100 *l.* executed a Release of their Cu-  
 stomary Share to the Father, and it was held, That they were barred from demanding any further  
 Share, and that this Release was no Writing under the Father's Hand signifying the Advancement.  
*Preced. Chan.* 594.

his or her said Father, producing such Will or other Writing, and bringing such Portion so had of his or her Father, or the Value thereof into Hotchpot, shall have as much as will make up the same a full Child's Part or Portion of the Customary Estate, his or her said Father had at the Time of his Decease; notwithstanding such Father shall by any Writing under his Hand and Seal declare that such Child was by him fully advanced.

*Abr. Eq.* 155.  
*Bright and Smith* decreed.  
(a) Where the Father by his Will declared that he had given 1000 *l.* to one of his Children, 1000 *l.* to another, &c.

A Freeman of *London* having advanced his Daughter with a Portion, and intending to exclude her from any further Share (on some Displeasure taken against her) made his Will, and thereby recites, that he had advanced her with 300 *l.* and (a) upwards, gives her 5 *s.* and no more, and died; yet after his Death, the Daughter on a Bill brought to have the said 300 *l.* made up a Moiety of his Estate (he having no other Child, and the Custom not extending to Grand-children) had a Decree accordingly; for the Words, *and upwards*, are *certum in incerto* and not to be regarded; though it was objected it might be 1000 *l.* or 2000 *l.* or any other Sum above 300 *l.*

*in full of their Orphanage Part by the Custom; such Declaration is sufficient to let them in to their full Customary Shares, on bringing these Sums into Hotchpot; but it seems that the Parties concerned are not so far concluded by this Declaration, but may give in Evidence that more was received by the Children than thus expressed. Preced. Chan. 470, 471.*

1 *Chan. Ca.* 160.

A (b) Settlement of a (c) Real Estate on a Child, is no Advancement, nor to be brought into Hotchpot.

(b) A Devise of the Real Estate to a Child, does not bar such Child of the Customary Share. 2 *Vern.* 753.  
(c) Or Money agreed to be laid out in the Purchase of Lands. 1 *Vern.* 345. 2 *Chan. Ca.* 118. *Abr. Eq.* 153.

*Abr. Eq.* 250.  
*Feaf and Feaf.*

If upon a Marriage Treaty *A.* a Freeman of *London*, covenants to leave his Wife 2000 *l.* at his Death, 2000 *l.* to his eldest Son, and 1000 *l.* a-piece to his younger Children, and dies, leaving several younger Children, the 1000 *l.* a-piece to the younger Children being due only by Covenant, is a Debt on the Personal Estate, and not being to be paid till after the Father's Death, is no Provision or Advancement within the Custom of *London*, to bar them of their Customary or Distributory Shares.

1 *Vern.* 345.  
2 *Vern.* 281.  
2 *Salk.* 426.  
S. P.

If a Freeman of *London* advances a Child in Part, by a Portion which is to be brought into Hotchpot, such Portion or Advancement must be brought into the Orphanage Part only.

2 *Vern.* 234,  
630. and  
2 *Vern.* 754.  
S. P. For if

And therefore, if there be but one Child, who has been in Part advanced by the Father in his Life-time, such Child shall not bring his Part into Hotchpot, there being none in equal Degree with him.

it were to be brought in, it must fall again into the Child's Part.

### 3. Of the Wife's Part, and what shall bar her thereof.

*Heil.* 158.  
1 *Vern.* 132.  
*Abr. Eq.* 156.

The Widow of a Freeman of *London*, by the Custom, is intitled to her Widow's Chamber, and to a Moiety of his Personal Estate if he leaves no Children, and to a third Part in Case he leaves any Child or Children.

*Preced. Chan.* 325, 326, &c.  
*Abr. Eq.* 157.  
(d) Although

But if a Woman, upon her Marriage, accepts a Settlement out of the (d) Freeman's Personal Estate, (e) such Compounding, as it is called, shall (f) bar her of her Customary Share.

the Composition or Sum to be paid her was Part of her own Fortune. *Preced. Chan.* 327. (e) Though no Notice was taken of the Custom. *Abr. Eq.* 159. (f) Where she shall take by the Custom, and likewise by her Husband's Will. 2 *Vern.* 110. But *vide Preced. Chan.* 353.

But tho' such Composition shall bar the Wife of her Customary Share, *Abv. Eq. 159.* yet is she not thereby precluded from demanding the Benefit of any Gift or Devise the Husband may think fit to make her.

Also if a Freeman, whose Wife has been thus compounded with, dies *Preced. Chan. 327.* Intestate, his Widow shall have such Part of the Legatory, or Dead Man's Share, as she is intituled to under the Statute of Limitations, especially if there were no exprefs Words in the Agreement to exclude her.

If a Freeman of *London* makes a Jointure on his intended Wife, and the same is expressed to be in Bar only of her Dower, or Thirds of Lands, Tenements, and Hereditaments, this shall not bar her of her Customary Share of his Personal Estate. *Abv. Eq. 158, 159. Decreed in Chancery between Atkins and Waterfon.*

4. Of the Legatory or dead Man's Share.

The Legatory or Dead Man's Share is the third Part of a Freeman's Personal Estate, in Case he has a Wife and (a) Children, which the Freeman might always have disposed of by Will, and which for want of such Disposition is under the Direction of the Statute of Distributions, and not at all under the Controll of the Custom of *London*. *Salk. 426. 1 Vern. 6. 2 Vern. 559. Skin. 41. Preced. Chan. 499.*

where there are no Children the Custom of *London* gives no Directions, therefore the Personal Estate must be wholly governed by the Statute of Distributions. But the Custom of the Province of *York* extends to give such Moiety to the next of Kin to the Intestate. *Preced. Chan. 327, 328.* But Note, that the Custom of the City of *London* in the Distribution of an Intestate's Estate shall prevail against the Custom of *York*. *2 Vern. 48.* —As if a Freeman of *London* dies in *York*, his Heir shall come in for a Share of the Personal Estate, tho' by the Custom of *York* he is debarred thereof, for the Custom of *London*, which follows the Person, shall be preferred to that of *York*, which is only Local. *2 Vern. 82.*

If a Freeman of *London* makes his Will, and devises Legacies to his Children more than their Orphanage Part would amount unto, without taking any Notice whatsoever of the Custom; these Legacies shall be a Satisfaction of their Orphanage Shares, to which they were intituled by the Custom in the Nature of a Debt, and the Legacies shall not come out of the Testamentary or dead Man's Part, for it would be unreasonable that they should take both by the Will and the Custom. *Abv. Eq. 160. & vid. 2 Vern. 111, 754. S. P. (b) Where it was held that 100 l. devised for*

Mourning should come out of the Testamentary, and not out of the whole Personal Estate. *2 Vern. 240.*

But if such Legacies are less than their Orphanage Shares, they shall not *pro tanto* be a Satisfaction, but in such Case the Legatees shall take both, especially if none of the Devisees in the Will are thereby disappointed. *Abv. Eq. 160. per Lord Chancellor; but in this Case he sent it to the Recorder to certify the Custom.*

If a Loss happens to a Freeman of *London's* Estate by the Insolvency of his Executors, such Loss shall be born out of the Testamentary Part of his Estate only, and not out of the whole Personal Estate, for the Wife and Children of a Freeman are in the Nature of Creditors, and shall have two Parts in three of the Personal Estate he died possessed of, altho' his Legatees are thereby defeated of their Legacies. *Preced. Chan. 409. Decreed between Read and Duk, altho' it was certified that there was no*

Custom in *London* which directed how such Loss should be born.

## (D) Of the Custom of London, as it relates to Feme Coverts.

*Cro. Car.* 69. **B**Y the Custom of *London* if a Feme Covert, the Wife of a Freeman, *Hettl.* 9. *Li t. Rep.* 31. *S. C.* (a) trades by herself in a Trade, with which her Husband does not (b) intermeddle, she may (c) sue and be sued as a Feme Sole, and the Husband shall be named only for Conformity; and if Judgment be given against them she only shall be taken in Execution. *1 Leon.* 131. *2 Brownl.* 218. *S. P.* (a) Need not be in a Shop. *1 Show. Rep.* 184. (b) But if the Wife uses the same Trade that her Husband does, she is not within the Custom. *1 Mod.* 26. (c) But it must be in the Courts of the City. *Moor* 135, 136. *Cro. Eliz.* 409.

*1 Shaw. Rep.* 183. *Fabian v. Plant.* If the Wife of a Freeman, who is a sole Trader, contracts a Debt and dies, and afterwards the Husband promises to pay it, yet such Promise is not sufficient to maintain an *Assumpsit* against the Husband, for as he was not originally liable, the subsequent Promise was without any Consideration.

*1 Rol. Abr.* 556. A Recovery suffered by Baron and Feme of the Lands of the Feme shall as effectually bind the Right of the Feme by the Custom of *London*, as a Fine at Common Law.

## (E) Of the Custom of London, With Respect to Masters and Apprentices.

*Moor* 134. *2 Bullf.* 192. *2 Rol. Rep.* 305. *Palm.* 361. *1 Mod.* 271. *Moor* 136. **A**N Infant unmarried, and above the Age of 14, may (d) bind himself Apprentice to a Freeman of *London* by Indenture with proper Covenants, which Covenants by the Custom of *London* shall be as (e) binding as if he were of full Age. (d) Custom of *London* to put over an Apprentice to another, is good. *March* 3. (e) And for a Breach an Action may be brought in any other Court as well as in the Courts in the City.

*2 Rol. Rep.* 305. *Palm.* 361. *vide Mod.* 271. If the Indentures be not inrolled before the Chamberlain within the Year, upon a Petition to the Mayor and Aldermen, &c. a *Scire Facias* shall issue to the Master to shew Cause why not enrolled; and if it was through the Master's Default, the Apprentice may sue out his Indentures; otherwise if through the Fault of the Apprentice, as if he would not come to present himself before the Chamberlain, &c. for it cannot be enrolled unless the Infant is in Court and acknowledges it.

*Mod.* 69. This Custom does not extend to one bound Prentice to a Waterman under 21, for the Company of Watermen are but a voluntary Society, and being Free of that does not make one Free of *London*.

(F) As it relates to Landlords and Tenants.

BY the Custom of *London* a Tenant at Will under the yearly Rent of 40 s. shall not be turned out without a Quarter's Warning, and such Tenant paying above 40 s. yearly Rent shall not be turned out without Half a Year's Warning.

But a Custom that Tenant for Years shall hold for Half a Year after his Term ended, is not good.

2 Sid. 20.

Moor 8. pl. 27.  
Palmer. 212.

(G) Of the Customs of London, Which are in Furtherance of Justice, and for the more speedy Recovery of Debts.

BY the Custom of *London* a Creditor may before the Day of Payment arrest his Debtor, and oblige him to find Sureties to pay the Money on the Day it shall become due.

Hob. 86.  
1 Vent. 29.  
5 Mod. 93.

& vide 1 Rol. Abr. 555.

If a Contract be entred into by two Citizens, and one of them, who is thereby obliged to pay a Sum of Money, dies Intestate, his Administrator shall be obliged to pay it in the same Manner as if it were a Debt by Obligation.

Cro. Eliz. 409.  
Noy 53.  
1 Rol. Abr. 557.

If *A.* and *B.* are bound as Sureties for and with *C.* to *D.* and *D.* recovers against *A.* in *London*, and has Execution against him, *A.* may there sue *B.* for Contribution *ut uterque eorum oneretur pro rata* according to the Custom of *London*, and therefore where such Action was removed in *B. R.* by Writ of Privilege the same was remanded, because otherwise the Plaintiff would be without Remedy, for by the Course of the Common Law no Action lies.

1 Leon. 166.  
Moor 136.  
S. P.

(H) Of the Custom of Foreign Attachment :  
And herein.

I. Of the Nature of the Debt or Duty which may be attached.

BY the (a) Custom of *London* if *A.* is indebted to *B.* and *C.* is indebted to *A.* *B.* upon entering a Plaint against *A.* may attach the Debt due from *C.* (who is called the Garnishee) to *A.* and this (b) Custom of Foreign Attachment is to no other Purpose but to compel an Appearance of the Defendant in the Action, for if he appear within (c) a Year and a Day, and put in Bail to the Action, the Garnishee is discharged.

(a) 1 Rol. Abr. 551.  
(b) Carth. 25.  
(c) For the Year and Day *disfraticio*

*nare debitum*, vide Cro. Eliz. 713. 1 Leon 52. 1 Rol. Rep. 106. 1 Rol. Abr. 551.

The Garnishee may plead this Custom of Foreign Attachment to an Action brought against him by his Creditor, but then the Plaintiff may

1 Rol. Abr. 551.  
Cro. Eliz. 398, 330.

traverse the Cause thereof, and he was not indebted to him who attached it.

17 E. 4. 7. b.  
1 Rol. Abr.  
551. S. C. Such Goods cannot be attached, of which the Party had no Property at the Time of the Attachment.

So if *A.* be indebted to *B.* and *J. S.* a Stranger takes by Tort certain Goods of *A.* as a Trespasser, *B.* cannot by the Custom attach these Goods in the Hands of *J. S.* for the Debt of *A.* because the Property is out of *A.* at the Time, and only a Right in him.

1 Rol. Abr.  
551.  
Noy 115 S. P. A Legacy cannot be attached in the Hands of an Executor by Foreign Attachment, because it is uncertain whether after Debts paid the Executor may have Assets to discharge it.

1 Rol. Abr.  
551.  
Spinke and  
Tenant.  
1 Rol. Rep.  
106. S. C. If *A.* be indebted to *B.* by Obligation, and *B.* is indebted by Contract to *H.* and *B.* dies, and his Administrator demands the Debt upon the Obligation of *A.* who promises him that if he will forbear him for a Month, that he will pay him then, but he does not pay him accordingly, and after *H.* brings Debt in London against the Administrator upon the Contract (as he may there by the Custom) the Debt of *A.* due by the Obligation may be attached in the Hands of the Administrator, for notwithstanding the Promise broke, yet the Debt continued Due by the Obligation, and a Recovery upon the Obligation will be a Bar of the Action upon the Promise, in which all should be recovered in Damages.

1 Rol. Abr.  
552.  
Hals and  
Walker ad-  
judged upon  
a Foreign  
Attachment  
in Exeter,  
where the  
Custom is  
the same as  
in London.  
If *A.* lends *B.* 100*l.* to be repaid him upon the Death of his Father, and after the Death of the Father of *B.* this 100*l.* is attached by Force of a Foreign Attachment, and after *A.* brings an Action upon the Case against *B.* for this Money, this Foreign Attachment will be a good Bar thereof, though the Custom be to attach Debts, and this is an Action upon the Case, in which Damages only are to be given, because this is a Debt, and he might have an Action of Debt thereupon; and therefore, in as much as this is well attached, he shall not defeat it by bringing an Action upon the Case.

1 Rol. Abr.  
552.  
Read and  
Hawkins. If *A.* sells certain Stockings to *B.* upon a Contract, for which *B.* is to give 10*l.* to *A.* and if he sells the Stockings again before August after that he shall give Twopence more for every Pair of the Stockings, the 10*l.* is attachable by Foreign Attachment, because an Action of Debt lies for it, but the Twopence for every Pair of Stockings is not attachable, because this rests only in Damages, to be recovered by an Action upon the Case, and not by Action of Debt, because it is made Payable upon a Possibility.

1 Vent. 112.  
Horsam and  
Target.  
1 Lev. 306.  
S. C. If there are several Accounts, &c. between *A.* and *B.* and *A.* dies, and his Executor and *B.* submit to the Award of *J. S.* and he awards that the Executor shall deliver certain Goods, of which *A.* died possessed, to *B.* and that *B.* shall pay the Executor 300*l.* this Money cannot be attached in the Hands of *B.* for the Debt of *A.* for upon the Matter the Executor being liable to a *devastavit* ought to have Remedy in his own Right for the Sum awarded.

2 Jon. 222.  
Lewis and  
Wallis. If *A.* is indebted to *B.* who is indebted to *C.* and *B.* assigns the Debt of *A.* to *C.* in Satisfaction of his Debt; now the Debt due from *A.* is become the Right and Property of *C.* and *B.* hath nothing but in Trust for *C.* and therefore it ought not to be attached for any Debt of *B.* and upon the special Matter shewed the Lord Mayor ought to give Relief.

1 Rol. Abr.  
553.  
(a) But if  
the Value of  
the Tobacco  
had been  
averred in  
the Record  
of the Attachment, the Debt might have been well attached in this Action. 1 Rol. Abr. 554. & vide  
3 Jon. 406.  
In an Action of Debt for Tobacco, in the Detinet, a Debt cannot be attached within the Custom, in Satisfaction thereof, because it does not (a) appear of what Value this Tobacco was; so that it might appear that the Debt is but a Satisfaction to the Value, which cannot be supplied by a Plea in Bar made in another Action against him, in whose Hands the Debt was attached.

3

A Debt due by Specialty may be attached by the Custom of London, because the Attachment may be pleaded if an Action be brought for it in the Courts at Westminster, but a Debt (a) recovered in any Court at Westminster by (b) a Judgment cannot be attached by the Custom of London, because the Party has then no Time to plead it.

1 Rol. Abr. 552.  
4 Leon. 240.  
Cro. Eliz. 63.  
1 Leon 29,  
264.  
(a) After

Issue joined in an Action of Debt in B. R. the Debt for which the Action was brought cannot be attached in London, for the Inferior Court cannot attach a Debt in a Superior Court. —So after Imparlance to an Action of Debt in B. R. —So if a Writ returnable in B. be purchased before the Attachment. —So if a Suit be begun in Equity, the Effect thereof shall not be prevented by a Foreign Attachment.

1 Rol. Abr. 552.  
1 Rol. Abr. 552. Cro. Eliz. 157. 3 Leon. 232.  
Cro. Eliz. 101, 595, 691. 3 Leon. 210. 1 Rol. Abr. 552. (b) So if levied upon a Fieri Facias, and in the Sheriff's Hands. 1 Leon. 30, 264.  
2 Chan. Ca. 233.

If A. is indebted to B. and C. is indebted to A. and B. brings Debt in B. R. against A. pending this Action, B. may affirm a Plaintiff in London against A. for the same Debt, &c. and attach the Debt in the Hands of C. for though a Debt in London, for which there is a Suit depending in B. R. cannot be attached, yet he that hath brought an Action in B. R. may, notwithstanding, according to Custom, attach the Debt of the Party, for the Debt in Question in B. R. is not touched by this Attachment.

Cro. Eliz. 595.  
Lewknor and Huntly 712, 713. S. C. resolved also upon a Writ of Error tho' the Judgment was reversed for another Reason.

A. is indebted to B. and C. is indebted to A. by simple Contract, A. dies Intestate, and B. enters a Caveat against his Widow's Taking out Administration, pending which he enters a Plaintiff in the Sheriff's Court of London against the Archbishop of Canterbury, and thereupon attaches the Debt due from C. after which the Widow has Administration granted to her, who brings an Action against C. who insisted on the Matter supra, and it was held that this pretended Custom in this Case was unreasonable and void, because the Archbishop had no Right to the Debt, nor any Means to recover it, besides hereby every Creditor would be his own Carver, and the Goods of the Intestate wasted without any Remedy.

Carth. 344.  
Masters and Lewis.  
5 Mod. 75, 93. S. C.  
2 Fon. 165, 204. & vide 1 Rol. Abr. 551, 906.  
Cro. Eliz. 410, 598.  
Noy 53.  
Dyer 247.

2. In whose Hands, and at what Time the Attachment may be made.

If A. recovers a Debt against B. in London, B. may attach this Debt in his (c) own Hands for so much due to him.

1 Rol. Abr. 554.  
Cro. Eliz.

186. (c) A Debt due to an Administrator may be attached within the Custom. — Whether a Debt owing to a Company is attachable, for the Debt of the Company.

1 Rol. Abr. 554. 1 Rol. Rep. 105. Mod. 212. dubitatur.

By this Custom a Debt contracted without the Jurisdiction of the City may be attached, if the Debtor is found within the Jurisdiction, for every Debt follows the Person of the Debtor.

Carth. 25, 26.  
1 Vent. 236.  
& vide 1 Rol. Abr. 554.

An Oblige before the Debt is due by Obligation cannot by the Custom attach a Debt for it, because he cannot affirm a Plaintiff for the first Debt before it is due.

1 Rol. Abr. 553.  
3 Leon. 236.  
S. C.

But if B. is indebted to A. and C. is bound to B. but the Day of Payment is not yet come, A. may attach this Debt in the Hands of C. (d) before it is due to B.

1 Rol. Abr. 553.  
3 Leon. 236.

& vide Cro. Eliz. 184. — And the Judgment shall be that he shall be paid when it becomes due.

1 Rol. Rep. 105. Cro. Eliz. 713. Noy 68. (d) But the Custom so to do must be specially alledged. 1 Rol. Abr. 553. Noy 68. 1 Sid. 327.

So if A. lends Money to B. to be repaid upon the Death of the Father of B. and after an Action is brought by C. against A. and after the Father of B. dies, the Money due by B. to A. may after be attached in

1 Rol. Abr. 553.

the Hands of *B.* tho' it was not due at the Time of the Plaint commenced against *A.* in as much as it became due before the Time that by Custom the Procefs is to be granted against him, in whose Hands it is attached.

1 Sid. 327.  
Rebbins and  
Standard.

If in Debt upon an Obligation of 100 *l.* conditioned for the Payment of 50 *l.* at a Day, the Defendant pleads, that before the Day of Payment of the 50 *l.* it was attached in his Hands by a Creditor of the Plaintiff, &c. and that after the Day upon a *Scire Facias* against him according to Custom he paid it, this is a good Bar of the (a) whole, because the Attachment being made before the Day of Payment, it became a Debt to the Creditor, and the Obligee could take no Advantage of a Breach of the Condition afterwards.

(a) But if the Attachment had been of 20 *l.* only, it might have

been pleaded in Bar of so much. 1 Sid. 327. & vide Godb. 196. Owen 2. Moor 598.

### 3. Of the Form of the Proceedings in a Foreign Attachment.

1 Rol. Abr.  
554.  
Cro. Eliz.  
713.  
1 Fon. 406.

By this Custom the Plaintiff must swear that the Debt is *bona Fide* due to him, but it is not sufficient to alledge that he swore that the Debt was a true one by himself, or his Attorney, for the Attorney's Swearing is not according to the Custom.

Cro. Eliz.  
172.  
1 Leon. 321.

If *A.* affirms a Plaint against *B.* and upon *Nihil* returned, it is furnished that *C.* hath Money in his Hands due to *B.* &c. and the Money is attached in the Hands of *C.* who appears upon the Attachment, and pleads that he owes nothing to *B.* tho' this be found against *C.* and thereupon there is Judgment against him, yet he shall not pay any Costs, for there are no Costs recoverable in a Foreign Attachment.

1 Rol. Abr.  
555.

By this Custom if *A.* sues *B.* in London, &c. and *C.* is indebted to *B.* in the same Sum, and the said *C.* is condemned there to *A.* according to the Custom and Judgment given against him accordingly, yet if no Execution be sued against *C.* *A.* may resort to have Judgment and Execution against *B.* his principal Debtor, and *B.* may sue *C.* for his Debt, notwithstanding the unexecuted Judgment.

1 Rol. Abr.  
555.

In Bar of an Action brought in *B. R.* if the Defendant pleads a Judgment in a Foreign Attachment in Bar, and alleges the Custom to be, that if the Plaintiff in the Court hath Procefs against the Defendant, and

(b) Godb. 401.  
Litch 228.

upon a *Nihil* (b) returned makes a Surmise that *B.* is indebted in so much to the Defendant, and upon his Prayer to attach it in his Hands by

(c) A Custom for a Foreign Attachment before some Default in the Defendant is naught.

Procefs, and he does it accordingly; and if (c) the Defendant makes Default at four Courts after, that by the Custom, at the last of the said four Courts the Plaintiff may pray Procefs against *B.* to come in and shew Cause wherefore the Judgment should not be against him at the next Court after, and when he comes to apply this Custom to his Case, he shews that there were four Defaults, and that at the fourth Default the Plea was continued for several Courts, and then Procefs went against *B.*

1 Vent. 236.

(d) Moor  
570. pl. 779.  
like Point.

and then after Judgment against him, (d) this is not warrantable by the Custom, in as much as he shews by the Custom it ought to be at the next Court after the four Defaults.

Carth. 282.  
Lawrence and  
Atherton ad-  
judged.

If in Debt the Defendant pleads that *J. S.* entred a Plaint, &c. against the Plaintiff in London, and upon Procefs against him *non est inventus* was returned, and thereupon a Suggestion was made that he had so much Money in the Hands of the Defendant, and that the Defendant was attached by the said Money, this is an ill Plea, for it ought to have been that the Plaintiff was attached by so much Money in the Defendant's Hands, for so is the Custom.

Carth. 25, 26.

After a *Dilatur* entred by the Garnishee in the Sheriff's Court, which is in Nature of an Imparlanche, he cannot plead to the Jurisdiction of the Sheriff's Court.

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